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CR 2018/9

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2018

Public sitting

held on Friday 23 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 vendredi 23 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 now open. This morning, the Court will hear the second part of Chile's first round of oral argument. I will now give the floor to Mr. Wordsworth to continue his presentation. You have the floor, Sir.

Mr. WORDSWORTH: Mr. President, Members of the Court, yesterday I was taking you to some of the key documents to show what Chile had really said it was open to by way of a negotiation including as to the compensation it was discussing with Bolivia and the President of the United States of America, the land for water formula. And of course this was all hugely politically sensitive.

THE 1950 DIPLOMATIC NOTES (CONTINUING)

IV. Subsequent events

39. I move on now to the events subsequent to the June 1950 Notes. Three points.

A. Bolivian inaction

40. First, Bolivia in no sense acted as if it had rights or obligations under a newly concluded treaty. Indeed, its conduct was marked by a telling lack of action.

41. Bolivia did not submit the Notes to its Congress for approval as a treaty or other international agreement, as would have been required by the Constitution then in force in Bolivia[1].

42. Bolivia did not respond to the Note in any way. It did not submit a proposal, stating what it was looking for in terms of sovereign access; so it obviously did not consider itself legally bound to perform, to get the negotiation under way by stating its position. Instead, it elected to do nothing. And it has also elected not to tell this Court why.

43. There may be an insight to be gained from the reports back to Bolivia's Foreign Minister from Bolivia's Ambassador in Santiago, in particular, the report of 11 July 1950, where the Ambassador said as follows (judges' folder, tab 43):

> "I think that it is urgent to inform the government of the United States, as we were asked to do by the Chilean Foreign Ministry, about the negotiations that have been

[1] See Republic of Bolivia, Political Constitution of 1947, 26 Nov. 1947, CMC, Ann. 136, Art. 58 (13).

> initiated and our country's willingness to reach the understanding of which President González Videla informed President Truman.
>
> [Now that is a reference to a request that was made by Chile in a separate communication of 20 June 1950[2]. In so far as we can tell, Bolivia never contacted the United States of America as requested by Chile. Bolivia's Ambassador continues:]
>
> Finally, it is indispensable that this Foreign Ministry [the Bolivian Foreign Ministry] send me the authorization I mentioned in my Cablegram No. 152, of 28 June, almost 20 days ago, to enter the second stage of negotiations that has currently been paralyzed by the answer contained in your cablegram No. 91, of 24 June."[3]

44. I note that, in the sessions earlier this week, you heard nothing about it being Bolivia "paralysing" negotiations in June 1950. One wonders, what was the answer in that Bolivian Foreign Ministry cablegram of 24 June that — according to Bolivia's own Ambassador — had the effect of paralysing the second stage of negotiations. We do not know. Bolivia has elected not to put this before the Court; and the same goes for the Bolivian Ambassador's cablegram of 28 June 1950, which would have revealed the contents of what Bolivia's Foreign Ministry had been saying on 24 June.

45. And yet, if there were a serious case on Bolivia having believed that a binding agreement had been reached, or on a binding unilateral declaration having been made, or even on demonstrating the reliance necessary for an estoppel[4], the Court would have to see the documents generated by Bolivia to show how it in fact reacted to receipt of Chile's 20 June 1950 Note, or whether in fact it was willing to commit — as Chile had requested — in general terms to what had been discussed between Chile and President Truman, that is an exchange of land for water[5].

46. Finally, and this we do know, Bolivia did not insist on performance by Chile on what is now said to be a binding obligation to negotiate. There was no negotiation pursuant to this supposed treaty. And Bolivia did not react to that fact by seeking in some way to enforce the alleged obligation — in stark contrast to the action of Greece in *Aegean Sea*, or of Qatar in *Qatar* v. *Bahrain*. Well over a decade went past before it even suggested — in the first of one of

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[2] Recorded in Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutierrez, to the Minister for Foreign Affairs of Bolivia, Pedro Zilveti Arce, No. 550/374, 20 June 1950, RB, Ann. 264, p. 265.

[3] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia No. 645/432, 11 July 1950, CMC, Ann. 145, p. 547.

[4] Cf. CR 2018/7, p. 52, para. 33 (Akhavan).

[5] Recorded in Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister for Foreign Affairs of Bolivia, Pedro Zilveti Arce, No. 550/374, 20 June 1950, RB, Ann. 264, p. 265.

less than a handful of occasions — that the June 1950 Notes contained some form of legal commitment[6].

B. The adverse public reaction

47. I move to my second point on subsequent events, which is simply to recapitulate that, as all the documents from the second half of 1950 show[7], there was a very significant public hostility to any negotiation — as indeed the two States had previously feared there would be — in both Chile and Bolivia, I should add[8].

C. Chile's statements do not assist Bolivia

48. My third point: Chile's reaction confirmed that it did not consider that it had made a legally binding commitment to a negotiation.

49. On Tuesday, Professor Forteau referred to a statement of Chile's Foreign Ministry made on 11 July 1950[9]. The aim of the statement was to try to calm the public reaction. Chile said:

> "Chile has expressed on different occasions, and even at the meeting of the League of Nations, its willingness to give an ear, in direct contacts with Bolivia, to proposals from this country aimed at satisfying its aspiration to have its own outlet to the Pacific Ocean.
>
> This traditional policy of our Foreign Ministry [that is, the willingness to give an ear] in no way diminishes the rights conferred on Chile by the treaties in force.
>
> The current government is consistent with the diplomatic precedents recalled here and, therefore, is open to enter into conversations with Bolivia about the problem referred to"[10].

50. No suggestion there of any binding obligation to negotiate.

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[6] Cf. CR 2018/7, pp. 23-24, para. 29 (Remiro Brotóns), without any supporting references.

[7] See e.g. Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, No. 668/444, 19 July 1950, CMC, Ann. 146, pp. 553, 555, 557 and 561; Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, No. 737/472, 3 Aug. 1950, CMC, Ann. 147, pp. 567, 571 and 573; 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.

[8] See e.g. Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, No. 598/424, 15 July 1948, RB, Ann. 258, pp. 203 and 205.

[9] CR 2018/7, pp. 59-60, para. 17 (iv) (Forteau), referring to Confidential Circular from the Minister for Foreign Affairs of Chile to the Heads of Diplomatic Missions of Chile, 28 July 1950, RC, Ann. 401.

[10] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, 11 July 1950, CMC, Ann. 145, p. 545; judges' folder, tab 43.

51. Many similar statements were made around the same time. On 19 July 1950, Chile's President made a statement in *Vea* magazine, to which Professor Chemillier-Gendreau referred on Monday[11]. He said:

> "We have to make things clear. The Government has not resolved anything concerning this issue. The only truth is that, in keeping with the traditions of the Chilean Ministry of Foreign Affairs, and ratifying my profound American spirit, I have never refused to hold conversations on Bolivia's port aspirations."[12]

52. And that, likewise, does not help Bolivia's current case on existence of a legal obligation. The President then explained, in a passage of interest as to the continuing impact of the 1904 Peace Treaty in any negotiation:

> "Such conversations shall not revolve around treaty revision because we have no unresolved issues with Bolivia in that respect. All treaties signed have already been performed over time, and, nowadays, they are just part of history. Consequently, no revision of any kind may be admitted. So I stated while acting as delegate in San Francisco, and all Chileans will surely remember that this battle against treaty revision was won by our delegation from start to finish. [So an interesting historical insight there. He continues:] The Preamble to the Charter of the United Nations reads as follows: 'We, the peoples of the United Nations, [are] determined to ESTABLISH CONDITIONS UNDER WHICH JUSTICE AND RESPECT FOR THE OBLIGATIONS ARISING FROM TREATIES and other sources of international law can be maintained.' Thus, the tone of the conversations with Bolivia will be none other than that of friendly, amiable dealings, based on providing compensation to Chile"[13].

53. This shows, once again, how disconnected Bolivia's case on an unfulfilled "historical bargain" is from the documentary record.

54. It also explains further what Chile was meaning when it referred, in its Note of 20 June 1950, to "safeguarding the *de jure* situation established in the Treaty of Peace of 1904"[14]. As Chile saw matters, and as indeed is consistent with the facts, with the Preamble to the United Nations Charter, and with Article VI of the Pact of Bogotá, all the issues with respect to the period prior to

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[11] CR 2018/6, p. 38, para. 26 (Chemillier-Gendreau).

[12] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia No. 668/444, 19 July 1950, CMC, Ann. 146, p. 557. Also reproduced in "Gonzalez Videla declares: All that has been agreed to is to initiate conversations with Bolivia; Arica will always remain free", *Vea* (Chile), 19 July 1950, RB, Ann. 269, p. 301; judges' folder, tab 44.

[13] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia No. 668/444, 19 July 1950, CMC, Ann. 146, p. 557. Also reproduced in "Gonzalez Videla declares: All that has been agreed to is to initiate conversations with Bolivia; Arica will always remain free", *Vea* (Chile), 19 July 1950, RB, Ann. 269, pp. 301 and 303; judges' folder, tab 44.

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

the 1904 Peace Treaty had been dealt with in that Treaty. If there were to be conversations with Bolivia these were to be "friendly, amiable dealings, based on providing compensation to Chile".

55. One last document from this period: Professor Forteau singled out for special treatment a statement made by Chile's Foreign Minister Walker that was reported on 13 September 1950[15]. You were not taken to the opening paragraph of this lengthy statement, which makes plain that its whole purpose was to convey the point that nothing had been formally agreed with Bolivia. The Foreign Minister said:

> "Efforts have been mainly made to distort the nature and ends of the *preliminary diplomatic démarche* carried out to address the Bolivian question and the most absurd of suspicions have been created in that regard. These unfounded assertions have reached the point of sending information to Arica to the effect that the Chilean Government has resolved to hand over that port, regardless of my energetic public refusal to such absurd and evil statement.
>
> Also, an attempt has been made to overlook the fact that, so as to be valid and binding, anything that is agreed to by the Foreign Ministries must be subjected to the ratification of the National Congress, which is the sovereign entity to approve or reject these measures and has, as a matter of fact, exercised this faculty on different occasions, without causing interruptions in our foreign affairs."[16]

56. And, of course, there was no such ratification of this "preliminary diplomatic démarche".

D. The so-called Trucco Memorandum

57. I move on to the so-called Trucco Memorandum of 10 July 1961[17]. This adds nothing, and the emphasis that Bolivia's counsel placed on this document earlier this week[18] would have come as a surprise to Bolivia's one-time Foreign Minister, Arze Quiroga, who actually attended the meeting of 10 July 1961. Chile's Ambassador Trucco described what happened as follows:

> "As for the 'port issues', Minister Arze Quiroga clearly explained the position of President Paz Estenssoro: 'This Government and the MNR are against the demagogic use of this matter. We believe that this problem can only be solved by the mutual understanding of the parties — among which I include Peru and Chile — in a three-party operation. Since this is not a current problem, we think that we should not bring it up without serious deliberation directly with you.'"

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[15] CR 2018/7, p. 60, para. 17 (v) , referring to "Let us not divide ourselves by political parties in resolving our foreign affairs", *El Imparcial* (Chile), 13 Sept. 1950, RB, Ann. 276.

[16] "Let us not divide ourselves by political parties in resolving our foreign affairs", *El Imparcial* (Chile), 13 Sept. 1950, RB, Ann. 276, p. 365; emphasis added; judges' folder, tab 45.

[17] Memorandum of the Chilean Embassy in Bolivia, 10 July 1961, CMC, Ann. 158; judges' folder, tab 46.

[18] CR 2018/6, p. 28, para. 21(Akhavan) and p. 39, para. 28 ((Chemillier-Gendreau); CR 2018/7, pp. 24-26, paras. 32-39 (Remiro Brotóns).

So none of this suggests a binding obligation on Chile to negotiate. The account continues:

> "He asked me what we thought about it and I replied that we had always refused to resort to third parties and that we had always shown our willingness to listen to Bolivia directly. To that end, I read the items on the copy that I had carried in my pocket [and that is the so-called Trucco Memorandum], which contained the express instructions I had received from the Office. As requested by our Ministry of Foreign Affairs, I did not mention the lack of response to the Chilean Note of June 1950.
>
> Minister Arze Quiroga took note of my statement."[19]

58. Just as with the unsigned memorandum on which Bolivia relies, there is no suggestion from this account — the only account — of the actual meeting that any legal obligation was somehow being formed or confirmed.

59. Months later, and following a change of its Foreign Minister, Bolivia sought to rely on the Trucco Memorandum in the context of the disintegrating diplomatic relations over the Lauca River. In a memorandum of 9 February 1962, Bolivia purported to express its "full agreement" to negotiations, but on its own terms referring to "satisfying the fundamental need" of Bolivia, not on any basis that had ever been put forward by Chile[20]. Just as with Chile's Note of 20 June 1950, Bolivia was not content with, and did not accept, what Chile had seen as acceptable.

60. On Tuesday, Professor Remiro Brotóns told you that a few weeks later, the Chilean Foreign Minister declared that "the 'problem of Bolivia's landlocked status' did not exist for Chile"[21]. The document that he referred to, an aide-memoire of 16 March 1962, in fact shows something rather different being said by Chile:

> "The Minister of Foreign Affairs [that is of Chile, of course] added that his Government did not accept linking the case of the Lauca River with the so-called 'Bolivian landlocked-status problem'. With respect to this point, there is no problem for Chile, since its limits with Bolivia were established by international treaties in force. He added that Chile has never refused to listen to Bolivian aspirations."[22]

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[19] Note from the Chilean Ambassador to Bolivia to the Minister for Foreign Affairs of Chile, 15 Feb. 1962, CMC, Ann. 160, pp. 695 and 697; judges' folder, tab 47.

[20] Memorandum of the Ministry of Foreign Affairs of Bolivia, No. G.M. 9-62/127, 9 Feb. 1962, CMC, Ann. 159, p. 651, para. 4.

[21] CR 2018/7, p. 25, para. 35 (Remiro Brotóns).

[22] Aide-Memoire from the Minister for Foreign Affairs of Chile delivered to the Ambassador of Bolivia in Santiago, 16 Mar. 1962, reproduced in Ministry of Foreign Relations and Culture of Bolivia, *La Desviaciòn del Río Lauca (Antecedentes y Documentos)* (La Paz, 1962), pp. 127-129, judges' folder, tab 48.

E. Bolivia's rupture of diplomatic relations

61. One month later, in April 1962, Bolivia announced the rupture of diplomatic relations between the two States, in protest at Chile's use of waters of the River Lauca[23]. In March 1963, Bolivia sought to make resumption of diplomatic relations conditional upon a commitment on Chile's part to the negotiation on the "port problem"[24]. But, as Chile's Foreign Minister explained in a speech of 27 March 1963, Bolivia's acts had led to such a deterioration in relations that "the favorable disposition that our country showed in 1961, as in previous times, to listen to Bolivia, no longer exists"[25].

62. When, later in 1963, Bolivia alleged for the first time[26] that Chile's Note of 20 June 1950 established some form of legally binding commitment to a negotiation[27], that was rejected by Chile[28].

63. Some four years later, in April 1967, President Barrientos of Bolivia claimed in a note to the President of Uruguay that the 1950 Notes constituted a commitment[29]. Chile again, and very publicly, rejected this. In a lengthy letter from Chile's Foreign Minister to all the Ministers of Foreign Affairs of Latin America, it was stated:

> "Negotiations did not even start. Bolivian and Chilean public opinion reacted so violently that Ambassador Ostria [of Bolivia] and Minister Walker [of Chile] were forced to explain that there had been no commitment and that negotiations had never been opened. This is what President Barrientos calls Chile's '*commitment*'."[30]

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[23] Minutes of Secret Session 68 of the Chilean Senate, 18 Apr. 1962, CMC, Ann. 162, p. 731; and cable from the Embassy of Chile in Bolivia to the Ministry of Foreign Affairs of Chile, No. 133, 15 Apr. 1962, CMC, Ann. 161, p. 701.

[24] Letter from the Acting Ambassador of Chile to the OAS to the Ambassador of Costa Rica to the OAS, 4 Mar. 1963, CMC, Ann. 163, pp. 737 and 739.

[25] Speech of the Minister for Foreign Affairs of Chile, 27 Mar. 1963, CMC, Ann. 164, p. 775. See also letter from the Acting Ambassador of Chile to the OAS to the Ambassador of Costa Rica to the OAS, 4 Mar. 1963, CMC, Ann. 163, p. 739, "fifth".

[26] Cf. CR 2018/7, pp. 25-26, para. 37 (Remiro Brotóns) and p. 49, para. 21 (Akhavan); and CR 2018/6, p. 28, para. 21 (Akhavan).

[27] Speech of the Minister for Foreign Affairs of Bolivia, 3 Apr. 1963, CMC, Ann. 165, pp. 805 and 807. See also Letter from the Minister for Foreign Affairs of Bolivia to Ríos Gallardo, former Minister for Foreign Affairs of Chile, 4 Nov. 1963, CMC, Ann. 166.

[28] Letter from Conrado Ríos Gallardo, former Minister for Foreign Affairs of Chile, to the Minister for Foreign Affairs of Bolivia, 17 Nov. 1963, CMC, Ann. 167, p. 841. See also Letter from Conrado Ríos Gallardo, former Minister for Foreign Affairs of Chile, to the Minister for Foreign Affairs of Bolivia, 6 Feb. 1964, CMC, Ann. 168, p. 849.

[29] Note from the President of Bolivia to the President of the Oriental Republic of Uruguay entitled "Why is Bolivia not present in Punta del Este?", 8 Apr. 1967, CMC, Ann. 170, p. 875.

[30] Letter from the Minister of Foreign Affairs of Chile to all Ministers for Foreign Affairs in Latin America, 29 May 1967, CMC, Ann. 171, p. 913; emphasis in original; judges' folder, tab 49.

64. If ever there was a communication that called for some reaction, if a reaction could be made, it was this[31]. And yet Bolivia said nothing. And, for good measure, I note that when Bolivia referred to the 1950 Notes before the OAS in 1987 and 1988[32], Chile made plain its position that Bolivia had no legal rights in play[33], and again Bolivia did not respond.

V. Conclusion

65. Bolivia would have had no legal basis on which to respond. Chile did not legally bind itself to a negotiation in its Note of 20 June 1950. The importance and sensitivity of the underlying issue is reflected in Chile's carefully chosen, tentative language, and indeed in the public furore that followed. Bolivia's current case to the contrary is counter to the actual terms in which the June 1950 Notes were cast, to the circumstances in which they were drawn up, and to the events — or rather non-events — that followed.

66. And even if Bolivia could get beyond the first stage of showing a legal obligation, the 1950 Notes could be of no assistance to Bolivia today. At best, there would have been an obligation, current in 1950, to enter into a negotiation. That cannot somehow translate into an obligation that is (i) enduring today, and (ii) requires negotiation on quite different terms, and all the more so when (iii) there was in fact a negotiation in the period 1975 to 1978, which failed because of Bolivia's wish to rewrite the accepted basis on which that negotiation was to be held. And it is to that negotiation that I now turn.

THE CHARAÑA PROCESS OF 1975 TO 1978

I. No legal obligation

A. The Joint Declaration of Charaña

1. The Joint Declaration of Charaña of 8 February 1975, which marked the resumption of diplomatic relations between Bolivia and Chile, is at tab 51 of your folders, and now on the screen.

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[31] Cf. *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 23.

[32] Minutes of the 4th Meeting of the General Committee of the OAS General Assembly (GA), 12 Nov. 1987, RC, Ann. 436, p. 656 (a more limited extract is MB, Ann. 210); Minutes of the Third Meeting of the General Committee of the OAS GA, 16 Nov. 1988, CMC, Ann. 302, p. 2078 (this is also MB, Ann. 213).

[33] Minutes of the 4th Meeting of the General Committee of the OAS GA, 12 Nov. 1987, RC, Ann. 436, pp. 659-661; Minutes of the Third Meeting of the General Committee of the OAS GA, 16 Nov. 1988, CMC, Ann. 302, p. 2084.

2. According to Bolivia today, this is a treaty, containing another entirely open-ended obligation on Chile to negotiate, capable of enforcement many decades down the line. Back at the time, matters were seen rather differently. For example, according to a statement of former Bolivian Foreign Minister, Guevara Arze, on the Joint Declaration, which was made to Associated Press and reported in Bolivia's *Los Tiempos* newspaper on 12 February 1975 :

> "'just as a savage who gives away gold nuggets in exchange for glass necklaces', President Banzer has gifted to Chile the resumption of diplomatic relations receiving in exchange 'officially' for BOLIVIA the vaporous and imprecise phrases of a 'joint declaration'."[34]

3. So one turns to the declaration itself. In its paragraph 1, the Joint Declaration records that General Pinochet of Chile met with General Banzer of Bolivia, this being a time when both countries were under military dictatorship. Paragraph 1 describes how these two have met "with the purpose of exchanging points of view on matters of interest to both countries and on the continental and worldwide situation"[35]. This language — "exchanging points of view" — could scarcely be further from suggesting an intention to create binding obligations. From paragraph 2, one sees that the meeting has "permitted the identification of important common ground"; so, some progress, but again that is not language indicating that any binding agreement had been reached.

4. The key paragraph for Bolivia is paragraph 4. It records:

> "Both heads of state, in that spirit of mutual understanding and constructive motivation, have resolved to continue the dialogue at various levels, to seek formulas for solving the vital matters that both countries face, such as the landlocked situation that affects Bolivia, taking into account their reciprocal interests and addressing the aspirations of the Bolivian and Chilean peoples."[36]

5. Now, it is important to approach this wording with a little more rigour, and also realism, than Bolivia has been advocating, and there is a useful comparison to be made with the 1990 Minutes at issue in the *Qatar* v. *Bahrain* case. Two points as to these:

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[34] *Los Tiempos* (Bolivia), "The Declaration of Charaña creates new problems", 12 Dec.1975; judges' folder, tab 52.

[35] Joint Declaration of Charaña, 8 Feb. 1975, CMC, Ann. 174, p. 947, para. 1. Unless otherwise indicated, all page references given herein are to the numbering of the printed volumes of annexes.

[36] Joint Declaration of Charaña, 8 Feb. 1975, CMC, Ann. 174, p. 947, para. 4.

(a) First, there is the obvious point that there is no clear statement of a specific course of action having been "agreed", as there was in the 1990 Minutes[37] in *Qatar* v. *Bahrain*.

(b) Secondly, in that case, the two States had been working together with the good offices of Saudi Arabia to fix on a means of settling their dispute, and were meeting in 1990 against a backdrop where each had already formally accepted the principle that: "All the disputed matters shall be referred to the International Court of Justice, at The Hague, for a final ruling[38]".

(c) Here, by contrast, the two States had long since broken off diplomatic relations. And it is simply implausible that they would have been intending to flip a switch so that their relationship went from full "off" to full "on", with the new position hard-wired through the adoption of binding obligations on the hugely sensitive issues of Bolivia's landlocked status and the resumption of diplomatic relations, which was dealt with in paragraph 6 of the Declaration. On Bolivia's case, if General Banzer had changed his mind when he returned to La Paz, deciding that Bolivia would not in fact normalize diplomatic relations because of, for example, a hostile public reaction in Bolivia, he would nonetheless have been legally bound to do so and that cannot have been what was intended.

6. I made the point yesterday that the very sensitivity of the issue of Bolivia's landlocked status made it unlikely that the two States would have been willing to take on binding obligations to negotiate on that matter in 1950. Well, this was even more the case in 1975, after a dozen or so years of ruptured relations. A public statement of 19 April 1976 from Bolivia's Foreign Ministry makes the point. The relevant background is that the military Government's approach to the negotiation is being attacked by no less than three former Bolivian Presidents.

(a) You see from the introduction, that this is a clarification made by Bolivia's Foreign Ministry to respond to what are called "untruthful assertions or comments".

(b) There is a description of the Government's policy on sovereign access and, at paragraph 3, a reference to the guidelines for the negotiation and I will be coming back to those shortly.

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[37] Cf. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 119, para. 19.

[38] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 117, para. 17.

(c) Then paragraph 4, there is a reference to the President's "conceptual bases for the negotiations", and at subparagraph *(d)* the statement: "The Government of the Armed Forces of the Nation has not undertaken any commitment in this matter, without the prior authorization of the people's opinion."[39]

7. That statement reflects the underlying reality. It would have been politically imprudent in the extreme, even for a military dictatorship, to take on legal obligations of any kind on this matter without public support, and that was all the more true at the very moment of the Charaña Declaration, when the two States were just seeking to renew diplomatic relations.

8. Mr. Akhavan made a point that the Joint Declaration was included in the Treaty Series of the Ministry of Foreign Affairs of Chile[40]. But, as Bolivia well knows, this series contains a variety of documents, including Chilean internal documents which are not treaties and do not contain any legal obligations. As Bolivia also knows, the Joint Declaration of Charaña was not ratified or otherwise treated by Chile as a treaty under its domestic law, and there is no suggestion that it was so ratified or so treated by Bolivia either[41].

9. Mr. Akhavan also sought to make something of the fact that, on 6 August 1975, (and I use his words) "the OAS unanimously proclaimed that: 'The landlocked situation which affects Bolivia is a matter of continental concern' for which a solution must be found."[42] The only trouble is that the words "for which a solution must be found" are the words of Mr. Akhavan, whereas the OAS in fact said "and all the American States offer to cooperate in seeking solutions"[43]. Rather different wording, one might think.

10. Three more specific points on paragraph 4.

11. First, there is no mention anywhere to the so-called international agreement made up by the June 1950 Notes. Had the two Heads of State considered such an agreement to be in place, they

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[39] Clarification of the Bolivian Ministry of Foreign Affairs, 19 Apr. 1976, RB, Ann. 309, pp. 775 and 777; judges' folder, tab 53.

[40] CR 2018/6, p. 28, para. 22 (Akhavan); and MB, paras. 378 and 141.

[41] CMC, para. 7.11 *(b)*.

[42] CR 2018/6, p. 28, para. 22 (Akhavan), judges folder, tab 54.

[43] OAS, GA/RES. CP/RES. 157 (169/75), 6 Aug. 1975, CMC, Ann. 175, p. 953.

would have been expected to make some explicit or at least implicit reference to it and they didn't do so, and it is plain that that was quite deliberate.

12. On Monday, Professor Chemillier-Gendreau referred to a meeting between Bolivia and Chile of April 1971, and to drafts for a joint declaration submitted by Bolivia four months later[44]. As to this, Bolivia had two alternative wordings, and you can see them up on the screen and at tab 55 of your judges' folder, the first alternative:

> "The Governments of Bolivia and Chile have resolved to continue the negotiations agreed to in the Notes exchanged by both Governments on 1 and 20 June 1950 and signed by the Foreign Minister of Chile, Mr. Horacio Walker Larrain and the Bolivian Ambassador to Chile, Mr. Alberto Ostria Gutierrez, to which end the two governments hereby declare that these documents are in full force".

So wording that plainly does not find its way into the 1975 Joint Declaration. The alternative proposed by Bolivia: "The Governments of Bolivia and Chile resolve to formally commence a direct and bilateral démarche to negotiate Bolivia's own and sovereign access to the Pacific Ocean, with due regard for both countries' reciprocal interests."[45] Again, nothing like the actual wording of paragraph 4.

13. Professor Forteau affected to find support in this 1971 draft for his case on continuity between the 1950 Notes and the 1975 Charaña Declaration[46], which is puzzling indeed because it is self-evident that the wording that was eventually considered acceptable and incorporated into the 1975 Declaration could scarcely have been more different from either of the 1971 draft alternatives of Bolivia.

14. Secondly, and following from what I have just said, paragraph 4 is not formulated in the language of international agreement, any more than the document taken as a whole. The two States have used the cautious language that you would expect to see where a decision is being made to normalize diplomatic relations after more than a dozen years, and where there is an intent to make to the world an entirely non-binding political statement. So they have said: "have resolved" instead of "have agreed", "to continue the dialogue at various levels" instead of "to negotiate", "to seek formulas for solving" instead of "to reach agreement on".

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[44] CR 2018/6, p. 39, para. 29 (Chemillier-Gendreau), referring to RB, Ann. 297.

[45] Draft of the Joint Declaration submitted by the Consul General of Bolivia to Chile to the Minister for Foreign Affairs of Chile, 13 Aug. 1971, RB, Ann. 298, pp. 673 and 675.

[46] CR 2018/7, pp. 59, para. 17 (iii) (Forteau), also p. 57, para. 11 (Forteau).

15. Professor Remiro Brotóns spent a great deal of time on Monday seeking to show that "have resolved" — *han resuelto* in the original — could mean "have decided" or "have agreed" as well as the more obvious "have resolved"[47]. The extract of the Royal Academy dictionary that he referred to did not, so far as I could see, give "have agreed" as a meaning, but that of course is not decisive, and Chile's case is not that "have resolved" could never be used to establish a legal obligation. More pertinently, the Declaration uses "have resolved" on various occasions, from which it appears plain that no legally binding force was intended. Thus, in addition to paragraph 4, in paragraphs 5 and 6, the Presidents said they

(a) "have resolved to continue developing a policy in favour of harmony and understanding so that, in a climate of cooperation, a formula for peace and progress is jointly found in our Continent" and then at paragraph 6;

(b) "have resolved to normalize the diplomatic relations . . . at the Ambassadorial level."[48]

16. These cannot tenably be read as binding obligations that each State could have sought to enforce as it saw fit.

17. Thirdly, even if one were somehow to accept that this is the language of international agreement, it would not help Bolivia. The obligation would be to "continue the dialogue at various levels" and "to seek formulas for solving the vital matters", of which one is "the landlocked situation that affects Bolivia". But Bolivia's case is about an alleged obligation to negotiate specifically sovereign access.

18. Professor Remiro Brotóns told you on Tuesday that this was implicit in the Declaration "puisque c'est bien de cela qu'il s'agissait. Autrement, la Bolivie n'aurait pas repris les relations diplomatiques"[49]. He did not refer to any document. A useful reference would have been to President Banzer's statement on 5 February 1975, recorded in the press as follows:

> "The landlocked problem of Bolivia is not a condition to resume diplomatic relations with Chile, stated Bolivian President Hugo Banzer earlier today.

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[47] CR 2018/6, p. 49, para. 13, referring to judges' folder of 19 Mar. 2018, tab 12.

[48] Joint Declaration of Charaña, 8 Feb. 1975, CCM, Ann. 174, p. 949, paras. 5 and 6.

[49] CR 2018/7, p. 27, para. 42 (Remiro Brotóns). See also RB, para. 287; see also paras. 375-377.

> 72 hours before meeting his Chilean colleague, Augusto Pinochet, General Banzer built a 'silver bridge' for an exchange between the Ambassadors of both countries.
>
> Banzer declared verbatim: 'The maritime reintegration is not a basic condition for resuming relations.'"[50]

19. So, rather the opposite of what you were told on Tuesday.

20. And the simple point here is that the actual terms of paragraph 4 bear no relation at all to Bolivia's claimed obligation in this case[51]. According to General Banzer, in an interview on 29 December 1975: "the Act of Charaña does not include a categorical commitment by Chile to resolve Bolivia's landlocked situation"[52]. That seems plain enough. Yet on Bolivia's case it does. To support that case, it has sought to make a great deal of the wording used by the press-secretary, Federico Willoughby[53], and of the tentative views expressed on the subsequent guidelines by well-known Chileans who were then rather touchingly youthful academics[54]; but it is President Banzer who signed the Joint Declaration, and what he said on 29 December 1975 is, with respect, by far the more convincing description.

B. The guidelines for a negotiation

21. As to what happened next, the two States worked on guidelines for a negotiation.

22. I'll take you to these in a moment, but first, the Parties' respective positions. Chile says that these did not create any legal obligation. As to Bolivia's case, this is very unclear but, as I understand matters, it is that the guidelines are legally binding so as to establish an obligation to negotiate, but not legally binding so as to one of their central and express tenets, which was that Chile was only willing to negotiate on the basis that any cession of territory by it would be compensated by a cession of territory by Bolivia[55]. In other words, binding guidelines, but only so far as concerns the parts that suit Bolivia's current case, which is not a very attractive position to adopt.

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[50] "Banzer claims Landlocked Situation, Not A Basic Condition", *El Mercurio* (Chile), 5 Feb. 1975, RC, Ann. 417, judges' folder, tab 56.

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

[52] "Negotiations will be held with Chile on the basis of territorial compensation", *Presencia* (Bolivia), 29 Dec. 1975, CMC, Ann. 184, p. 1026. See judges' folder, tab 57.

[53] CR 2018/7, p. 27, para. 43 (Remiro Brotóns), referring to RB, Anns. 300-301.

[54] CR 2018/7, p. 28, para. 47 (Remiro Brotóns), referring to RB, Ann. 313.

[55] CR 2018/7, p. 28, paras. 46-47 (Remiro Brotóns); p. 66, para. 34 (Forteau).

23. Bolivia proposed guidelines were formulated in August 1975, and are at tab 58 of your folder[56]. According to paragraph 1, the proposal was put forward "to specify the guidelines for a negotiation". According to paragraph 7, Bolivia was "willing to consider, as a fundamental matter of the negotiation, the contributions that may correspond, as an integral part of an understanding that takes into account reciprocal interests"[57].

24. Chile's position was presented at a meeting of plenipotentiaries on 12 December 1975. Bolivia responded positively on 16 December. As you can see, Bolivia stated that it "accepts the general terms of the Chilean Government's response". Then, in the next paragraph, Bolivia reiterated a request "for a written response, on the same terms as the one stated orally by Your Excellency at the meeting on Friday the 12th of this month, and that constitutes the basis for the agreement that our two countries are negotiating"[58].

25. And this was done pretty much right away, in a letter of 19 December: you see the complete document at tab 60 of your folders[59].

26. The key paragraph is paragraph 4, which reiterates what had been presented a week earlier:

(a) At subparagraph *(a)*, you can see that the starting-point for President Banzer, which Chile was seeking to respond to, was "to consider the current reality without reviving historical antecedents". So a fresh start, not the performance of some "historical bargain" or a reference back to the 1950 Notes. I note in passing that Mr. Akhavan told you on Monday that "In a diplomatic Note date dated 19 December 1975, Chile once again proposed the 1895 formula."[60] Well, that does not quite appear to catch how these States were seeing matters.

(b) As subparagraph *(b)* then makes plain, the 1904 Peace Treaty was very much to remain central in the relations of the two States.

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[56] Aide-memoire from the Bolivian Embassy in Chile to the Ministry of Foreign Affairs of Chile, 26 Aug. 1975, CMC, Ann. 177, p. 965, para. 1.

[57] Aide-memoire from the Bolivian Embassy in Chile to the Ministry of Foreign Affairs of Chile, 26 Aug. 1975, CMC, Ann. 177, p. 967, para. 7.

[58] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Chile, No. 681/108/75, 16 Dec. 1975, CMC, Ann. 178, judges' folder tab 59. See also Memorandum by the Ministry of Foreign Affairs of Chile entitled "Course of the negotiation with Bolivia", 1978, RC, Ann. 423, p. 499.

[59] Note from the Minister for Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No. 686, 19 Dec. 1975, CMC, Ann. 180.

[60] CR 2018/6, p. 28, para. 23 (Akhavan).

(c) Then, as recorded in paragraph 4 *(c)*: "As His Excellency President Banzer stated, the cession to Bolivia of a sovereign maritime coastline, linked to Bolivian territory through an equally sovereign territorial strip, would be *considered*"[61]. The broad outline of what was to be considered was then set out in paragraphs 4 *(d)* through to 4 *(f)*.

(d) As per paragraph 4 *(d)*: "Chile would be willing to negotiate with Bolivia the cession of a strip of territory north of Arica up to the Concordia Line" based on specified boundaries.

(e) In paragraph 4 *(e)*, Chile unsurprisingly rejected as "unacceptable, the cession of territory . . . that could affect in any way the territorial continuity of the country".

(f) Then at paragraph 4 *(f)*:

> "The cession to Bolivia described in section d) would be subject to a simultaneous exchange of territories, that is to say, Chile would at the same time receive in exchange for what it hands over a compensatory area at least equal to the area of land and sea ceded to Bolivia."[62]

27. Bolivia did not then reply to say — no, you have misstated our position, we do not agree to negotiate on the basis of a territorial exchange. Of course not — that was a fundamental part of the basis for the negotiation. To the contrary, in fact, two days later, General Banzer informed the Bolivian public as to Chile's position on an exchange of territories, and stated in his message that the proposal was under responsible consideration and that "the Government considers that the reply of the Chilean Government to the Bolivian proposal constitutes an acceptable global basis for negotiations"[63].

28. Now, one might have expected the guidelines to be at the heart of Bolivia's case. The two States had settled on the general terms for a negotiation on sovereign access to the sea, with the basic lines of the *quid pro quo* set out in writing. There was then a negotiation by reference to the guidelines. This is a unique episode in the relations between the two States. And yet Bolivia now tries to pull back from what the guidelines actually said, just as it did in 1978.

29. At an obvious level, this is no doubt because the guidelines are:

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[61] Emphasis added.

[62] Note from the Minister for Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No. 686, 19 Dec. 1975, CMC, Ann. 180, pp. 981-985, paras. 4 *(c)-(f), (n)* and 5.

[63] Message of President Banzer announcing that Chile's Reply (19 Dec. 1975) constitutes a globally acceptable basis for negotiations, 21 Dec. 1975, CMC, Ann. 181, p. 991; judges' folder, tab 61.

(i) inconsistent with Bolivia's case on who was to blame for the breakdown of the negotiation, since all Chile did was to stick to the central tenet of the guidelines;

(ii) inconsistent with the relief now claimed by Bolivia, which ignores altogether the compensation that Chile considered essential; and

(iii) entirely inconsistent with Bolivia's case on the so-called "historical bargain"[64].

30. There is a further point to be made. Bolivia's case depends on establishing an intent to establish legal relations or the existence of a statement on which it could reasonably rely and did rely to its detriment. That requires a close focus on the wording of documents made by the two States, in particular at the isolated instances when the two States were most closely focused on the issue of sovereign access.

31. Yet it is precisely at these moments that Bolivia asks the Court to step back from the actual words on the page — indeed elects not to take you to the documents — because the detail shows that, when Chile was actually willing to negotiate with respect to sovereign access, this was on the basis of material compensation, notably water or land. This was an essential requirement, not least because it could make consideration of a cession of territory politically and publicly acceptable in Chile. And, no less to the point, the Government of Bolivia was also subject to an imperative in terms of negotiating towards an outcome that would be acceptable to its domestic audience.

32. These competing imperatives were decisive in terms of whether and on what basis each State could enter into a negotiation, and what in fact transpired once a negotiation was contemplated. Even in the unique period of the mid-1970s, when both States were subject to military dictatorships, and there was no democratic accountability in either State, the negotiation failed precisely because of these competing imperatives — in the event, because Bolivia decided it would not meet the position that it had accepted on territorial exchange. Bolivia now wishes to cast this failure in different terms, but the true position is that the pain-free sovereign access to which Bolivia now says it is legally entitled has never been, and could never have been, available.

[64] CR 2018/8, pp. 35-37, paras. 58-68 (Bethlehem).

II. The negotiation

33. I turn to the conduct of the negotiation, which took place between 1975 and 1978 — to the point where it failed because Bolivia refused to continue discussions on the basis of the accepted guidelines, rendering futile any further attempts at reaching a negotiated outcome. The Court will see the full record of interactions in the Charaña period set out, with reference to both Bolivian and Chilean contemporaneous documents, in Chile's Counter-Memorial and in its Rejoinder[65]. I just want to make four key points.

A. Reaffirmation of the guidelines for a negotiation

34. First, in the initial months of engagement, Bolivia explicitly reaffirmed its acceptance of Chile's proposed guidelines, including the condition on territorial exchange. It is perplexing that Bolivia seeks to suggest that this is in doubt[66].

(a) On your screens you see one of the headlines of the *Presencia* newspaper, published in La Paz on 29 December 1975. The headline makes the point plainly enough: "Negotiations will be held with Chile on the basis of territorial compensation". And you can see also that this is a transcript of a radio interview with General Banzer — at a roundtable with newspaper publishers and directors of radio stations — broadcast on 28 December 1975, and he is saying in terms to the widest possible audience that "we have accepted the Chilean proposal, globally considered as a basis for negotiations, we also consider that an exchange of territories is part of that fundamental basis"[67]. Professor Forteau made a half-hearted attempt on Tuesday to argue that the globally accepted basis did not include the condition of territorial exchange[68]. That is just incorrect[69].

(b) Statements to similar effect on the accepted basis of territorial exchange were reiterated by General Banzer and also the Bolivian Foreign Minister in the days and months that followed,

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[65] See CMC, Chap. 7; and RC, Chap. 6.

[66] CR 2018/7, p. 66, para. 33 (Forteau). See also p. 28, para. 45 (Remiro Brotóns).

[67] "Negotiations will be held with Chile on the basis of territorial compensation", *Presencia* (Bolivia), 29 Dec. 1975, CMC, Ann. 184, p. 1019; judges' folder, tab 62.

[68] CR 2018/7, p. 66, para. 33 (Forteau). See also p. 28, para. 45 (Remiro Brotóns).

[69] Cf. reliance by Professor Forteau on "Bolivia has not assumed definitive commitments with the Chilean Government", *El Diario* (Bolivia), 11 Mar. 1976, CMC, Ann. 195; "Chile's Ministry of Foreign Affairs: There is no deterioration in the negotiations over Bolivia's outlet to the sea", *Presencia* (Bolivia), 13 Mar. 1976, CMC, Ann. 196; and telex from the Embassy of Chile in Bolivia to the Minister for Foreign Affairs of Chile, 11 Mar. 1976, CMC, Ann. 194.

and it was stated as early as January 1976 that studies by technical sub-committees were underway so that Bolivia could propose an area for exchange that it considered most suitable[70].

35. In a meeting on 27 September 1976, General Banzer confirmed that those studies had been concluded[71]. In the same meeting, Chile agreed to exclude the 200 nautical mile "patrimonial sea" from the area to be taken into account in determining the area of the size of the territory to be exchanged[72]. Bolivia's President considered that Chile's position was fair, and that it should be accepted by what he called the "notables" of Bolivia. As to this, he is recorded as saying at this meeting:

> "These are the people [i.e. the notables] who gave me the mandate to obtain a sovereign outlet to the sea for Bolivia. I have obtained it under conditions I deem fair in times of peace. If they accept the terms that I convene with Chile, perfect; if not, the historical responsibility of their rejection and the failure of the negotiation will lie with them [that is the notables again] as the President of the Republic would have presented them with the only feasible solution through peaceful means . . ."[73]

36. And yet you are now being asked to accord this "historical responsibility" to Chile.

37. There is a further point, which is that Bolivia has a case on "degradation" of a supposed obligation under the 1950 Notes — due to the fact of the position accepted by Bolivia as to territorial exchange. It was even said on Tuesday that Chile had acted in bad faith in systematically reducing the object and scope within which it was prepared to negotiate[74]. It is as if Bolivia feels free to make any allegation, however serious, free from any need to look at the actual facts.

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[70] See "Banzer: It will be the people who decide on the agreement with Chile", *Presencia* (Bolivia), 30 Dec. 1975, CMC, Ann. 185, p. 1037. See also "Foreign Minister Guzmán Soriano: We will give compensation that does not compromise our development", *Presencia* (Bolivia), 1 Jan. 1976, CMC, Ann. 187, p. 1053.

[71] Report from Gregorio Amunátegui Prá to the President of Chile, October 1976, RC, Ann. 420, p. 457.

[72] Report from Gregorio Amunátegui Prá to the President of Chile, October 1976, RC, Ann. 420, p. 459. See also Ministry of Foreign Affairs of Chile, *History of the Chilean-Bolivian Negotiations 1975-1978*, [1978], RB, Ann. 316, pp. 851-852; and "The National Maritime Council Points Out: Exchange of territories is the only realistic solution for Bolivia", *La Tercera* (Chile), 1 Nov. 1976, RC, Ann. 421, p. 477.

[73] Report from Gregorio Amunátegui Prá to the President of Chile, Oct. 1976, RC, Ann. 420, p. 461. See also p. 467, judges' folder, tab 63.

[74] CR 2018/7, p. 63, para. 27 (Forteau).

B. Chile's good faith consultation with Peru

38. I move to my second key point. Pursuant to Article I of the 1929 Supplementary Protocol with Peru, Chile and Peru agreed not to cede any part of Tacna or Arica to any third State "without previous agreement"[75].

39. So, Chile made good faith efforts to consult with Peru, including in two rounds of meetings in April and July 1976[76]. But Peru was, perhaps naturally enough, concerned with its own interests.

(a) On 18 November 1976, Peru put forward its own proposal, which you can see on this sketch-map. At the base of a new Bolivian corridor, Peru wanted an area of shared sovereignty. In other words, Peru wanted to acquire sovereign rights in an area of Chilean territory that Chile was considering ceding to Bolivia[77].

(b) On 22 November 1976, Chile and Bolivia met to discuss this proposal, which was antithetical to both States' interests. You can see General Banzer's reaction on screen: "he rejected the Peruvian proposal and understood perfectly Chile's position against [it]". He said that "if negotiations failed, he would publicly acknowledge Chile's positive attitude"[78]. The evidence of that meeting has been on the Court's record since July 2016, and it has been persistently ignored by Bolivia; one wonders whether Bolivia's counsel will finally deal with this evidence next Monday.

40. On 26 November, consistent with what had been discussed with Bolivia, Chile responded to and rejected Peru's proposal, asking Peru to respond to the proposal as originally sent by Chile back in December 1975[79]. But Peru did not accept this.

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[75] Supplementary Protocol to the Treaty of Lima, signed at Lima on 3 June 1929 (entry into force 28 July 1929), League of Nations, *Treaty Series (LNTS)*, Vol. 94 , p. 401, Preliminary Objection of the Republic of Chile (POC), Ann. 11, Art. 1.

[76] See in particular: Joint Peruvian-Chilean Press Release, 23 Apr. 1976, CMC, Ann. 200; Joint Peruvian-Chilean Press Release, 9 July 1976, CMC, Ann. 201; and Report of Representatives of Chile to the Minister for Foreign Affairs of Chile, 24 Nov. 1976, CMC, Ann. 210, p. 1183, para. 4.

[77] Official Communiqué of the Ministry of Foreign Affairs of Peru, No. 30-76, 18 Nov. 1976, CMC, Ann. 207, judges' folder, tab 64.

[78] Report of Ministry of Foreign Affairs of Chile on the meetings held by G. Amunátegui Prá, Special Envoy of the President of the Republic of Chile, and President Banzer of Bolivia, 22 Nov. 1976, CMC, Ann. 209, judges' folder, tab 65 . See also Report from Gregorio Amunátegui Prá to the President of Chile, Oct. 1976, RC, Ann. 420, p. 463.

[79] Memorandum of the Ministry of Foreign Affairs of Chile, 26 Nov. 1976, CMC, Ann. 212, p. 1195. See also Report of Representatives of Chile, to the Minister for Foreign Affairs of Chile, 24 Nov. 1976, CMC, Ann. 210, pp. 1183-1185, paras. 6-11.

41. On the same day, Peru made a statement that was published in the *El Diario* newspaper to say it was maintaining its position[80]. This was consistent with what Peru's Foreign Minister had said in a long interview published in *La Prensa* in Lima. You can get the gist of Peru's position from the fourth page, where the Foreign Minister says "But as we have very clearly indicated, the *sine qua non* condition for meeting all the other requirements is this area of shared sovereignty."[81]

42. Earlier this week, Bolivia told you that "Peru was open to negotiation" on its proposal[82], relying on Peru's letter addressed to the Court in the context of this case, sent in 2016 and that is at tab 67 of your folder. Bolivia drew your attention to paragraph 4.4 of that letter, but it referred to a passage that was just setting out Peru's position, as it saw it, under the 1929 Treaty of Lima, i.e. that Peru could accept or reject and also discuss a proposal impacting on sovereignty over Arica. More to the point, in the passage of the letter, Peru also included a footnote referring back to the statements it made in 1976, including the statement made by its Foreign Minister that I have just taken you to, indicating that an area of shared sovereignty was in fact an immovable condition for Peru[83]. We invite you to read the letter in full.

C. Bilateral negotiation in 1976 and 1977

43. I move on to my third key point from the record of the negotiation. Less than a month after Chile delivered the agreed response to Peru, Bolivia abruptly and unilaterally sought to reject the guidelines for negotiation[84], seemingly because of a change in public opinion in Bolivia against territorial exchange[85].

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[80] Statement of the Foreign Minister of Peru in "Response by the Peruvian Foreign Ministry to information provided to the Ambassador of Peru by the Undersecretary of Foreign Affairs of Chile", *El Diario* (Bolivia), 26 Nov. 1976, CMC, Ann. 211, p. 1191, paras. 3 and 6.

[81] "Complete version of the Explanations by the Peruvian Minister for Foreign Affairs José de la Puente", *El Mercurio* (Chile), 26 Nov. 1976, CMC, Ann. 213, p. 1207, judges' folder, tab 66; see also pp. 1205 and 1213-14; see also Statement of the Foreign Minister of Peru in "Response by the Peruvian Foreign Ministry to information provided to the Ambassador of Peru by the Undersecretary of Foreign Affairs of Chile", *El Diario* (Bolivia), 26 Nov. 1976, CMC, Ann. 211, paras. 3 and 6.

[82] CR 2018/7, p. 67, para. 35 (Forteau).

[83] "Complete version of the Explanations by the Peruvian Minister for Foreign Affairs José de la Puente", *El Mercurio* (Chile), 26 Nov. 1976, CMC, Ann. 213, p. 1207, judges' folder, tab 67.

[84] Message from the President of Bolivia, 24 Dec. 1976, CMC, Ann. 214, p. 1241.

[85] See e.g. Letter from the Chilean Ambassador to Bolivia to the Minister for Foreign Affairs of Chile, No. 571/148, 28 Sept. 1977, CMC, Ann. 228, p. 1385, para. 11; and Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, No. 281/140/77, 7 Apr. 1977, RC, Ann. 422, p. 483.

44. This particular shift in position was short-lived. Within two weeks, Bolivia returned to the discussions with Chile, on the basis of the accepted guidelines[86]. Discussions continued on this basis throughout 1977[87].

45. On Tuesday Bolivia placed some emphasis on a joint declaration issued by the Foreign Ministers of Bolivia and Chile on 10 June 1977[88], suggesting that the two States reiterated their commitment to negotiate sovereign access, but without referring to territorial exchange[89]. The Declaration is at tab 68 of your folders, and again it is another document that we do respectfully ask you to read in full. It is the sort of wordy and unattractive declaration that is made where military dictatorships meet and see fit to make statements on the importance of human rights. It is baffling that Bolivia is relying on this document, the language of which is quite inconsistent with either the guidelines or the Charaña Declaration having established any legal obligation.

46. And, consistent with what I have just said, after June 1977, Bolivia continued to confirm that it was negotiating on the basis of territorial exchange. For example:

(a) In early August 1977, General Banzer affirmed that negotiations between the two States were continuing on the basis of the guidelines adopted in 1975, noting that the two States were "not looking for a new proposal, we have ratified what we have done and what we have proposed and we will maintain those terms"[90].

(b) The following month, the Heads of State of Chile, Bolivia and Peru met in Washington DC[91], and just two days later General Banzer explained to the press that it would be for Bolivia to select the territories to be exchanged with Chile[92].

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[86] Memorandum by the Ministry of Foreign Affairs of Chile on the audience granted by the Chilean Minister for Foreign Affairs to the Bolivian Ambassador to Chile, 7 Jan. 1977, CMC, Ann. 215, p. 1257-61, paras. 3, 5-9 and 13.

[87] See Note from the Minister for Foreign Affairs of Chile on the conversation held with the Bolivian Ambassador to Chile and his Minister Counsellor, 27 Jan. 1977, CMC, Ann. 216, p. 1275; Letter from the President of Chile to the President of Bolivia, 8 Feb. 1977, CMC, Ann. 217; Letter from the Minister for Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, No. 22, 15 Apr. 1977, CMC, Ann. 220, pp. 1309-75, paras. V-VI and XI; and Letter from the Minister for Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, No. 24, 21 Apr. 1977, CMC, Ann. 221, p. 1327.

[88] Joint Declaration of the Foreign Ministers of Chile and Bolivia, 10 June 1977, CMC, Ann. 222.

[89] CR 2018/7, p. 66, para. 34 (Forteau) and also pp. 29-30, para. 50 (Remiro Brotóns). See also RB, para. 278.

[90] Statement of President Banzer, reported in *Hoy* (Bolivia) in early Aug. 1977, reproduced in Letter from the Chilean Embassy in Bolivia to the Chilean Minister for Foreign Affairs, No. 480/114, 19 Aug. 1977, CMC, Ann. 223, p. 1351.

[91] See Joint Declaration of the Presidents of Bolivia, Chile and Peru, reproduced in "Meeting held among Pinochet, Morales and Banzer", *El Mercurio* (Chile), 9 Sept. 1977, CMC, Ann. 224.

47. But then, in late December 1977, General Banzer sought once again radically to revise the basis for the negotiation, asking Chile to abandon the condition of territorial exchange. And it is useful to note that this was all in the language of proposal and request, and that General Banzer recognized that it was not for Bolivia to insist on the establishment of new conditions [judges' folder, tab 69]. He said [on screen]: "The establishment of new conditions to overcome the current stage and lead us to the aims we set at the meeting of Charaña [aims, one notes, not obligations,] is not in the hands of Bolivia."[93]

48. Chile's position, however, was that the accepted guidelines remained "the only viable and realistic way to satisfy the longing" of Bolivia[94]. And in this respect it is recalled that the Chilean Government too had its own imperative that any agreement on sovereign access had to be domestically acceptable[95].

D. The failure of the negotiation

49. And this leads to my fourth key point. Bolivia caused the negotiation to fail.

50. On 17 March 1978, General Banzer suspended diplomatic relations with Chile, making particular reference to Chile's refusal to change its position on territorial exchange[96]. Chile's reaction expresses bafflement. In a declaration issued the following week, Chile stated:

> "It is incredible that the Bolivian Government has a nebula about this [the condition of territorial exchange] in circumstances when that condition — territorial compensation — has been reiterated personally from President to President, from Foreign Minister to Foreign Minister, and to the two Ambassadors that Bolivia had in Santiago in the past three years."[97]

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[92] Telex from the Chilean Embassy in Bolivia to the Ministry of Foreign Affairs of Chile, No. 301, 14 Sept. 1977, CMC, Ann. 225, para. 4. See also Confidential Memorandum by the Ministry of Foreign Affairs of Chile to the General Directorate for Foreign Policy, No. 424, 20 Oct. 1977, CMC, Ann. 233, para. II. See also Letter from the Second Secretary of the British Embassy in Bolivia to a Desk Officer at the FCO South America Department, No. 021/5, 30 Sept. 1977, CMC, Ann. 231, para. 4; "Foreign Minister Patricio Carvajal, 'Our territory won't be sold or given away'", *La Segunda* (Chile), 17 Sept. 1977, CMC, Ann. 226.

[93] Letter from the President of Bolivia to the President of Chile, 21 Dec. 1977, CMC, Ann. 235, p. 1453. Cf. CR 2018/7, p. 67, para. 35 (Forteau); see also RC, para. 6.45.

[94] Letter from the President of Chile to the President of Bolivia, 18 Jan. 1978, CMC, Ann. 236, p. 1459.

[95] See e.g. Confidential Memorandum from the Ministry of Foreign Affairs of Chile to Chile's Directorate General for Foreign Policy, No 116, 15 Mar. 1978, CMC, Ann. 238, pp. 1489 and 1493.

[96] Letter from the President of Bolivia to the President of Chile, 17 Mar. 1978, CMC, Ann. 239.

[97] Declaration of the Government of Chile of 23 Mar. 1978, CMC, Ann. 242, p. 1539; judges' folder, tab 70.

51. As to what happened next, the important point is that Bolivia never sought to return to the negotiating table on the basis of territorial exchange, nor sought to negotiate with Chile on the basis of the Joint Declaration and the accepted guidelines; and diplomatic relations have remained severed ever since.

52. Now Professor Forteau sought to make the argument on Tuesday that, despite this unpromising set of facts, the supposed obligation to negotiate under the 1975 Joint Declaration and/or the guidelines remained, and indeed remain, in full force.

53. Yet, this is a situation where Bolivia removed the whole basis for the negotiation through its refusal to negotiate any longer on the basis of the accepted guidelines and, for good measure, broke off diplomatic relations. Professor Forteau spent a fair amount of time discussing what Bolivia considers to be the appropriate legal standard, and suggesting that the issue was not whether further negotiations had become futile[98]. That was perfectly interesting, but regardless of whether the appropriate standard is one of futility, as appears from the Court's most recent jurisprudence[99], or is a requirement to negotiate as far as possible, as in the *Railway Traffic* case[100], or as Paul Reuter has put it: "les perspectives de succès semblent définitivement écartées", with the result that "l'obligation de négocier est caduque faute d'objet"[101], the test is plainly met.

54. It is strange indeed to suggest that a supposed obligation to negotiate under Charaña could be brought back to life decades after Bolivia's acts brought the negotiation to an end, and all the more so in circumstances where there has never been the faintest suggestion that Bolivia wanted to renew negotiations on the basis that it had previously accepted.

55. And I would add that the entirety of Professor Forteau's argument was based on the predicate that the 1975 Joint Declaration and/or the guidelines established an obligation to carry out a never-ending cycle of negotiations, whereas there is no basis for that whatsoever in the language

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[98] CR 2018/7, pp. 64-65, paras. 29-31.

[99] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, para. 159; see also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), I.C.J. Reports 2011 (II)*, p. 685, para. 132.

[100] *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaikiadorys), Advisory Opinion, 1931, P.C.I.J. Series A/B, No. 42*, p. 116.

[101] P. Reuter, « De l'obligation de négocier », in *Mélanges Morelli*, Paris, 1975, p. 729.

of those two documents. If somehow either could be construed as establishing an obligation to negotiate, there is not a trace anywhere of any obligation to reach a result satisfactory to Bolivia.

56. Professor Forteau also focused on Article 59 of the Vienna Convention concerning the circumstances in which one treaty will supersede and terminate an earlier treaty. It is plain to Chile that, if Bolivia could indeed point to treaties concluded in 1950 and 1975, the latter would supersede the former, including on the basis of incompatibility.

57. Professor Forteau argued, however, that the supposed obligation under the 1975 Declaration and/or the guidelines was not such that it would be incompatible with the supposed obligation arising out of the 1950 Notes. That is a remarkable argument. It is correct that the 1950 Notes foresaw non-territorial, as opposed to territorial, compensation. And it is precisely because the supposed obligations arising in 1975 were different that the Charaña negotiation failed. The incompatibility is demonstrated by the facts. And it is a fundamental incompatibility because it goes to the very basis on which the negotiation was to take place. So, Professor Forteau's references to the views of Sir Humphrey Waldock at the time of the Vienna Conference[102] do not help Bolivia at all.

58. It is also untenable to argue as if there were some core of a supposed obligation to negotiate under the Joint Declaration, which would not have been conditioned by the accepted basis by which that obligation to negotiate was in fact interpreted and applied by the two States at the relevant time[103]. That is just plain wishful thinking on Bolivia's part.

59. Finally, I also note that Professor Forteau referred to Article 65 of the Vienna Convention as if there were a requirement that Chile make a notification under Article 59 of the Convention[104]. We presume he will be returning on Monday to convince the Court that such a requirement existed under customary international law at the relevant time.

60. Mr. President, Members of the Court, that concludes Chile's submissions on the Charaña process; and I ask that you give the floor to Professor Pinto to continue Chile's first round argument.

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[102] See F. Dubuisson, "Commentary on Article 59 of the Vienna Conventions of the Law of Treaties, in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties. A Commentary.* (2011), Vol. II, pp. 1341-1343.

[103] CR 2018/7, p. 63, para. 27 (Forteau).

[104] CR 2018/7, p. 62, para. 23 (Forteau).

The PRESIDENT: I thank you and I now give the floor to Professor Pinto. Vous avez la parole, Madame.

Mme PINTO :

LES RÉSOLUTIONS DE L'OEA ET L'«APPROCHE NOUVELLE»

1. Monsieur le président, Madame la vice-présidente, Mesdames et Messieurs de la Cour, c'est toujours un honneur de prendre la parole devant vous. Je le fais aujourd'hui au nom du Chili.

2. Au début de la semaine, les conseils de la Bolivie ont voulu faire croire que les résolutions adoptées par l'Assemblée générale de l'Organisation des Etats américains (ci-après «OEA») ainsi que la conduite du Chili dans les années 1980 ont confirmé ou créé — sur ce point la Bolivie a du mal à prendre position — ont confirmé ou créé, disais-je, une obligation de négocier qui lierait le Chili encore aujourd'hui. Il me revient de vous expliquer pourquoi il n'en est rien. Je le ferai donc en trois parties :

a) d'abord, je vous démontrerai que les résolutions de l'Assemblée générale de l'OEA sur lesquelles la Bolivie s'appuie n'ont ni réitéré ni créé une quelconque obligation de négocier et, de toute façon, n'auraient pas pu le faire eu égard à leur nature et à leur portée juridique non contraignantes ; aucune obligation de négocier ne découle non plus de la Charte de l'OEA sur la base de ces résolutions ou indépendamment de celles-ci ;

b) dans un deuxième temps, j'évoquerai les circonstances dans lesquelles ces résolutions ont été adoptées, circonstances qui ne permettent en aucun cas de transformer ces résolutions en une obligation juridique de négocier ni de créer une telle obligation ; et

c) pour terminer, j'aborderai le processus de dialogue engagé entre le Chili et la Bolivie en dehors de l'organisation régionale dans le but d'améliorer leurs rapports et auquel la Bolivie a, dès 1987, fait référence sous le terme de «el enfoque fresco»[105] ou l'«approche nouvelle».

3. Mais avant de développer ces trois points tour à tour, il est utile de faire quelques remarques préliminaires qui, nous semble-t-il, sont indispensables à une meilleure compréhension

[105] «Foreign Minister Del Valle : «Chile and Bolivia Must Seek a Rapprochement»», *El Mercurio* (Chili), 25 février 1986, CMC, annexe 283.

du contexte de ce chapitre des années 1980, qui, contrairement aux allégations de nos contradicteurs et amis[106], ne s'inscrit pas dans une quelconque continuité.

4. La fin des années 1970 n'a pas été très lumineuse, ni pour la Bolivie ni pour le Chili et certainement pas pour leurs relations bilatérales. M. Wordsworth vient de vous expliquer que, en 1978, les relations diplomatiques entre les deux Etats ont été rompues à l'initiative de la Bolivie. Dans les deux pays, ce sont des gouvernements militaires qui ont pris le pouvoir au détriment de l'état de droit.

5. Profitant de l'isolement politique du Chili sous le général Pinochet, la Bolivie a tout de suite adopté une stratégie de multilatéralisation pour obtenir un soutien à ses aspirations maritimes et accuser le Chili sur la scène internationale et régionale. Cette politique de dénonciation et d'accusation au niveau multilatéral a été ouvertement assumée par la Bolivie dès la rupture des relations diplomatiques[107].

6. La Bolivie a soumis la question de «son» accès à la mer à l'OEA. Lors de l'Assemblée générale tenue à La Paz en 1979, elle a présenté son «Rapport sur le problème de l'accès de la Bolivie à la mer»[108], dans lequel elle se plaint de son statut d'Etat sans littoral. Par la suite, l'OEA a adopté onze résolutions[109] entre 1979 et 1989, une chaque année.

7. La Bolivie omet cependant de préciser qu'aucune résolution sur cette question n'a été adoptée par l'OEA ni avant le coup d'Etat au Chili en 1973, ni après le retour de la démocratie, ni même en 2012 lors de la dernière Assemblée générale tenue à La Paz. En effet, Monsieur le

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[106] Voir, par exemple, CR 2018/7, p. 68-70, par. 37-40 (Forteau).

[107] Déclaration officielle du ministre des affaires étrangères de la Bolivie rompant les relations diplomatiques avec le Chili, 17 mars 1978, CMC, annexe 241, par. 8.

[108] Rapport sur le problème de l'accès de la Bolivie à la mer, 26 octobre 1979, DC, annexe 426 ; 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, p. 1630-1641.

[109] Résolutions AG/RES. 426 (IX–O/79), «Accès de la Bolivie à l'océan Pacifique», 31 octobre 1979, CMC, annexe 250 ; AG/RES. 481 (X–O/80), «Problème de l'accès de la Bolivie à la mer», 27 novembre 1980, CMC, annexe 254 ; AG/RES. 560 (XI-O/81), «Rapport sur le problème de l'accès de la Bolivie à la mer», 10 décembre 1981, CMC, annexe 257 ; AG/RES. 602 (XII–O/82), «Rapport sur le problème de l'accès de la Bolivie à la mer», 20 novembre 1982, CMC, annexe 259 ; AG/RES. 686 (XIII–O/83), «Rapport sur le problème de l'accès de la Bolivie à la mer», 18 novembre 1983, CMC, annexe 266 ; AG/RES. 701 (XIV–O/84), «Rapport sur le problème de l'accès de la Bolivie à la mer», 17 novembre 1984, CMC, annexe 272 ; AG/RES. 766 (XV–O/85), «Rapport sur le problème de l'accès de la Bolivie à la mer», 9 décembre 1985, CMC, annexe 282 ; AG/RES. 816 (XVI–O/86), «Rapport sur le problème de l'accès de la Bolivie à la mer», 15 novembre 1986, CMC, annexe 287 ; AG/RES. 873 (XVII–O/87), «Rapport sur le problème de l'accès de la Bolivie à la mer», 14 novembre 1987, CMC, annexe 300 ; AG/RES. 930 (XVIII–O/88), «Rapport sur le problème de l'accès de la Bolivie à la mer», 19 novembre 1988, CMC, annexe 304 ; AG/RES. 989 (XIX–O/89), «Rapport sur le problème de l'accès de la Bolivie à la mer», 18 novembre 1989, CMC, annexe 306.

président, depuis le retour de la démocratie au Chili il y a 29 ans, l'organisation régionale n'a donné aucun appui politique (et moins encore juridique) aux aspirations boliviennes. Bien que le sujet soit resté inscrit à l'ordre du jour après 1989 et que la Bolivie ait présenté des rapports contredits par le Chili, l'organisation ne s'est plus exprimée sur le problème maritime : aucune résolution, aucune recommandation à recourir à des négociations ou au dialogue, aucune reconnaissance de l'existence d'un quelconque différend entre les deux Etats, aucune réaffirmation de l'intérêt de l'hémisphère concernant ce sujet.

I. Les résolutions de l'Assemblée générale de l'OEA n'ont ni créé ni confirmé une obligation de négocier

8. Monsieur le président, Mesdames et Messieurs de la Cour, au bénéfice de ces remarques préliminaires, j'en viens à mon premier point : ces onze résolutions de l'Assemblée générale de l'OEA n'ont ni créé ni confirmé l'obligation de négocier que la Bolivie revendique aujourd'hui.

9. Ni la Bolivie[110] ni aucun autre Etat membre de l'OEA ne tenait les résolutions de l'Assemblée générale pour des instruments autres que des recommandations politiques[111]. En 1979, juste avant l'adoption de la première de ces résolutions, la Bolivie elle-même expliquait qu'il n'y avait aucune raison de transformer «une exhortation de l'Assemblée générale en une injonction qui n'existe pas»[112].

En 1990, la Bolivie reconnaissait cela sans aucune ambiguïté ; selon les dires du ministre des affaires étrangères de ce pays :

> «Those resolutions repeatedly affirm that the need to find an adequate solution to Bolivia's maritime confinement is of permanent hemispheric interest. All of this support, which is now part of the history of the successive Assemblies of the OAS, has preserved the principles of non-intervention and respect for the sovereignty of States, because it has been limited to recommending negotiations between the Parties involved, respecting their rights and their self-determination.»[113]

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[110] Procès-verbal de la 12e réunion plénière de l'Assemblée générale de l'OEA, 31 octobre 1979, CMC, annexe 249, p. 1655.

[111] Procès-verbal de la 8e réunion plénière de l'Assemblée générale de l'OEA, 20 novembre 1982, CMC, annexe 258, p. 1699 (Paraguay) ; procès-verbal de la 6e réunion de la commission générale de l'Assemblée générale de l'OEA, 19 novembre 1979, DC, annexe 427, p. 595 (Argentine), p. 598 (Uruguay).

[112] Procès-verbal de la 12e réunion plénière de l'Assemblée générale de l'OEA, 31 octobre 1979, CMC, annexe 249, p. 1655.

[113] Procès-verbal de la 2e réunion de la commission générale de l'Assemblée générale de l'OEA, 6 juin 1990, CMC, annexe 307, p. 2121.

10. Cette position quant à la valeur de ces résolutions suffirait à clore le débat. Il n'y a pas eu et il n'y a toujours pas d'obligation de négocier découlant des résolutions de l'OEA. Elles ne mentionnent pas une telle obligation et moins encore un différend non résolu entre les deux Etats. Les résolutions de l'Assemblée générale faisaient et font partie de l'histoire de ce chapitre. Elles sont fonction des circonstances particulières et de l'isolement politique du Chili caractérisant cette période. A ce jour, la Bolivie n'a pas su expliquer pour quelles raisons son appréciation de ces résolutions de l'OEA a changé. [Fin de la projection]

11. Dans son mémoire, la Bolivie a en effet soutenu que les résolutions de l'OEA ont confirmé ou créé une obligation de négocier ayant «une valeur juridique et une force contraignante toutes particulières»[114]. Dans la réplique, la Bolivie a cependant admis que les résolutions d'organisations internationales n'ont pas en elles-mêmes de portée juridique contraignante et que l'Assemblée «ne [peut] contraindre les Etats à adopter un comportement précis»[115]. Bien sûr, le Chili en a pris acte dans sa duplique[116].

12. Néanmoins, mardi matin, Mme Sander s'est distancée de cette position[117] tout en développant une nouvelle thèse sur la base des dispositions et obligations de la Charte de l'OEA relatives au règlement pacifique des différends. Selon Mme Sander, ces obligations étaient seulement réitérées par les recommandations de l'Assemblée générale, qui auraient été acceptées par le Chili et, en tout état de cause, le liaient indépendamment d'une acceptation, voire malgré ses votes négatifs[118]. Ce raisonnement, qui est en tout point conforme à celui du professeur Lowe concernant l'article 2, paragraphe 3, de la Charte des Nations Unies[119], est artificiel ; il ne constitue qu'une nouvelle tentative de trouver un fondement en droit international à l'existence de l'obligation de négocier que la Bolivie demande à la Cour de confirmer.

13. Aucune des onze résolutions invoquées par la Bolivie — aucune Monsieur le président — ne mentionne une quelconque «obligation de négocier». Aucune ne confirme

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[114] MB, par. 384.

[115] REB, par. 289.

[116] DC, par. 7.5.

[117] CR 2018/7, p. 31, par. 4 (Sander).

[118] CR 2018/7, p. 32, par. 6.

[119] CR 2018/6, p. 63-65, par. 24-34 (Lowe).

l'existence d'une obligation de négocier et aucune ne crée une telle obligation. La Bolivie elle-même ne cherchait pas à engager de nouvelles négociations[120]. Le «Rapport sur le problème de l'accès de la Bolivie à la mer» ne fait pas mention de nouvelles négociations, et encore moins d'une *obligation* de négocier[121]. La Bolivie considérait alors que ses aspirations — son soi-disant droit — n'étaient justement pas négociables[122] et qu'elle ne voulait plus des «prétendues négociations généreuses»[123].

14. Je viens de le dire, le texte des résolutions de l'Assemblée générale n'utilise pas le terme «obligation». L'organe plénier parle seulement d'un «intérêt permanent du Continent»[124], d'un «esprit de fraternité»[125]. Il recommande aux Etats concernés «d'entamer des négociations»[126], invite «instamment les Etats concernés … à ouvrir par les voies appropriées un dialogue»[127] ou décide d'exhorter «la Bolivie et le Chili à entamer, dans un esprit de fraternité américaine, un processus de rapprochement»[128]. Rien dans les recommandations ne confirme l'existence ni n'établit une

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[120] DC, par. 7.7.

[121] «Rapport sur le problème d'accès de la Bolivie à la mer», 26 octobre 1979, DC, annexe 426 ; procès-verbal de la 2e réunion de la commission générale de l'Assemblée générale de l'OEA, 26 octobre 1979, CMC, annexe 248, p. 1629-1641.

[122] Procès-verbal de la réunion extraordinaire du Conseil permanent de l'OEA, 14 février 1979, DC, annexe 425, p. 545.

[123] Procès-verbal de la réunion extraordinaire du Conseil permanent de l'OEA, 14 février 1979, DC, annexe 425, p. 565.

[124] OEA, Assemblée générale, résolutions AG/RES. 426 (IX–O/79), «Accès de la Bolivie à l'océan Pacifique», 31 octobre 1979, CMC, annexe 250 ; AG/RES. 481 (X–O/80), «Problème de l'accès de la Bolivie à la mer», 27 novembre 1980, CMC, annexe 254 ; AG/RES. 560 (XI–O/81), «Rapport sur le problème de l'accès de la Bolivie à la mer», 10 décembre 1981, CMC, annexe 257 ; AG/RES. 602 (XII–O/82), «Rapport sur le problème de l'accès de la Bolivie à la mer», 20 novembre 1982, CMC, annexe 259 ; AG/RES. 701 (XIV–O/84), «Rapport sur le problème de l'accès de la Bolivie à la mer», 17 novembre 1984, CMC, annexe 272 ; AG/RES. 766 (XV–O/85), «Rapport sur le problème de l'accès de la Bolivie à la mer», 9 décembre 1985, CMC, annexe 282 ; AG/RES. 873 (XVII–O/87), «Rapport sur le problème de l'accès de la Bolivie à la mer», 14 novembre 1987, CMC, annexe 300 ; AG/RES. 930 (XVIII–O/88), «Rapport sur le problème de l'accès de la Bolivie à la mer», 19 novembre 1988, CMC, annexe 304 ; AG/RES. 989 (XIX—O/89), «Rapport sur le problème de l'accès de la Bolivie à la mer», 18 novembre 1989, CMC, annexe 306.

[125] OEA, Assemblée générale, résolutions AG/RES. 426 (IX–O/79), «Accès de la Bolivie à l'océan Pacifique», 31 octobre 1979, CMC, annexe 250 ; AG/RES. 602 (XII–O/82), «Rapport sur le problème de l'accès de la Bolivie à la mer», 20 novembre 1982, CMC, annexe 259 ; AG/RES. 686 (XIII–O/83), «Rapport sur le problème de l'accès de la Bolivie à la mer», 18 novembre 1983, CMC, annexe 266 ; AG/RES. 873 (XVII–O/87), «Rapport sur le problème de l'accès de la Bolivie à la mer», 14 novembre 1987, CMC, annexe 300 ; AG/RES. 930 (XVIII–O/88), «Rapport sur le problème de l'accès de la Bolivie à la mer», 19 novembre 1988, CMC, annexe 304 ; AG/RES. 989 (XIX–O/89), «Rapport sur le problème de l'accès de la Bolivie à la mer», 18 novembre 1989, CMC, annexe 306.

[126] OEA, Assemblée générale, résolution AG/RES. 426 (IX–O/79), «Accès de la Bolivie à l'océan Pacifique», 31 octobre 1979, CMC, annexe 250.

[127] OEA, Assemblée générale, résolutions AG/RES. 481 (X–O/80), «Problème de l'accès de la Bolivie à la mer», 27 novembre 1980, CMC, annexe 254 ; AG/RES. 560 (XI–O/81), «Rapport sur le problème de l'accès de la Bolivie à la mer», 10 décembre 1981, CMC, annexe 257.

[128] OEA, Assemblée générale, résolution AG/RES. 686 (XIII–O/83), «Rapport sur le problème de l'accès de la Bolivie à la mer», 18 novembre 1983, CMC, annexe 266.

obligation de négocier qui pourrait être transformée en obligation contraignante pour le Chili et la Bolivie. Il s'agit seulement d'aspirations politiques et les termes utilisés le confirment.

15. Mardi matin, Mme Sander n'a pas affirmé le contraire. Plutôt que de rechercher la source de l'obligation de négocier dans les textes des résolutions, elle vous a renvoyé aux dispositions des articles 3 i) et 24 de la Charte de l'OEA. Je ne vais pas m'attarder sur le sens et la portée de ces dispositions. Sir Daniel et le professeur Thouvenin ont d'ores et déjà présenté notre position sur la question dans le cadre de la Charte des Nations Unies[129] et il n'y a pas de raison de revenir là-dessus.

16. Mais, Monsieur le président, rien ne permet d'affirmer qu'en adoptant ses onze résolutions, l'Assemblée générale de l'OEA agissait dans le cadre de l'objectif de résoudre des différends entre Etats membres, compétence qui, par ailleurs, n'est pas dévolue à l'Assemblée, mais au Conseil permanent[130]. Les résolutions n'utilisent pas le terme «différend» ou «controverse» et, dans la grande majorité des cas, font seulement référence aux «Etats directement concernés par le problème». Or, ni le Chili ni l'Assemblée générale de l'OEA n'ont reconnu l'existence d'un différend ou d'une controverse entre les deux Etats, mais seulement d'un problème ou de nombreuses «difficultés qui les sépar[ai]ent»[131].

17. Au risque de déplaire au professeur Remiro Brotóns, il ne s'agit pas de jouer sur les mots. Et les mots sont importants, Monsieur le président ; c'est une cour de droit à laquelle on s'adresse aujourd'hui. L'Assemblée a bien choisi les termes employés et surtout ceux qu'elle n'a pas voulu employer. Elle a justement refusé de se référer au chapitre V de la Charte de l'OEA, référence qui figurait pourtant dans le projet de résolution soumis par la Bolivie en 1979[132]. La Bolivie, le Chili et la Colombie ont également décidé de ne pas retenir la référence à l'article 24 de

[129] CR 2018/8, p. 26-27, par. 20-27 (Bethlehem), p. 41-42, par. 10-20 (Thouvenin).

[130] Charte de l'OEA, art. 84 («Le Conseil permanent veille au maintien des relations amicales entre les Etats membres et, à cette fin, les aide d'une manière effective à régler leurs différends de façon pacifique, conformément aux dispositions suivantes.»)

[131] OEA, Assemblée générale, résolution AG/RES. 686 (XIII–O/83), «Rapport sur le problème de l'accès de la Bolivie à la mer», 18 novembre 1983, CMC, annexe 266 ; lettre du ministre des affaires étrangères du Chili, Miguel Alex Schweitzer, au ministre des affaires étrangères de la Colombie, Rodrigo Lloreda, 15 décembre 1983, REB, annexe 322.

[132] Premier projet de résolution sur le problème d'accès de la Bolivie à la mer, 1979, DC, annexe 424, p. 517-519.

la Charte dans le projet de résolution adopté en 1983[133], visant le rapprochement des deux Etats. Les résolutions de l'Assemblée ne s'inscrivent tout simplement pas dans la logique de l'article 3 ou de l'article 24 de la Charte et la Bolivie ne peut pas changer leur objet et but *ex post facto* devant la Cour.

18. L'obligation de considérer les recommandations de l'Assemblée générale — qui, selon la Bolivie[134], est inhérente au statut d'Etat membre de l'OEA — ne change rien à l'effet juridique de ces résolutions. La Bolivie fait grand cas de l'opinion individuelle du juge Lauterpacht jointe au premier avis consultatif sur le *Sud-Ouest africain*. Mais il a également, et avant tout, pris soin de confirmer dans son opinion qu'«un Etat n'est pas tenu d'accepter [une] recommandation»[135] et qu'il n'y a pas d'«obligation d'accepter sans réserve une recommandation ou une série de recommandations particulières»[136]. Examiner une résolution de bonne foi n'implique aucunement une obligation d'accepter comme juridiquement contraignant son contenu. L'effet juridique contraignant qui fait défaut à une recommandation ne peut être réintroduit par le biais d'une soi-disant obligation de la prendre en considération[137].

19. La dernière des résolutions adoptées par l'Assemblée générale de l'OEA en 1989, l'année qui précède la restauration de la démocratie au Chili, confirme qu'il n'y a ni obligation de négocier, ni différend et certainement pas de différend sur l'accès souverain de la Bolivie à la mer. Mme Sander a projeté le texte de la résolution sans pour autant vous lire la partie la plus importante[138]. Vous l'avez à nouveau sur vos écrans et à l'onglet n° 73 de vos dossiers de plaidoiries. L'Assemblée souligne seulement «l'importance que revêt la solution du problème de l'accès de la Bolivie à la mer sur des bases qui prennent en considération les besoins réciproques

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[133] Voir note du représentant permanent de la Bolivie auprès des Nations Unies, Jorge Gumucio Granier, au ministre des affaires étrangères de la Bolivie, Jose Ortiz Mercado, MRB 58/84, 16 février 1984, REB, annexe 324, p. 991.

[134] CR 2018/7, p. 36, par. 25-26 (Sander).

[135] *Procédure de vote applicable aux questions touchant les rapports et pétitions relatifs au Territoire du Sud-Ouest africain, avis consultatif, C.I.J. Recueil 1955*, opinion individuelle du juge Lauterpacht, p. 119. Voir aussi *ibid*, opinion individuelle du juge Klaestad, p. 88 ; C.F. Amerasinghe, *An Introduction to the Institutional Law of International Organizations*, 2005, p. 180.

[136] *Procédure de vote applicable aux questions touchant les rapports et pétitions relatifs au Territoire du Sud-Ouest africain, avis consultatif, C.I.J. Recueil 1955*, opinion individuelle du juge Lauterpacht, p. 120.

[137] REB, par. 291.

[138] CR 2018/7, p. 42, par. 47 (Sander).

ainsi que les droits et intérêts des parties concernées». L'Assemblée ne mentionne aucune obligation préexistante de négocier. Elle ne mentionne qu'un problème — et non pas un différend. Elle ne visait qu'à «assurer une meilleure entente et une plus grande solidarité et intégration du continent», des objectifs éminemment politiques. Plutôt que d'imposer une obligation de négocier, l'organe principal de l'OEA exhortait «les parties au dialogue»[139].

20. Il est bien difficile d'imaginer que ces termes politiques par nature aient été choisis pour imposer au Chili des obligations juridiquement contraignantes concernant des négociations aboutissant à un accord sur l'accès à la mer. [Fin de la projection] Les presque trente années de silence de la part de l'OEA corroborent l'absence d'une telle obligation dans l'appréciation de l'organisation régionale qui, faut-il le rappeler, aurait été seule habilitée à vérifier l'exécution et le respect d'un engagement pris à son égard[140].

II. La conduite du Chili au sein de l'OEA n'a pas créé un accord ou arrangement avec la Bolivie

21. Consciente des lacunes de sa thèse — et ceci est mon deuxième point — la Bolivie a recours à une autre construction artificielle selon laquelle la conduite du Chili pendant la rédaction et l'adoption des résolutions aurait eu pour effet de cristalliser ou de faire naître un accord entre les deux Etats, ou que cette conduite aurait donné naissance à des attentes légitimes (de la Bolivie bien sûr) en vertu desquelles le Chili ne pourrait plus changer sa conduite aujourd'hui[141].

22. La Bolivie considère qu'un vote positif de la part d'un Etat peut transformer une simple recommandation en instrument obligatoire[142]. Une telle proposition ignore la réalité de la vie diplomatique et des hémicycles des organisations internationales. Aucun représentant qui lève la main ne le fait dans l'intention et la conscience de lier juridiquement son Etat au contenu d'une résolution qui est en tant que telle dépourvue d'effet juridique.

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[139] OEA, Assemblée générale, résolution AG/RES. 989 (XIX–O/89), «Rapport sur le problème de l'accès de la Bolivie à la mer», 18 novembre 1989, CMC, annexe 306.

[140] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 132, par. 262.

[141] REB, par. 293 citant B. Sloan, «General Assembly Resolutions Revisited (Forty Years Later)», *British Yearbook of International Law*, vol. 58, 1987, p. 65.

[142] REB, par. 298.

23. La Bolivie croit trouver un précédent dans l'affaire de la devancière de la Cour relative au *Trafic ferroviaire entre la Lithuanie et la Pologne*[143], concernant une résolution du Conseil de la Société des Nations. Comme Mme Sander l'a expliqué[144], la Pologne et la Lithuanie avaient accepté explicitement les termes et le contenu de ladite résolution[145]. La Cour permanente a rappelé que les deux Etats «ont participé à l'adoption de cette résolution du Conseil»[146]. Pourtant, pour la Cour permanente, les deux Etats — et seulement ces deux Etats d'ailleurs — étaient liés en vertu de «leur acceptation de la résolution du Conseil»[147]. En d'autres termes, le seul vote positif de la part de la Pologne et de la Lithuanie n'était pas suffisant pour juridiquement lier les deux Etats à la résolution, dont les compétences — les compétences du Conseil de la Société des Nations — étaient très différentes de celles de l'Assemblée générale de l'OEA.

24. Monsieur le président, Mesdames et Messieurs de la Cour, la situation du Chili et de la Bolivie est tout à fait différente. Le Chili n'a jamais accepté une obligation de négocier l'accès de la Bolivie à la mer. Il n'a même jamais voté en faveur de ces résolutions[148]. Bien au contraire, Monsieur le président, le Chili a voté contre les résolutions en 1979 et entre 1984 et 1989[149]. En 1982, le Chili a refusé de participer au vote de la résolution et exposé sa position dans une déclaration[150]. En 1980, 1981 et 1983, il ne s'est pas opposé au consensus sans pour autant voter pour les résolutions. Il a par ailleurs très clairement contesté la compétence de l'Assemblée

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

[144] CR 2018/7, p. 40, par. 40-41 (Sander).

[145] Extrait des comptes rendus du Conseil de la Société des Nations (10 décembre 1927), reproduit *in Trafic ferroviaire entre la Lithuanie et la Pologne, avis consultatif, 1931, C.P.J.I., série C n° 54*, p. 235.

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

[147] *Ibid*.

[148] CMC, par. 8.24

[149] Procès-verbal de la 12e réunion plénière de l'Assemblée générale de l'OEA, 31 octobre 1979, CMC, annexe 249, p. 1657 ; procès-verbal de la 8e réunion plénière de l'Assemblée générale de l'OEA, 17 novembre 1984, CMC, annexe 271, p. 1805-1806 ; procès-verbal de la 3e réunion plénière de l'Assemblée générale de l'OEA, 9 décembre 1985, CMC, annexe 281, p. 1867 ; procès-verbal de la 9e réunion plénière de l'Assemblée générale de l'OEA, 15 novembre 1986, CMC, annexe 286, p. 1921; procès-verbal de la 10e réunion plénière de l'Assemblée générale de l'OEA, 14 novembre 1987, CMC, annexe 299, p. 2055-2056 ; procès-verbal de la 13e réunion plénière de l'Assemblée générale de l'OEA, 19 novembre 1988, CMC, annexe 303, p. 2103-2104 ; procès-verbal de la 9e réunion plénière de l'Assemblée générale de l'OEA, 18 novembre 1989, CMC, annexe 305, p. 2113.

[150] Procès-verbal de la 8e réunion plénière de l'Assemblée générale de l'OEA, 20 novembre 1982, CMC, annexe 258, p. 1699.

générale en la matière, comme il l'avait déjà fait en 1979[151]. Il est difficile, pour ne pas dire impossible, d'établir sur cette base une quelconque acceptation du contenu de ces résolutions. Tout au plus, les objections du Chili confirment qu'il ne s'agit pas d'une question et encore moins d'un différend qui entrait dans la compétence de l'OEA. En tout état de cause, comme je viens de l'expliquer, les termes mêmes des résolutions ne mentionnent aucunement une obligation de négocier qui pouvait être acceptée ou transformée en obligation contraignante.

25. Même en 1983 en participant à l'élaboration de la résolution 686 et en ne s'opposant pas au consensus au sein de l'Assemblée, le Chili n'a aucunement accepté une obligation de négocier l'accès à la mer. Le texte de cette résolution — consciencieusement établi entre les deux Etats[152] — ne laisse aucun doute. Il exhortait le Chili et la Bolivie à «entamer, dans un esprit de fraternité américaine, un processus de rapprochement des peuples bolivien et chilien, et de resserrement de leurs liens d'amitié»[153]. Les événements des années 1983, 1984 et 1985 confirment que ce processus de rapprochement avait été considéré comme l'élément clef de cette résolution. L'objectif du Chili était de rétablir des relations normales avec la Bolivie à travers un dialogue constructif. C'était la condition *sine qua non* pour des discussions concernant le soi-disant «problème maritime» de la Bolivie[154]. Cette interprétation n'était pas seulement celle du Chili, mais également celle de la Colombie qui jouait un rôle important dans ce processus[155]. Si jamais il y avait eu une acceptation, une telle acceptation ne pouvait concerner que cela, l'engagement d'un processus de rapprochement.

26. Monsieur le président, le Chili n'a pas voté en faveur des résolutions, il ne les a pas acceptées comme obligatoires et il n'a pas non plus créé d'«attentes légitimes» quant aux négociations portant sur un accès à la mer pour la Bolivie. Les résolutions de l'Assemblée générale

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[151] Message officiel de la délégation chilienne auprès de l'OEA au ministre des affaires étrangère du Chili, n° 401, 24 novembre 1980, CMC, annexe 252 ; procès-verbal de la 6e réunion plénière de l'Assemblée générale de l'OEA, 27 novembre 1980, CMC, annexe 253 ; procès-verbal de la 4e réunion de la commission générale de l'Assemblée générale de l'OEA, 7 décembre 1981, CMC, annexe 255.

[152] Voir note du représentant permanent de la Bolivie auprès des Nations Unies, Jorge Gumucio Granier, au ministre des affaires étrangères de la Bolivie, Jose Ortiz Mercado, MRB 58/84, 16 février 1984, REB, annexe 324.

[153] OEA, Assemblée générale, résolution AG/RES. 686 (XIII–O/83), «Rapport sur le problème de l'accès de la Bolivie à la mer», 18 novembre 1983, CMC, annexe 266.

[154] DC, par. 7.16. Voir aussi rapport du représentant permanent de la Bolivie auprès des Nations Unies concernant la réunion entre les ministres des affaires étrangères de la Bolivie et du Chili, 1er octobre 1983, CMC, annexe 262, p. 1746.

[155] Lettre du président de la Colombie au président du Chili, 18 novembre 1983, DC, annexe 428.

de l'OEA et la conduite du Chili pendant leur adoption sont absolument incapables d'établir une obligation juridique, que ce soit par forclusion, par acquiescement, par une soi-disant doctrine des attentes légitimes ou par le biais de l'obligation de règlement pacifique des différends. En effet, — et je me permets de paraphraser l'arrêt de la Cour de céans dans l'affaire des *Activités militaires et paramilitaires* — les résolutions de l'Assemblée générale ne sont que de simples déclarations politiques «ne comportant pas d'offre formelle pouvant constituer, par son acceptation, une promesse en droit et donc une obligation juridique» ; la Bolivie n'a pas davantage prouvé l'existence d'un «instrument ayant une valeur juridique, unilatéral ou synallagmatique, par lequel le [Chili] se serait engagé»[156].

III. L'approche nouvelle était une autre forme de dialogue envisagée par les deux Etats pour améliorer leurs relations bilatérales

27. Monsieur le président, cela m'amène à mon troisième point : un court épisode du processus de discussion entre le Chili et la Bolivie engagé dans les années 1986 et 1987 dans un cadre purement bilatéral, et donc en dehors de l'OEA. Cette «approche nouvelle» n'a pas non plus pu créer ou confirmer l'existence d'une obligation de négocier un accès souverain à la mer.

28. Cette nouvelle approche fut initiée en février 1986 par le nouveau président bolivien, Paz Estenssoro[157]. Il ne s'agissait pas, dans l'esprit de la Bolivie elle-même, d'une continuité des négociations antérieures et encore moins d'une confirmation d'un engagement non existant de négocier, comme le professeur Forteau a voulu le faire croire[158]. Plutôt que d'insister sur la mise en œuvre d'une obligation préexistante de négocier un accès à la mer, cette «approche nouvelle» — comme son nom l'indique — était véritablement différente et en rupture avec les «stéréotypes du passé» pour reprendre les termes utilisés par mon collègue le professeur Remiro Brotóns[159]. Il

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[156] *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 132, par. 261.

[157] «Foreign Minister Del Valle: «Chile and Bolivia Must Seek a Rapprochement»», *El Mercurio* (Chili), 25 février 1986, CMC, annexe 283.

[158] CR 2018/7, p. 70, par. 39-40 (Forteau).

[159] CR 2018/7, p. 19, par. 18 (Remiro Brotóns).

visait un rapprochement des intérêts de la Bolivie et du Chili dans une multitude de domaines dont l'un était l'accès à la mer[160].

29. Le Chili s'est engagé de bonne foi dans un dialogue important avec la Bolivie, dans le contexte des relations de bon voisinage qu'il souhaitait entretenir avec elle. Car tous deux souhaitaient améliorer leurs relations dans les différents domaines. Rien ne permet d'affirmer que la Bolivie considérait que le Chili était obligé d'une quelconque façon à engager ce dialogue. Aucune obligation de négocier n'a été évoquée par les deux Parties. Aucune attente quant à l'octroi d'un accès territorial à la mer n'a pu être créée dans ce contexte.

30. Concernant, justement, l'accès à la mer, la Bolivie a soumis plusieurs propositions au Chili impliquant toutes une cession d'une partie de son territoire[161]. Le Chili a soigneusement considéré ces propositions[162]. Il a formulé des questions[163] auxquelles la Bolivie a répondu[164]. Il a engagé des consultations au niveau interne. Toutefois, il est devenu rapidement évident que la cession d'une partie du territoire chilien était pour le peuple chilien inacceptable[165]. Si le Chili s'est proposé de continuer les discussions pour trouver d'autres moyens d'améliorer les relations entre les Parties[166], la Bolivie a purement et simplement refusé de continuer le dialogue sur des bases autres que celles d'une cession de territoire.

31. Pendant cette courte période de discussion et de rapprochement, le Chili n'a pas assumé d'obligations juridiques quant aux négociations sur un accès à la mer[167], il n'a pas non plus violé une quelconque obligation de négocier[168]. Au contraire, le comportement du Chili est en tout point

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[160] Procès-verbal de la 3e réunion de la commission générale de l'Assemblée générale de l'OEA, 12 novembre 1986, CMC, annexe 285, p. 1914.

[161] Mémorandum bolivien no 1 du 18 avril 1987, CMC, annexe 289 ; mémorandum bolivien no 2 du 18 avril 1987, CMC, annexe 290.

[162] Discours du ministre des affaires étrangères du Chili, 21 avril 1987, CMC, annexe 291 ; déclaration du ministre des affaires étrangères du Chili, 9 juin 1987, CMC, annexe 296.

[163] Questions concernant les propositions boliviennes envoyées par le Chili à la Bolivie, 21 avril 1987, CMC, annexe 292.

[164] Mémorandum bolivien no 3 du 22 avril 1987, CMC, annexe 293.

[165] Déclaration du ministre des affaires étrangères du Chili, 9 juin 1987, CMC, annexe 296.

[166] Déclaration du ministre des affaires étrangères du Chili, 9 juin 1987, CMC, annexe 296, par. 3.

[167] DC, par. 7.29.

[168] MB, par. 443. Voir également CR 2018/7, p. 71, par. 41 (Forteau) ; CR 2018/6, p. 40, par. 33 (Chemillier-Gendreau).

conforme aux éléments de négociations de bonne foi évoqués par le professeur Lowe lundi matin[169].

32. Qui plus est, Monsieur le président, l'attitude du Chili pendant ces discussions dans le cadre de l'approche nouvelle n'a pas pu créer, renforcer ou nourrir des attentes légitimes de la Bolivie. Bien au contraire, la déclaration du ministre des affaires étrangères du Chili de 1987 ne laissait aucun doute. Le ministre expliquait :

> «the substance of the Bolivian proposal is not acceptable for Chile in either of its alternatives ... Chile understands that it may collaborate with said country in the search for solutions that, without altering the national territorial or maritime patrimony, would allow for a bilateral integration that would effectively serve the development and well-being of the respective countries. The Government of Chile deems it its duty to explain these details, since it does not consider it fair – with its silence or delay – to generate confusion for the national public, or to give rise to false expectations of the Bolivian Government and people that would, in time, be frustrated.»[170]

33. Cette déclaration ne pouvait guère être plus explicite : aucune attente ne pouvait naître des déclarations ou de la conduite du Chili lors de ces échanges dans le cadre de l'approche nouvelle. [Fin de la projection]

34. Monsieur le président, Mesdames et Messieurs de la Cour, aucune obligation de négocier n'a été créée en vertu des résolutions de l'OEA, de l'attitude du Chili vis-à-vis de ces résolutions. L'approche nouvelle n'a pas non plus établi une telle obligation. Ni la Bolivie ni l'OEA n'ont mentionné une telle obligation ou sa violation.

35. Monsieur le président, Mesdames et Messieurs de la Cour, je vous remercie pour votre bienveillante attention. Monsieur le président, je vous prie d'appeler mon collègue Ben Juratowitch à la barre, sûrement après la pause. Merci, Monsieur le président.

The PRESIDENT : I thank Professor Pinto. Before I invite the next speaker to take the floor, the Court will observe a coffee break of 15 minutes. The hearing is suspended.

The Court is adjourned from 11.35 a.m. to 11.50 a.m.

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[169] CR 2018/6, p. 59-60, par. 9 (Lowe).

[170] Déclaration du ministre des affaires étrangères du Chili, 9 juin 1987, CMC, annexe 296, p. 1983-1985.

Mr. PRESIDENT: Please be seated. The sitting is resumed. For reasons made known to me, Judge Donoghue is not able to be with us for the remainder of today's hearing. I will now give the floor to Dr. Ben Juratowitch. You have the floor, Sir.

Mr. JURATOWITCH:

INTERACTIONS AFTER THE RESTORATION OF DEMOCRACY IN CHILE

I. Introduction

1. Mr. President, Madam Vice-President, Members of the Court, I have the honour to address you on events occurring after the Chilean people restored democracy to their country in 1990, now almost three decades ago. That restoration ended Chile's international isolation under General Pinochet. It provided a new democratic context for the relations between Chile and Bolivia. In that new context, both States resolved not to dwell on their history, but instead to concentrate on new practical approaches to improving their relations for the future.

2. The end of the previous historical chapter was embodied in the June 1987 statement of Chile with which Professor Pinto ended just before the break. Chile indicated that it was rejecting a transfer of sovereignty over territory so as not "to give rise to false expectations of the Bolivian Government and people"[171].

3. Bolivia cannot now reasonably say following that statement that there was continuity or consistency in the interactions of the two States on the topic of transfer of sovereignty over coastal territory. The Charaña chapter was closed in 1978, and it remained closed.

4. Bolivia had this same understanding as recently as the filing its Memorial. Addressing Chile's June 1987 statement, Bolivia submitted that:

> "The rejection of the Bolivian proposals did not rely, on Chile's side, on the specific terms of Bolivia's proposals, which could have been the subject of negotiation and reciprocal concessions. Chile's refusal was based on a point of principle: it refused to engage in any negotiation aimed at the establishment of a sovereign access to the sea for Bolivia. According to Chile, negotiations between the two States could only be considered provided that they would not lead to any territorial cession — which is to say, on the condition that they would not involve any sovereign access to the sea"[172].

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[171] Statement by the Minister for Foreign Affairs of Chile, 9 June 1987, CMC, Ann. 296, p. 1985, para. 4.

[172] MB, para. 445.

5. Here Bolivia made clear what it meant by sovereign access to the sea — "territorial cession" — and Bolivia acknowledged that in 1987 Chile made clear that there would be no negotiation on that topic. That is the background against which the most recent set of interactions began after 1990.

II. The importance of the period following 1990

6. The last three decades are important to an evaluation of Bolivia's case. To succeed, Bolivia must establish not only that an obligation to negotiate sovereign access came into existence, but also that it has endured all the way up to the present moment in time, hence Bolivia's new concentration on the theme of "continuity".

7. If Bolivia and Chile were today subject to an obligation to negotiate sovereign access, then in these three most recent decades there would have been documents created by the two States recording the existence of such an obligation. And there would have been conduct by both States proceeding on the basis that they were subject to that obligation. Members of the Court, there is neither.

8. Following the restoration of democracy in Chile, through until 2011, Bolivia did not claim that Chile was under a legal obligation to negotiate sovereign access to the Pacific Ocean[173]. Bolivia has *said* the contrary before you, but has not actually identified any evidence of such a claim being made[174].

9. When in 2011 Bolivia did claim that there was such an obligation, it was in a letter to the Court in the context of the maritime boundary dispute between Peru and Chile[175], after — I emphasize: *after* Bolivia's President had announced that it would commence a case against

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[173] See *Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of their Offshore Areas as defined in the Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada–Newfoundland Atlantic Accord Implementation Act*, First Phase Award, 17 Mar. 2001, *International Law Reports (ILR)*, Vol 425, para. 7.6, regarding it as "a striking feature of the negotiating history that none of the participants invoked earlier agreements as binding or formally protested at departures from them".

[174] See RC, para. 8.12.

[175] Letter from David Choquehuanca, Minister for Foreign Affairs of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 8 July 2011, POC, Ann. 65. See also Chile's response: Letter from the Ministry for Foreign Affairs of Chile to the Ministry for Foreign Affairs of Bolivia, 8 Nov. 2011, RC, Ann. 451, p. 805, final para: "No antecedent mentioned in the letter of 8 July 2011 allows the inference of a recognition of the existence of an obligation to negotiate sovereign access to the sea, or of an alleged right of sovereign access to the sea".

Chile[176]. Even then Bolivia did not in any communication to Chile claim that there was an obligation to negotiate sovereign access, nor that Chile had breached any such obligation.

10. There were also no *actual negotiations* in this period on transfer of sovereignty over territory, and precisely for that reason Bolivia argued in its Memorial that from 1987 onwards Chile was in continuous breach of an obligation to negotiate said to have arisen prior to 1987[177].

11. Now this could not plausibly be maintained, because from the restoration of democracy through to 2011 Bolivia never once alleged such a breach.

12. Confronted with that difficulty, Bolivia rather dramatically changed its case in its Reply, to argue that the very same conduct that in its Memorial it regarded as a breach of an obligation to negotiate, instead Bolivia then said, *created* an obligation to negotiate enduring throughout the very same decades. This was part of a broader new case, developed further this week. That new case is that from prior to 1895 through until 2011, Chile was subject to, and reiterated, one continuous and consistent obligation, which Chile breached in 2011.

13. This new focus on continuity up to 2011 is obviously inconsistent with Bolivia's case in its Memorial that the obligation arose in 1895, from which point there was a progressive degradation of the obligation from 1895 through to 1987[178], followed by a continuous breach from 1987 onwards[179].

14. On Monday and Tuesday, most of Bolivia's counsel stayed true to Bolivia's new case that the alleged breach came only in 2011[180], but they left Professor Forteau with the task of trying to explain in the last speech what had happened between 1987 and 2011. He reverted to the position that Chile breached the alleged obligation in 1987[181]. The Court would doubtless be assisted in its assessment of Bolivia's case if on Monday Bolivia's counsel could present just one

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[176] Speech delivered by President Evo Morales, 23 Mar. 2011, CMC, Ann. 358, pp. 2909 and 2911.

[177] See, e.g. MB, para. 465: "Since 1987" Chile has stated "its categorical refusal to engage in any negotiation over a sovereign access". See also MB, paras. 17, 443, 469, 474 and 475.

[178] MB, para. 3 and Chap. III, Sec. I ("Degradation of the Negotiations Terms").

[179] See, e.g. MB, para. 465: "Since 1987" Chile has stated "its categorical refusal to engage in any negotiation over a sovereign access". See also MB, paras. 17, 443, 469, 474 and 475.

[180] CR 2018/6, p. 20, para. 16 (Veltzé); pp. 29-30, paras. 28-29 (Akhavan); pp. 36, 41 and 44, paras. 18, 35 and 47 (Chemillier-Gendreau); p. 55, para. 37 (Remiro Brotóns).

[181] CR 2018/7, pp. 70-71, para. 41 (Forteau).

definitive and clear position on whether, in Bolivia's view, from 1987 to 2011 Chile was or was not in breach of the obligation that Bolivia asserts.

15. Of course whichever legal argument Bolivia ultimately settles on will not affect what actually happened, and it is to that that I now turn.

III. No legal obligation was created or confirmed after 1990

16. To seek to show that something since 1987 created, or at least confirmed, a continuous obligation to negotiate sovereign access to the Pacific[182], Bolivia relies principally on two documents: the Algarve Declaration of 2000[183] and the 13-Point Agenda of 2006[184].

A. The Algarve Declaration[185]

17. The Algarve Declaration is the rather grand title that has been attributed to identical press releases of each Government concerning a meeting of the two foreign ministers in Algarve, Portugal in February 2000. The full text is at tab 78 of your folders and the central paragraph will be on the screen. It just says that:

> "The Foreign Ministers resolved to prepare a work agenda, which will be formalized in the subsequent stages of the dialogue, that incorporates, without any exclusion, the essential issues of the bilateral relationship, in the spirit of contributing to the establishment of a climate of trust that must preside over this dialogue."[186]

18. This you will recognize as classic diplomatic language that manifests no intention to create any legal obligation.

19. There is no mention of sovereign access to the sea. It refers to an agenda without any exclusion, indicating that the subject-matter either State could raise was not limited. But it was plainly not the creation or confirmation of any legal obligation to negotiate concerning any particular subject-matter.

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[182] RB, paras. 312-318, on "[t]he undertakings post-1990".

[183] See, e.g., RB, para. 316: "both Parties agreed in the 2000 Algarve Declaration to negotiate sovereign access"; CR 2018/6, p. 29, para. 26 (Akhavan) (in Sec. IV, "Chile's continuing promise to Bolivia (1929-2011)"); CR 2018/7, p. 72, para. 46 (Forteau).

[184] See, e.g., RB, para. 462: "the binding nature of the 'agenda of thirteen points'"; CR 2018/6, p. 29, para. 27 (Akhavan) (in Sec. IV, "Chile's continuing promise to Bolivia (1929-2011)"); CR 2018/7, p. 72, para. 46 (Forteau).

[185] Joint Press Release issued by Bolivia and Chile, 22 Feb. 2000, CMC, Ann. 318.

[186] Joint Press Release issued by Bolivia and Chile, 22 Feb. 2000, CMC, Ann. 318, p. 2245, para. 2.

20. There is no sign that the two States considered themselves to be already under any continuing obligation to negotiate enduring from an earlier time. Two States without diplomatic relations were seeking to hold a dialogue to improve the relations between them, and they announced that in press releases.

B. The 2006 13-Point Agenda[187]

21. The second event from this period upon which Bolivia has seized is the establishment of the 13-Point Agenda. This was also announced in a press release, this time issued jointly by both Governments.

22. It is at tab 81 of your folders and also on your screens. It refers to bilateral meetings held between the vice-ministers of foreign affairs of the two States and adds:

> "As a result of these meetings, both Delegations agreed to move forward with the discussion of issues of mutual interest for the two countries, within the framework of a broad Agenda without exclusions, supported by effective measures of mutual trust."[188]

It continues:

> "In this context, they agreed that the said agenda comprises all issues relevant to the bilateral relationship, highlighting, among others, border integration, free transit, physical integration, the maritime issue, economic complementation, Silala and water resources."[189]

(a) This was overtly diplomatic in character.

(b) It used very broad language, which obviously did not manifest any intention to create or acknowledge any legal obligation.

(c) It did not refer to sovereign access to the sea, a point on which Bolivia's request for relief depends and a matter to which I will return.

(d) As with the Algarve Declaration, it did not suggest that either State considered itself to be under any continuing obligation that arose earlier.

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[187] Joint Press Release issued by Bolivia and Chile, 18 July 2006, CMC, Ann. 336.

[188] Joint Press Release issued by Bolivia and Chile, 18 July 2006, CMC, Ann. 336, p. 2507.

[189] Joint Press Release issued by Bolivia and Chile, 18 July 2006, CMC, Ann. 336, p. 2507.

23. Although Bolivia now says that the 13-Point Agenda created and confirmed a legal obligation, before the Organization of American States in 2010, Bolivia's Foreign Minister described it as "an expression of the *political will* of both countries"[190]. That was entirely accurate.

IV. A focus on new practical ideas, rather than history or sovereignty over territory

24. Consistently with the broad terminology used in these documents, in these recent decades the interactions that did occur focused on new practical ideas, not on nineteenth century history, and not on a transfer of sovereignty over territory[191]. Bolivia's Foreign Minister thus announced before the General Assembly of the United Nations in 1998 that: "If we want to find new, different solutions in keeping with the times, we can no longer remain mired in the juridical, diplomatic and military logic of the past."[192]

25. One way in which the two States together pursued that goal, and pursued the 13-Point Agenda, was through the Political Consultation Mechanism. Following each of its meetings, minutes agreed by both States were produced. The agreed minutes from 2007 referred to "taking into account the conditions prevailing in Chile and Bolivia" and recorded a common desire "to keep the bilateral dialogue constructive" and focus on "criteria that were shared"[193]. This was described in the agreed minutes from 2008 as a "realistic and future-oriented approach"[194].

26. In 2009 and 2010 the agreed minutes recorded the mutual desire to find initiatives that were "constructive and realistic"[195], "realistic and practical"[196], and "feasible and useful"[197].

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[190] Minutes of the Fourth Plenary Meeting of the Organization of American States General Assembly, 8 June 2010, CMC, Ann. 347, p. 2763; emphasis added. See also Minutes of the Twenty-Second Meeting of the Political Consultations Mechanism, 14 July 2010, CMC, Ann. 348, p. 2787 ("reflects a concerned Policy"); Minutes of the Fourth Plenary Meeting of the Organization of American States General Assembly, 5 June 2012, CMC, Ann. 363, p. 2965 ("with respect to the maritime problem that the process reflects a concerted policy between both Governments").

[191] See further CMC, paras. 9.7, 9.10-9.12 and 9.18-9.20; RC, paras. 8.9-8.11 and 8.31.

[192] Verbatim record of the Twenty-First Plenary Meeting, 50th Session of the United Nations General Assembly, UN Doc. A/53/PV.21, 30 Sept. 1998, RB, Ann. 343, p. 1189.

[193] Minutes of the Seventeenth Meeting of the Political Consultations Mechanism, 19 Oct. 2007, CMC, Ann. 339, pp. 2571 and 2573.

[194] Minutes of the Eighteenth Meeting of the Political Consultations Mechanism, 17 June 2008, CMC, Ann. 341, p. 2611.

[195] Minutes of the Twentieth Meeting of the Political Consultations Mechanism, 30 June 2009, CMC, Ann. 344, p. 2695.

[196] Minutes of the Twenty-First Meeting of the Political Consultations Mechanism, 13 Nov. 2009, CMC, Ann. 346, p. 2747

27. All of these extracts from the minutes were agreed under the agenda item designated as "the maritime issue". In its reformulated case on continuity, Bolivia has sought to rewrite that broad diplomatic expression to become "sovereign access". Professor Forteau accused Chile of playing games with words for insisting that "maritime issue" and "sovereign access" did not mean the same thing[198], as though these two States, with their history, would have drawn no distinction between "sovereign access" and "maritime issue". But the words themselves, and the agreed minutes of what was discussed under the agenda item for which they were the caption, demonstrate how revisionist that is. Professor Remiro Brotóns said that the two States "ont délibérément adopté une terminologie ouverte parce qu'ils ont appris, par expérience, qu'une terminologie plus précise peut alimenter une pression néfaste dans la négociation de l'accès souverain, en devenant le centre de l'attention médiatique et des attentes qui produisent des résultats immédiats, tout en divisant l'opinion publique"[199]. And yet Bolivia is requesting the principal judicial organ of the United Nations to make an order in the terms that Bolivia acknowledges that the Parties themselves studiously avoided. "Maritime issue" was not code for "sovereign access". It was not just the words that were controversial, it was the very idea. "Maritime issue" was an expression that may have allowed Bolivia to say for its own internal political purposes that it was maintaining its aspiration, but it neither required nor actually involved the negotiation of sovereign access, as now claimed by Bolivia.

28. Professor Remiro Brotóns accused Chile of "hyper-formalism"[200]. It is not, with respect, formalistic to be concerned before the Court with what words representatives of States actually chose to use, and with the meaning of those words. These discussions were focused on pursuing practical initiatives that might be politically acceptable in both States.

29. In the preliminary objections phase Bolivia was acutely conscious of that and indeed deployed it to its advantage. As part of its argument that the Court should take jurisdiction, Bolivia emphasized that the outcome of any negotiation between Bolivia and Chile that it asked the Court

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[197] Minutes of the Twenty-Second Meeting of the Political Consultations Mechanism, 14 July 2010, CMC, Ann. 348, p. 2787.

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

[199] CR 2018/6, p. 54, para. 33 (Remiro Brotóns).

[200] CR 2018/6, p. 53, para. 28 (Remiro Brotóns).

to order might be "a special zone, or some other practical solution"[201], rather than a transfer of sovereignty over territory. Having passed the jurisdictional hurdle, those expressions and the ideas they represent appear to have disappeared from the Bolivian lexicon, but of course the evidence remains the same, and the evidence is that what was being discussed were potential practical initiatives.

30. In 2008, consistently with the agreed minutes you saw a moment ago, the Chilean Foreign Minister stated before the General Assembly of the Organization of American States that the "maritime issue" was:

> "a question of exploring, constructively and creatively, formulas that make possible a better access to the Pacific Ocean for Bolivia, Chile reserving its legal and political positions on the matter. Therefore, the goal of this process cannot be a sovereign outlet to the sea, because if that were the case, my country would not have agreed to include this item in the agenda."[202]

31. In that 2008 statement, Chile made clear its position and if Bolivia had not agreed with us, if that had not been a shared understanding of the diplomatic process underway, Bolivia doubtless would have said so before the General Assembly of the Organization of American States, before which it has not demonstrated any timidity, or at least in a communication to Chile, but Bolivia was silent. It was silent because that *was* a shared understanding and *was* precisely what was happening, and not just in 2008.

32. Twelve years earlier, in 1996, the Chilean Foreign Minister had stated that: "Chile is willing to discuss new modalities of access to the sea for Bolivia, provided that imaginative formulas are used that do not mean [cession] of sovereignty by Chile."[203]

33. In 1997, the Chilean Foreign Minister stated that Chile has "granted Bolivia the largest and most extensive facilities for access to the sea. Chile is willing to continue down the same path, but cannot under any circumstances include the cession of territorial sovereignty."[204]

34. Consistently with this evidence, Bolivia's Memorial made these representations to the Court.

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[201] CR 2015/19, p. 51, para. 3 (Akhavan).

[202] Minutes of the Fourth Plenary Meeting of the OAS GA, 3 Jun. 2008, CMC, Ann. 340, p. 2591.

[203] Minutes of the Fourth Plenary Meeting of the OAS GA, 4 Jun. 1996, RC, Ann. 438, p. 686.

[204] Minutes of the Fourth Plenary Meeting of the OAS GA, 3 Jun. 1997, RC, Ann. 439, p. 695.

(a) at paragraph 469 — concerning a statement by Chile in 1991 about its territorial integrity[205] — "This signalled that any negotiation related to the grant of a sovereign access to the sea for Bolivia was excluded."

(b) at paragraph 474 — "in 2004 and 2005, Chile said that it was ready to talk to Bolivia, but only on condition that the negotiations would not deal with the issue of the sovereign access to the sea".

(c) at paragraph 475 — "in 2008 (as well as in 2009 and 2010)" Chile "again limited the scope of negotiations by excluding any possible consideration of a sovereign access to the sea." Bolivia noted that Chile's statement in 2008 incorporated the substance of Chile's June 1987 statement with which Professor Pinto ended, and I began[206]. So continuity, but not of the kind that Bolivia is now asserting.

35. This all comes from Bolivia's own Memorial, which explained, accurately, that both States understood throughout these decades that Chile was not willing to negotiate a transfer of sovereignty over territory.

36. Blithely pretending that its Memorial did not say these accurate things, Bolivia's reformulated case in its Reply, and earlier this week, invokes estoppel, and asserts that there was a consistent representation maintained by Chile concerning the negotiation of sovereign access that persisted consistently and continuously from the nineteenth century up to 2011. Bolivia has still not been clear about the precise content of the representation it alleges, but whatever it might be, Bolivia's new case on estoppel is flatly contradicted by the statements you have just seen.

37. There was no "clear and unequivocal representation"[207] by Chile persisting up to 2011 on which Bolivia could rely, and Chile did not, to use the Court's words in *Cameroon* v. *Nigeria*, "consistently ma[k]e it fully clear"[208] that it was willing to negotiate sovereign access or that it considered itself legally obliged to do so.

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[205] Statement by the Foreign Minister of Chile at the Fourth Session of the General Commission of the OAS GA, 5 Jun. 1991, MB, Ann. 215.

[206] Statement by the Minister for Foreign Affairs of Chile, 9 Jun. 1987, CMC, Ann. 296, p. 1985, para. 4.

[207] *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, Nos. 20/21,* p. 39.

[208] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 57.

38. The evidence, and the extracts from Bolivia's Memorial accurately describing that evidence, indicate that Chile stated that it would *not* negotiate sovereign access. If at some point in history prior to 1987 there had been a representation by Chile that might, theoretically at least, in due course have led to an estoppel, which of course there was not, then any such representation would have been countermanded by the many statements Chile later made[209]. Even if a representation can be established, a claim of estoppel must fail if that representation is later countermanded before it is relied on, and as Dr. Parlett demonstrated yesterday, there was no such earlier reliance.

39. Nor was the crucial element of reliance[210] satisfied in this later period. On the contrary, Bolivia understood that Chile would not negotiate sovereign access to the Pacific, because Chile kept saying so, and Bolivia proceeded on that basis and engaged with Chile over decades on a range of practical initiatives to improve Bolivia's access to the Pacific Ocean.

40. As well as its significance for Bolivia's estoppel case, this period of time also further demonstrates the fallacy of Bolivia's case that there was some kind of tacit agreement, starting much earlier in history, and stretching through these decades to the present.

41. An agreement that is tacit is still an agreement the existence of which must be proved. In the press releases constituting the Algarve Declaration and the 13-Point Agenda, in the agreed minutes under the Political Consultation Mechanism, and in all the other interactions between the two States since 1990, neither State made any explicit or implicit reference to any pre-existing agreement, tacit or otherwise, to negotiate sovereign access. That is because there was not such an agreement and neither State thought that there was.

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[209] See *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 27, para. 33.

[210] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 26, para. 30; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 63; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp.* 303-304, para. 57; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 81, para. 228.

V. Bolivia's change in position

42. I turn now to Bolivia's change in position in 2011, following which it abandoned the constructive bilateral engagement on practical initiatives and seised the Court in pursuit of a transfer of sovereignty over territory.

43. Bolivia claims that it was "forced" to "resort to the Court" because of what it now describes as an abrupt and arbitrary change of position by Chile in 2011[211]. In Bolivia's Reply, and for most of its counsel this week, that alleged change of position by Chile in 2011 is the basis of Bolivia's case on breach of the obligation it asserts[212].

44. As Chile's Agent indicated yesterday, what actually changed in 2011 was that Bolivia decided to act on the international plane in compliance with the requirements imposed on its Executive Government by the Bolivian Constitution of 2009, and, Members of the Court, I propose to take you to the relevant aspects of Bolivia's Constitution and statements made about it as matters of fact, before turning to the conclusions that Chile asks the Court to draw concerning Bolivia's case.

45. Article 267 [on screen] proclaims Bolivia's "unwaivable and imprescriptible right over the territory giving access to the Pacific Ocean and its maritime space"[213]. It declares that the "effective solution of the maritime dispute" requires "the full exercise of sovereignty", "over the territory giving access to the Pacific Ocean"[214].

46. One of the Constitution's transitional provisions [on screen] required the Executive to "denounce and, if necessary, renegotiate those international treaties that are contrary to the Constitution"[215]. The same provision stated that the Executive must do so "[w]ithin 4 years"[216]. That meant taking the constitutionally required action by December 2013.

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[211] RB, paras. 472, 13 and 382. See also CR 2018/6, 19, p. 20, para. 16 (Veltze); p. 30, para. 30 (Akhavan); p. 41, para. 35 (Chemillier-Gendreau).

[212] RB, paras. 348, 349 and 352.

[213] Political Constitution of the Plurinational State of Bolivia, 7 Feb. 2009, RC, Ann. 447, p. 753, Art. 267 (1).

[214] Political Constitution of the Plurinational State of Bolivia, 7 Feb. 2009, RC, Ann. 447, p. 753, Art. 267 (1)-(2).

[215] Political Constitution of the Plurinational State of Bolivia, 7 Feb. 2009, RC, Ann. 447, p. 757, Ninth Transitional Provision.

[216] Political Constitution of the Plurinational State of Bolivia, 7 February 2009, RC, Ann. 447, p. 757, Ninth Transitional Provision.

47. Before the OAS in 2012, the Bolivian Foreign Minister "demand[ed] the Government of the Republic of Chile to renegotiate the 1904 Treaty"[217]. He said that he made "the specific proposal of renegotiation, under the framework of our Political Constitution"[218].

48. The Bolivian Senate then specified in February 2013 that the Executive could fulfil its constitutional duty not only by renegotiating treaties, but also by challenging such treaties before international tribunals[219]. Just two days later, the Bolivian Vice-President announced that [on screen]:

> "the Political Constitution of the State obviously provides for a period up to year-end to adapt all treaties signed by Bolivia with other governments on any subject-matter, to adapt them to the Political Constitution of the State, and most certainly this will be done with the 1904 Treaty"[220].

49. Just two months after that, Bolivia filed its Application with the Court. And the documents from the President of Bolivia appointing Bolivia's Agent[221], and just two months ago its Co-Agent, begin with Article 267 of Bolivia's constitution[222].

50. As proclaimed in that Article, the solution to what Bolivia calls in its internal law the "maritime dispute" requires the "full exercise of sovereignty"[223] by Bolivia over coastal territory. That is a "permanent and unwaivable" objective of Bolivia[224].

51. This constitutional imperative matters for the case before the Court for three related reasons.

(a) The first is that Bolivia came to the Court not to seek any recommencement of recent dialogue[225], but to ask the Court to impose a change in the subject-matter of that dialogue.

(b) The second is that it prompts scrutiny of Bolivia's emphasis on Chile's statements in 2011.

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[217] Minutes of the Fourth Plenary Meeting of the OAS GA, 5 June 2012, CMC, Ann. 363, p. 2967.

[218] Minutes of the Fourth Plenary Meeting of the OAS GA, 5 June 2012, CMC, Ann. 363, p. 2974.

[219] Bolivian Law on Normative Application – Statement of Reasons, 6 Feb. 2013, POC, Ann. 71, p. 1003, Art. 6.

[220] "García Linera: The adaptation of the 1904 Treaty to the [Political Constitution] will take place by December 2013", *Agencia de Noticias Fides* (Bolivia), 15 Feb. 2013, CMC, Ann. 368, p. 2993.

[221] Bolivian Supreme Resolution 09385, 3 Apr. 2013, attached to the Letter from David Choquehuanca, Minister for Foreign Affairs of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 24 Apr. 2013, POC, Ann. 72, p. 1007.

[222] Letter from Eduardo Rodríguez Veltzé, Agent of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 17 Jan. 2018.

[223] Political Constitution of the Plurinational State of Bolivia, 7 Feb. 2009, RC, Ann. 447, p. 753, Art. 267 (2).

[224] Political Constitution of the Plurinational State of Bolivia, 7 Feb. 2009, RC, Ann. 447, p. 753, Art. 267 (2).

[225] *Contra* CR 2018/6, p. 30, para. 30 (Akhavan).

(i) Bolivia claims that Chile repudiated the alleged obligation in June and September 2011[226].

(ii) Prior to that, on 17 February 2011, Bolivia's President said this: "I will wait until 23 March for a concrete proposal that may act as a basis for a discussion"[227]. The Court will doubtless be reminded of Professor Lowe's submission that "Bolivia does *not* argue that it can sit back passively and call for Chile to make proposals"[228]. Bolivia set a time-limit of five weeks for a proposal from Chile.

(iii) That five weeks brought Bolivia to its annual Day of the Sea, 23 March, on which in 2011 the President announced in a public address that Bolivia's "maritime claim" would be taken to court[229]. That decision was announced months *before* the statements by Chile on which Bolivia now relies to allege a repudiation of the asserted obligation.

(iv) In Chile's June 2011 statement the Minister said that Chile would not cede territory,[230] which was nothing new, and he also said that the dialogue should focus on "useful solutions for the Bolivian people — feasible, concrete and mutually satisfactory solutions"[231]. Which was also nothing new.

(v) In Chile's September 2011 statement on which Bolivia also relies for its repudiation allegation Chile's Minister stated that "[o]ur country has been, and always will be, willing to engage in dialogue with Bolivia on the basis of full respect for the treaties and international law". And he referred to that dialogue involving "concrete, feasible and useful solutions for both countries"[232].

Chile had been stating for many years prior to 2011 that it would not negotiate a transfer of sovereignty over territory. Bolivia was negotiating practical initiatives with Chile on that basis, but in 2011 Bolivia's position changed, which caused Bolivia, motivated by its constitution to

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[226] CR 2018/6, pp. 29-30, paras. 28-30 (Akhavan).

[227] "Evo requests Chile to submit a maritime proposal before 23 March for discussion", *Agencia Efe* (Spain), 17 Feb. 2011, CMC, Ann. 356, p. 2899.

[228] CR 2018/6, p. 60, para. 10 (Lowe); emphasis in original.

[229] Speech delivered by President Evo Morales, 23 Mar 2011, CMC, Ann. 358, pp. 2909 and 2911. See also Ministry for Foreign Affairs of Bolivia, *The Book of the Sea* (La Paz, 2014), POC, Ann. 75, p. 1086.

[230] Minutes of the Fourth Plenary Meeting of the OAS GA, 7 June 2011, CMC, Ann. 359, p. 2926, second last para.

[231] Minutes of the Fourth Plenary Meeting of the OAS GA, 7 June 2011, CMC, Ann. 359, p. 2927.

[232] Statement by the Minister for Foreign Affairs of Chile, 66th Session of the United Nations General Assembly, UN doc A/66/PV.15, 22 Sept. 2011, p. 14.

seek a transfer of sovereignty over territory, and abandon the constructive dialogue in which the two States had been consensually engaged.

(c) The third point is the futility of negotiations on sovereign access[233], since Bolivia now cannot under its Constitution accept anything less than transfer of sovereignty over territory, and its President has publically so declared[234]; whereas Chile has for many years made clear that it will not transfer sovereignty over its undisputed territory, and this remains and will remain the case[235].

VI. Conclusion

52. Members of the Court, the question before you is whether Chile is *today* under an obligation to negotiate sovereign access to the Pacific Ocean for Bolivia. These recent decades demonstrate that it is not.

53. There was no continuity between any previous chapter in history and this modern consensual pursuit of practical initiatives in a democratic context. No obligation lingered on from the past, and none was created in this period.

54. I thank the Court for its attention, and I invite you, Mr. President, to call on Professor Koh.

The PRESIDENT: I thank you. I will now invite Professor Harold Koh to take the floor. You have the floor.

Mr. KOH:

1. Mr. President, Members of the Court, it is my honour to appear before you on behalf of Chile to conclude our opening round presentation.

2. You have now heard both sides of this case, which in the end, is quite straightforward: Chile has never manifested any intention to be bound by international law to negotiate about

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[233] See RC, paras. 2.58-2.59 and 8.32-8.33.

[234] Speech delivered by President Evo Morales, 23 Mar. 2011, CMC, Ann. 358, p. 2909, final para. See also Political Constitution of the Plurinational State of Bolivia, 7 Feb. 2009, RC, Ann. 447, p. 753, Art. 267 (2).

[235] See e.g. Minutes of the Fourth Plenary Meeting of the OAS GA, 4 June 1996, RC, Ann. 438, p. 686; Minutes of the Fourth Plenary Meeting of the OAS GA, 3 June 1997, RC, Ann. 439, p. 695; Minutes of the Fourth Plenary Meeting of the OAS GA, 3 June 2008, CMC, Ann. 340, p. 2591; Minutes of the Fourth Plenary Meeting of the OAS GA 5 June 2012, CMC, Ann. 363, p. 2969, fourth and fifth paras.

whether Bolivia might be granted sovereignty over land located on Chile's own sea coast. Bolivia has failed to establish that any individual historical episode created such an obligation, by express or tacit agreement, unilateral declaration or other representation. Nor has Bolivia established that any *continuity* among disparate historical episodes created such a legal obligation. Even assuming *arguendo* that some obligation ever existed, Bolivia has never shown that that obligation was ever breached or not fully discharged. Thus, Bolivia has entirely failed to establish *any* of the three points it must prove to prevail: that Chile ever undertook a binding obligation to negotiate; ever breached such an obligation; or that such an obligation still exists today.

3. Bolivia tries to dismiss Chile's rigorous legal analysis as a formalistic "flood of details"[236]. It offers instead a confused and shifting case that finds no basis in the text of the documents on which it relies, the structure of the bilateral relationship or the historical record, and rests ultimately on a theory unmoored in law that cannot be squared with the settled practice of international diplomacy. As we have shown, Chile's consistent, unchanging position is firmly supported by these same considerations.

I. Consistency

4. As Sir Daniel recounted, Bolivia's case has now shifted four times. Bolivia's Memorial claimed without basis that Bolivia had a *right* of sovereign access to the Pacific[237]. At preliminary objections, Bolivia retreated to its second theory: that the Court should require Chile to negotiate in good faith about some kind of "practical solution"[238]. Bolivia's Reply thirdly claimed an unwritten "nineteenth century historical bargain", whereby Bolivia somehow agreed to exchange its coastal territory under the 1904 Peace Treaty for an obligation to negotiate to gain sovereignty over other Pacific coast territory[239]. And as we heard earlier this week, Bolivia now argues for a fourth, "no-evidence" theory of liability: the Court needs no evidence of any conduct by the Parties to find a binding obligation to negotiate, because that obligation exists as a matter of general international

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

[237] See MB, paras. 20-21, 36, 94, 96, 143, 254, 271-273, 338, 493, 497 and 498.

[238] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*, Hearing on the Preliminary Objection, CR 2015/19, pp. 50-51, para. 3.

[239] See RB, paras. 8, 13, 142, 188 and 197-198.

law, Article 2 (3) of the United Nations Charter, and the OAS Charter. This free-floating evidence-free international-law "duty to negotiate"[240] would apparently force Chile, year after year, to keep returning to the negotiating table — even when Bolivia has broken off diplomatic relations — until Bolivia finally gets what it wants.

5. Bolivia would have it both ways. Bolivia first claimed, as you heard from Mr. Juratowitch, that it was Chile's *inconsistency* — from 1895 to 1978, and again in 1987 — that breached its alleged obligation[241]. Its Reply then claimed that the very same facts constituted a continuous and *consistent* course of conduct by Chile over time[242]. But whether Chile was too inconsistent or too consistent in its conduct, either way Bolivia calls it liable. In fact Bolivia's case now seems to be that almost everything that Chile has done or said for more than a century creates a binding legal obligation, while almost nothing Chile could say or do could ever discharge or terminate that obligation. Bolivia's constantly shifting case vividly shows that it cannot identify any real legal basis for either Chile's alleged obligation to negotiate or any claimed breach of that obligation.

6. Even while Bolivia has vacillated from pleading to pleading, Chile has remained consistent regarding both the law and the facts. Chile has consistently called for a plain reading of the documents, accurate appreciation of the bilateral diplomatic history, and faithful adherence to an *objective* legal test for the creation of any international obligation. The facts show that over the last century, these two neighbours have engaged in diplomacy, nothing more. Chile has listened to Bolivia — and at times, discussed improving Bolivia's access to the sea. But Chile has never — through written word or unwritten acts — undertaken any *legal* obligation to negotiate a grant to Bolivia of sovereign access to the Pacific. When Chile did negotiate with Bolivia about its aspiration for sovereign access, such as during the Charaña period, those negotiations failed, and Chile never agreed to be legally bound to continue those or any other negotiations in the future.

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[240] CR 2018/6, p. 59, para. 5 (Lowe).

[241] On the degradation from 1895 to 1978, see MB, paras. 400-439. See especially MB, para. 410: "The starting point is the 1895 Transfer Treaty." On the alleged outright refusal to negotiate from 1987, see MB, paras. 440-486. See especially MB, para. 465, claiming that: "Since 1987" Chile has stated "its categorical refusal to engage in any negotiation over a sovereign access". See also, e.g. MB, paras. 17, 443, 469 and 475. On Bolivia's new case of breach only in 2011, see RB, para. 352.

[242] See RB, paras. 2, 8, 13, 141-142, 162, 177, 188 and 197-198.

II. Textual basis in the documents

7. Turning to text, earlier this week, Bolivia's counsel led us on a game of intellectual hopscotch through many historical eras, mischaracterizing many documents from many episodes without ever carefully discussing the text of any of them. Each time Bolivia referred to an historical episode, it tried to deflect the Court's attention away from the text of the very documents on which it relies. To give these documents legal significance, Bolivia retrospectively recharacterized the political atmosphere surrounding each. But as my colleagues have shown through a close, honest reading of that text, Chile never, in any of those documents, expressed any objective intent to be legally bound to negotiate.

8. Unlike Bolivia, Chile has anchored its case in the actual *text* of the many legal documents cited.

(a) As Sir Daniel has shown, the bedrock 1904 Peace Treaty between the two countries made absolutely no mention of any collateral bargain to negotiate to transfer territory to Bolivia[243].

(b) As Dr. Parlett has shown, the documents in the next quarter century that Bolivia claims *created* or *confirmed* a legal obligation in fact make clear that no such obligation could exist. As she quoted, the 1920 Minutes explicitly stated that they did "*not* contain provisions that create rights or obligations for the States"[244].

(c) As Mr. Wordsworth has shown, the 1950 Notes were not a treaty because they contained *materially different* expressions of what each State thought would be politically acceptable and appropriate compensation at that time[245].

(d) And the 1975 Charaña Declaration simply recorded the diplomatic truism that the two States "resolved to continue the dialogue at various levels, *to seek formulas* for solving the vital matters that both countries face" — language that clearly does not and could not manifest any intention to be legally bound[246].

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[243] Treaty of Peace and Amity between Chile and Bolivia, signed at Santiago on 20 Oct. 1904, CMC, Ann. 106.

[244] Minutes of 10 Jan. 1920, CMC, Ann. 118, p. 339; emphasis added.

[245] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Chile, 1 Jun. 1950, RC, Ann. 398; Note from the Minister for Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 Jun. 1950, RC Ann. 399.

[246] Joint Declaration of Charaña, 8 Feb. 1975, CMC, Ann. 174, p. 947.

(e) As Professor Pinto has shown, none of the OAS General Assembly resolutions between 1979 and 1989 which Bolivia cites even *mentions* an obligation to negotiate. All were framed as general political recommendations[247]. Nor did anything Chile ever said or did in connection with these non-binding resolutions create any legal obligation.

(f) And as you have just heard from Dr. Juratowitch after democracy was restored in Chile, the Parties never negotiated on the issue of "sovereign access", including in the 2000 Algarve Declaration and the 2006 13-Point Agenda. At most, those documents constituted *political frameworks* to guide the Parties' future interactions, saying absolutely nothing about the transfer of sovereignty over territory[248].

9. Mr. President, Members of the Court, as you well know, in high-stakes diplomacy and international law, *words matter*. Words especially matter when sovereign territory is at issue. When a nation claims that documents create binding legal obligations, it must clearly point to the words in those documents that created those obligations. As Chile has demonstrated through its comprehensive chronological review, Bolivia has not pointed to a single document, not even a single word that — fairly read — creates any basis for the alleged obligation to negotiate.

III. Structure and nature of the bilateral relationship

10. The structure and nature of the co-operative bilateral relationship between the two Parties confirm what we can conclude from text that no legal obligation was ever created. Bolivia suggests without basis that Chile has been a bad neighbour. As our Agent, Professor Grossman explained, history shows the opposite. A central feature of the States' bilateral engagement has always been Chile's openness to Bolivia's concerns, and its conscientious engagement on issues of mutual concern. Over the last century, the bilateral relationship has been characterized by co-operation in a

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[247] OAS, AG/RES. 426 (IX–O/79), Access by Bolivia to the Pacific Ocean, 31 Oct. 1979, CMC, Ann. 250; OAS, AG/RES. 481 (X–O/80), The Bolivian Maritime Problem, 27 Nov. 1980, CMC, Ann. 254; OAS, AG/RES. 560 (XI–O/81), Report on the Maritime Problem of Bolivia, 10 Dec. 1981, CMC, Ann. 257; OAS, AG/RES. 602 (XII–O/82), Report on the Maritime Problem of Bolivia, 20 Nov. 1982, CMC, Ann. 259; OAS, AG/RES. 686 (XIII–O/83), Report on the Maritime Problem of Bolivia, 18 Nov. 1983, CMC, Ann. 266; OAS, AG/RES. 701 (XIV–O/84), Report on the Maritime Problem of Bolivia, 17 Nov. 1984, CMC, Ann. 272; OAS, AG/RES. 766 (XV–O/85), Report on the Maritime Problem of Bolivia, 9 Dec. 1985, CMC, Ann. 282; OAS, AG/RES. 816 (XVI–O/86), Report on the Maritime Problem of Bolivia, 15 Nov. 1986, CMC, Ann. 287; OAS, AG/RES. 873 (XVII–O/87), Report on the Maritime Problem of Bolivia, 14 Nov. 1987, CMC, Ann. 300; OAS, AG/RES. 930 (XVIII–O/88), Report on the Maritime Problem of Bolivia, 19 Nov. 1988, CMC, Ann. 304; and OAS, AG/RES. 989 (XIX–O/89), Report on the Maritime Problem of Bolivia, 18 Nov. 1989, CMC, Ann. 306.

[248] Joint Press Release issued by Bolivia and Chile, 22 Feb. 2000, CMC, Ann. 318; Joint Press Release issued by Bolivia and Chile, 18 July 2006, CMC, Ann. 336.

multitude of areas: political, economic, social, scientific, cultural, educational, transportation, immigration, and technical fields. These overlapping zones of co-operation were clearly set out in the Agenda of the 13 Points that framed the Parties' engagement in the years after 1990, following Chile's restoration of democracy[249].

11. At times, these bilateral co-operative arrangements have addressed Bolivia's access to the sea. Mr. President, Members of the Court, Bolivia *has* access to the sea. It has had access for more than a century. *Contrary to Bolivia's rhetoric, there is no wall.* Under the governing 1904 Peace Treaty, Bolivia has enjoyed, for more than a century, the freest right of *commercial transit* across Chilean territory and through Chilean ports, at very substantial annual financial cost, which Chile gladly bears to support neighbourly relations.

12. Chile is an open society, one of the most open societies in its hemisphere. Its abiding openness to engaging with Bolivia as a good neighbour on such matters of mutual concern reflects the co-operative dialogue that has characterized that relationship. Chile recognizes the importance of Latin American integration and solidarity based on bilateral and regional co-operation under international law. Yet as Bolivia did in 1962 and again in 1978[250], Bolivia met Chile's collaborative spirit with dissension; it severed diplomatic relations when it became dissatisfied with the relationship. On the one hand, Bolivia has refused to maintain regular and continuous diplomatic relations for 53 of the last 56 years; on the other hand, it now insists that Chile is legally bound by a continuous, century-old obligation to negotiate, in which every act or statement by Chile that mentions anything related to the sea reaffirms its claimed historical bargain or creates unwritten legal obligations.

13. Seven years ago, Bolivia abruptly shifted to its current posture of litigation, provoked, as you have just heard, not by any action by Chile, but by Bolivia's new constitutional imperative to denounce, renegotiate or litigate concerning any treaties that limited its access to the Pacific[251]. In the end, that constitutional imperative, not any provocation by Chile, drove Bolivia to this Court.

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[249] Joint Press Release issued by Bolivia and Chile, 18 July 2006, CMC, Ann. 336, p. 2507; and see the list of 13 agenda items set out in the Minutes of the Fifteenth Meeting of the Political Consultations Mechanism, 25 Nov. 2006, CMC, Ann. 337.

[250] See RC, paras. 5.28 and 6.55.

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

So there is a simple answer to the question Bolivia has asked several times: "why are we here and not at the negotiating table?" The answer: because Bolivia brought us here. And because of its own constitutional imperatives, not because of anything Chile ever did or said.

IV. Corroboration by the historical record

14. As my colleagues have thoroughly explained, history, fairly read, also fully supports Chile's case. Bolivia's misleading image of a blood-soaked history is fully rebutted in Chile's Counter-Memorial[252]. As Sir Daniel explained, these proceedings are not a trial of duelling visions of nineteenth century history. This Court well understands the difference between evaluating political claims and adjudicating legal claims of binding obligation.

15. What is clear is that to circumvent your jurisdictional ruling in this very case, Bolivia has not challenged the 1904 Peace Treaty head-on; it instead tried to enforce its invisible twin: a so-called "historical bargain" that runs through six quite different episodes which arise decades apart and each within its own distinctive political and diplomatic context. Bolivia uses this hypothetical "bargain" as a device to cover up gaps in time that it cannot explain and that undermine the claims of consistency on which its case now depends. What Bolivia cannot explain is why, if such a significant bargain endured over the last century, no one ever recorded it. No document ever mentions it. As you heard, during the exchanges of the early 1900s, the 1950s, and the 1970s, no one ever brought it up.

16. Bolivia would stitch these disparate historical episodes into a continuous course of conduct. But as we have shown, each episode was *sui generis*. The episodes were fragmented and discontinuous, characterized by long periods of inactivity, repeated breaking of diplomatic relations, and shifting political priorities and preferences. Nor can Bolivia explain the differences *within* each individual episode, including the ways in which, over time, each State's respective interests changed what each State was willing to consider as potential compensation. So these were not identical beads, far from it. And there was never any "golden thread" that tied them together into a single necklace. The only "historical bargain" that definitively settled all issues of territorial sovereignty between the two States was the Peace Treaty of 1904.

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[252] CMC, paras. 2.10-2.37.

17. Before commencing their case, Bolivia never claimed either a continuous course of conduct by Chile, or an enduring legal obligation to negotiate. To the contrary, Bolivia concedes that there were long historical periods of silence when it never mentioned sovereign access and became distracted by other priorities. Each time Bolivia suggested that Chile might be subject to a legal obligation to negotiate, Chile promptly and strongly rejected that suggestion, and Bolivia never responded[253].

18. In sum, contrary to Bolivia's portrayal, the continuous conduct most shown by history has been Chile's openness and good neighbourliness. That openness has included discussing ways to improve Bolivia's access to the sea, and it has shown Chile's sustained openness to discussing issues of mutual concern, which brings me to my final point.

V. The broader implications of accepting Bolivia's case

19. In the end, Bolivia seeks to create law from politics. Bolivia asks this Court to transform Chile's *political* willingness to talk at various times into an enduring and binding international *legal* obligation. By so doing, Bolivia claims international law gives Chile a binary choice: either refuse to negotiate, or express a willingness to engage and create a legally binding *obligation* to negotiate[254]. But if those were the only two options, why would any nation ever sit down with another at the negotiating table in the first place?

20. Mr. President, Members of the Court, as you well understand, the world is hardly so simple. Between Bolivia's two artificial choices — either walk away or be bound — lies that vast realm we call *diplomacy*. Within that realm, responsible States can and must engage repeatedly in *legally non-binding* political and diplomatic exchanges for the purpose of harmonizing and improving their relations and fostering international co-operation.

21. Every diplomat knows that in a serious negotiation, nothing is agreed until everything is agreed. Dialogue does not automatically create obligation. Agreeing to talk is not the same as being *bound* to talk. But Bolivia's position would mechanically convert every fragment of daily diplomatic discourse into a source of legal obligation. Accepting Bolivia's position would alter

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[253] See RC, paras. 5.20, 5.31 and 5.33.

[254] See RB, para. 188. See further CR 2018/7, p. 17, para. 14 (Remiro Brotóns).

States' settled expectations about their freedom to conduct their diplomatic activity and presents them with an untenable choice: on the one hand, incurring legal obligations with every act or conversation; on the other, pursuing a counter-productive diplomatic disengagement.

22. Bolivia asserts that "Chile's willingness to enter into formal negotiations with Bolivia, on a matter as exceptional and consequential as sovereign access" is "*exactly why*" that willingness "expresses a commitment rather than a mere offer to talk"[255]. Bolivia has it backwards. It is precisely when the stakes are highest that willingness to talk alone is not enough. If States wish to be bound, they do not leave things vague. They make their intentions clear. Bolivia urges the Court to ignore the details, but the careful, qualified language used by Chile in every diplomatic exchange, as you have seen on your screens, makes crystal clear that Chile *never* intended to be bound under international law.

23. Mr. President, Members of the Court, the stakes here, as Bolivia has noted, are much larger than the interests of these two Parties. Most States have much to discuss with their neighbours; a great many *want* something from one another. Those issues may be discussed by successive governments in successive episodes over many decades. According to Bolivia, a country's occasional political willingness to meet at the negotiating table creates a transcendent legal obligation that endures beyond any diplomatic engagement and can never be discharged.

24. Now, many States could, by clever pleading, manufacture "historical bargains" by sewing together snippets of speeches, ministerial statements and diplomatic exchanges entirely divorced from the text and context of documents relied upon and from the broader history and structure of the bilateral relationship. Those States could then come before this Court, seeking enforcement of such political patchworks against States who, like Chile, sought nothing more in good faith than to be good neighbours and diplomatic partners honestly open to dialogue.

25. Which brings me to the position of Professor Lowe, who urges you to impose an even broader "positive duty" to negotiate "to establish a just solution in situations where international relations are currently disfigured by injustice"[256]. His unbounded theory of Article 2 (3) suggests that it is the role of this Court to resolve complex diplomatic crises. And he would not limit his

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[255] RB, para. 181; emphasis added.

[256] CR 2018/6, p. 63 (subheading "The duty to settle disputes is a positive duty") and p. 66, para. 38 (Lowe).

free-floating obligation to negotiate to legal disputes, because, as he says, "'[j]ustice' is not limited by justiciability"[257].

26. Surely, all of us who care about human rights want strong judicial enforcement. As our Agent recalled, Chile not only helped to create, it actively supported the work of all global and regional human rights mechanisms. But respect for the rule of law and the proper role of this Court cautions that we be careful what we ask for. Taken seriously, Professor Lowe's theory — which he rests in part on the OAS Charter — would undermine the Pact of Bogotá by mandating that every State Party keep negotiating, even after concluding hard-won treaties, to reopen settled bargains. More globally, his theory would broadly entangle every ongoing diplomatic dialogue in claims of binding legal obligation. Yesterday, Professor Thouvenin gave several examples of how adopting Bolivia's reasoning would inject legal obligation into several ongoing diplomatic discussions. In every difficult long-running diplomatic negotiation, Bolivia's theory would empower one side, or both, to use the Court to force the other to negotiate until it reached its desired result. And it would force this Court to sit on call near every diplomatic table to decide on an urgent basis whether one side or another was in breach of one of the many steps of Professor Lowe's elaborate "duty to negotiate".

27. This Court concerns itself with legal obligations and so has set a clear and high bar for their creation. It should be particularly high when one party says that the other must surrender sovereign territory secured by a century-old treaty. That high bar is not one Bolivia can meet. This Court has never found that simple diplomatic discussion creates a legal obligation unless a State specifically intends to be bound. Frustration about not achieving one's desired result does not, and cannot, create a legal obligation. Neither Bolivia's intense desire to obtain sovereign access to the sea, nor Chile's willingness to discuss that desire at various moments, is enough to evidence or create such a binding and enduring international legal obligation.

28. Mr. President, Members of the Court, some of Bolivia's counsel invite you to ignore your own past ruling in this case and impose an obligation of result. Others of Bolivia's counsel urge you to find an obligation of conduct: a novel "no-evidence" theory that would mandate an

[257] CR 2018/6, p. 67 (Lowe).

expansive “positive duty to negotiate”. Taken seriously, either theory would apply well beyond the facts of this case and transform many aspects of daily diplomacy into binding law. To accept any of Bolivia’s many positions — and there are many — would offend the text, history, structure and common sense of these two States’ bilateral relations. For all of these reasons, Chile respectfully asks this Court to refuse Bolivia’s invitation.

29. Mr. President, Members of the Court, that concludes Chile’s opening round of presentations. Thank you all very much for your kind attention.

The PRESIDENT: I thank Professor Koh. I would like to remind you that this brings us, actually, to the end of the first round of oral argument. The Court will meet again on Monday 26 March at 10 a.m. to hear Bolivia’s second round of oral argument. At the end of that sitting, Bolivia will present its final submissions. Chile will present its second round of oral argument on Wednesday 28 March at 10 a.m. At the end of that sitting, Chile will also present its final submissions.

It is important to recall that in accordance with Article 60, paragraph 1, of the Rules of the Court, the oral statements of the second round are to be as succinct as possible. The purpose of the second round of oral argument is to enable each of the Parties to reply to the arguments put forward orally by the opposing Party. The second round must therefore not be a repetition of the arguments already set forth by the Parties, which, moreover, are not obliged to use all the time allotted to them.

The sitting is adjourned. Thank you very much.

The Court rose at 1.05 p.m.