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*CR 2018/11*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2018**

***Public sitting***

***held on Wednesday 28 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)**

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**VERBATIM RECORD**

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**ANNÉE 2018**

***Audience publique***

***tenue le mercredi 28 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)**

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**COMPTE RENDU**

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

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

M. Couvreur, greffier

———————

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The PRESIDENT: Please be seated. The sitting is open. The Court meets this morning to hear the second round of the oral argument of Chile. For reasons made known to me Judge Robinson will not be able to sit with us today. I will now give the floor to Professor Koh. You have the floor, Sir.

Mr. KOH:

1. Mr. President, Madam Vice-President, Members of the Court, it is my honour to appear before you again on behalf of Chile to open our final presentation.

**Bolivia's burden of proof**

2. In the end, where, exactly, does Bolivia's case stand? Monday's presentations confirmed that Bolivia has entirely failed to establish *any* of the three points it was required to prove to prevail: that Chile ever *became subject to* a binding obligation to negotiate; that Chile ever *breached* such an obligation; or that such an obligation still *exists* today. Bolivia cannot win its case unless it proves all three elements[1]. Because it has proven none of them, its case must be entirely dismissed.

3. Bolivia's case is characterized by extraordinary vagueness on all three points.

**The timing, content and nature of the obligation**

4. First, international law obligations operate as limits on the freedom of States, and so exist only from the moment that the obligation comes into existence. Thus, the Applicant must be able to point to some moment in time by which the binding obligation was first created, if not by explicit, then by tacit, agreement, unilateral act, general international law, or some other legally significant representation. Even if Bolivia relies — as it heavily does — on such slippery notions as "continuity" or "accumulation", Chile still must have performed some initial, foundational juridical act, upon which such claimed "continuity" or "accumulation" can build.

[1] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101.

5. But when Judge Greenwood asked Bolivia at the preliminary objection stage, "[o]n what date does Bolivia maintain that an agreement to negotiate on sovereign access was concluded?"[2], Professor Akhavan answered: "There is no principle of international law requiring a single magical moment when agreements or understandings appear out of nothingness."[3] On Monday, he again denied the need for a "magic moment", instead referring abstractly to "many different occasions" on which Chile supposedly bound itself[4].

6. But international law is not so imprecise. It is hornbook international law that obligations arise at specific points in time. Precisely when an obligation arises is often inextricably linked to the source of law on which it is based. This poses severe problems for Bolivia, which has loosely referred to, without reconciling, multiple legal theories. But even where such obligations arise from aggregated conduct, such as the creation of general international law, an objective observer should still be able to find, if only in hindsight, a specific point in time by which one could fairly conclude that the obligation had come into existence. Nearly five years after this case commenced — after more than a century of hindsight and a voluminous documentary record — Bolivia still cannot answer a simple question: *when* did the obligation arise and on *what precise legal basis* was it founded?

7. Nor can Bolivia answer the question of content: *what* exactly was the obligation that was created? Was it an obligation as part of which Bolivia was to pay compensation, or one that Bolivia was allegedly unilaterally owed? And if the former, what was the nature of the compensation to be paid: land for water (the possibility discussed before Bolivia caused talks never to start in 1950) or land for land-and-sea (the possibility discussed before Bolivia caused the Charaña discussions to fail)? For Bolivia, this question is crucial, because it cannot claim that Chile's "continuous conduct" had any kind of legal relevance unless that conduct was continuous with respect to the same proposal. Entirely different, episode-specific proposals that arose many decades apart do not assist Bolivia in claiming historic continuity.

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

[3] CR 2015/21, p. 33, para. 9 (Akhavan).

[4] CR 2018/10, p. 15, para. 3 (Akhavan).

8. That raises another question about the nature of the obligation: not just when and what, but *to what end?* If such an obligation exists, is it an obligation only to negotiate some kind of practical solution, or an obligation to negotiate Bolivia's sovereign access to the sea?

The PRESIDENT: Mr. Koh, I think it would be very helpful to the interpreters if you could speak a little bit more slowly so that they can follow you.

Mr. KOH: I will do so.

The PRESIDENT: Thank you.

Mr. KOH: If such an obligation exists, is it an obligation only to negotiate some kind of practical solution, or is it an obligation to negotiate Bolivia's sovereign access to the sea? And what would that mean: to negotiate *on the topic of* Bolivia's proposed sovereign access to the sea, or *to grant* Bolivia that sovereign access? Your preliminary objection opinion clearly directed that "assuming *arguendo* the Court were to find the existence of such an obligation, it would not be for the Court to predetermine the *outcome* of any negotiation that would take place in consequence of that obligation"[5]. But tracking Bolivia's position on this has been like watching a tennis match. You have to look first this way, and then that way, just to follow the action.

9. You have heard counsel for Bolivia argue — against your clear directive — for an obligation of result: that the Court must predetermine the outcome of any negotiation: the resulting access must be sovereign, leaving it to the lawyers to work out the details[6]. Yet in the next breath, they retreat to saying that Bolivia requests only an obligation of conduct: a duty "to receive, consider and discuss each other's formal communications on the subject, and, as long as the serious problem persists, to look for ways of addressing it that would accommodate the interests of both States"[7]. And then on Monday, the Bolivian Agent's closing submission again demanded an obligation of result. Echoing Bolivia's original Application, the Agent asked the Court to adjudge and declare that "Chile has the obligation to negotiate with Bolivia in order to *reach an agreement*

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[5] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 605, para. 33.

[6] CR 2018/10, p. 53, para. 3 (Lowe).

[7] See e.g. CR 2018/10, p. 57, para. 22 (Lowe).

granting Bolivia *a fully sovereign access to the Pacific Ocean*", an obligation that Chile would not fulfill unless it promptly and effectively "*grant[s]* Bolivia a fully sovereign access to the Pacific Ocean"[8].

10. Mr. President, Members of the Court, what Bolivia never clarifies is what, in real life, granting "fully sovereign access" would actually mean. You heard about the impact such a judicially imposed solution would have on the "people in the factories and fields of Bolivia"[9], including indigenous peoples[10]. Professor Lowe dramatically asked: "[D]oes international law, does the Court, have anything to say in these circumstances? Or does it look on, impotent and aimless?"[11] Consider this: for this Court to order the relief Bolivia requests would have drastic consequences for thousands of Chilean families, including indigenous Chileans, who have lived for generations in peace and stability on these sovereign lands. In the name of international law, would Professor Lowe have this Court — to avoid looking "impotent and aimless" — effectively require that those Chileans be displaced or surrender their homes to another country?

**When did the breach occur?**

11. We see the same alarming vagueness with regard to the second element of Bolivia's claim: assuming *arguendo* that the claimed obligation to negotiate was breached, exactly *when* did that breach occur? Bolivia's Memorial first alleged that the breach occurred through a "degradation of negotiation terms" from 1895 to 1987, sometime after which a definitive breach supposedly happened[12]. But in its Reply, Bolivia changed and argued that breach did not occur until 2011, just seven years ago[13]. Last week, Bolivia switched yet again, now suggesting that Chile's conduct in 1987 somehow "prefigured" a breach that later occurred in 2011[14]. But on Monday, Bolivia's "tennis match" resumed, as Professor Forteau claimed that from 1987, Chile was ambiguous in its

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[8] Bolivia's Request for Relief: CR 2018/10, p. 70, para. 10 (Rodríguez Veltzé); AB, paras. 32 *(a)* and *(c)*; MB, paras. 500 *(a)* and *(c)*; RB, p. 192, paras. *(a)* and *(c)*; emphasis added.

[9] CR 2018/10, p. 54, para. 8 (Lowe).

[10] *Ibid.*, p. 66, paras. 11-12 (Llorentty Soliz).

[11] *Ibid.*, p. 54, para. 7 (Lowe).

[12] See MB, e.g. paras. 443, 445-446 and 448.

[13] See RB, e.g. paras. 13 and 472.

[14] CR 2018/7, p. 71, para. 41 (Forteau).

position[15], and only in 2011 repudiated the alleged obligation to negotiate (although he still could not decide whether that repudiation occurred in February, May or November 2011)[16].

12. Last Friday, Dr. Juratowitch pointed out that what Bolivia complains about in Chile's conduct in 2011 was not new[17]. After more than a century, Bolivia suddenly identified breach as occurring seven years ago, in order to head off a looming constitutional deadline to litigate concerning treaties that limit its access to the sea[18]. Dr. Juratowitch challenged Bolivia's counsel to "present just one 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"[19]. But on Monday, Bolivia's only answer was more obfuscation. So once again, with respect to a question absolutely fundamental to its case — when was the breach? — five years after this case began, Bolivia has no answer.

**Was any obligation discharged?**

13. Third, if any obligation ever arose, why was it not discharged or otherwise terminated? In many negotiations, there comes a moment when one side, having negotiated as far as possible in good faith so that further negotiations would be futile, may say "enough", and consider discharged any claimed obligation to negotiate. This third issue arose most graphically in the discussions following the Charaña Declaration. Last Friday, Mr. Wordsworth thoroughly dissected those historical discussions and showed that *Bolivia* had caused those discussions to fail: by never returning to the negotiating table to address the critical issue of territorial exchange; by refusing to negotiate on the basis of accepted guidelines; and by breaking off diplomatic relations that remain ruptured to this day. But never minding that history, Bolivia simply returned on Monday and again claimed that Chile has an endless obligation to carry out never-ending negotiations, which can only be terminated when the Parties have finally reached a result satisfactory to Bolivia.

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[15] CR 2018/10, p. 48, para. 30 (Forteau).

[16] *Ibid.*, p. 51, para. 43 (Forteau).

[17] CR 2018/9, pp. 59-60, paras. 30-35 (Juratowitch).

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

[19] CR 2018/9, pp. 54-55, para. 14 (Juratowitch).

14. Mr. President, Members of the Court, it is a very serious matter when an Applicant asks this Court to declare rights related to sovereign territory. It is even more serious when the Applicant cannot answer such basic questions as: "What is the obligation?"; "When did it arise?"; "When and how was it breached?"; and "What is required to discharge it?". As you well know, in international law, words matter. On Monday, Professor Akhavan repeated those words to you[20], but quickly ignored them. As this case has gone on, Bolivia has rested its constantly shifting case on progressively thinner reeds.

15. By the end of Monday, Bolivia's case had reduced to three thin reeds, which my colleagues will shortly rebut: first, claims of continuity and accumulation; second, political recommendations by the OAS General Assembly; and third, the "evidence-and-law-free" theory of liability based on Article 2 (3) of the United Nations Charter, which Bolivia claims imposes a "positive duty"[21] to negotiate. This is not an elaborate duty, Professor Lowe claimed, because it creates just four steps for the Court to monitor each and every time one State claims another has threatened its vital interests[22]. How often does that happen? But Bolivia would invoke this positive duty to expand this Court's role well beyond this case, even beyond the world of legal disputes, "to establish", in his words, "a just solution in situations where international relations are currently disfigured by injustice"[23].

**Bolivia's shifting case**

16. There is an extraordinary mismatch between this ambitious agenda that Bolivia urges on the Court and the utter failure of Bolivia's counsel even to agree amongst themselves about which of their many theories actually applies. Remarkably, just two days ago, in the remarks of Professor Akhavan, Bolivia dared to change its case yet *again*, this time seeking to source the alleged obligation to negotiate in *local* customary international law, as set out in the *Rights of Passage* case[24]. By adding local customary international law to its hodgepodge of arguments,

[20] CR 2018/10, pp. 20-21, para. 17 (Akhavan).

[21] CR 2018/6, p. 63 (subheading "The duty to settle disputes is a positive duty") (Lowe).

[22] *Ibid.*, pp. 59-60, para. 9 (Lowe); CR 2018/10, p. 55, para. 14 (Lowe).

[23] *Ibid.*, p. 66, para. 38 (Lowe).

[24] CR 2018/10, p. 14, para. 2 (Akhavan) referring to *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 6.

Bolivia has now resorted to every possible basis for creating an obligation. At one point, Professor Akhavan simply admitted: "Whatever the circumstances of each specific episode set out in Bolivia's pleadings, and whatever principle of international law is applied to the facts, there can be no doubt about the ultimate result."[25] In other words: let us throw everything against the wall and hope something sticks. Bolivia's constantly shifting case confirms both the manifest lack of legal foundation for, and Bolivia's manifest lack of commitment to, its own legal arguments.

**Legalizing diplomacy: confusing law and politics**

17. Finally, at the close of its presentation on Monday, Bolivia showed how much it has confused law with politics. Bolivia's Co-Agent said:

> "Moving forward, Bolivia is prepared to build the conditions necessary for resuming diplomatic relations with Chile. Bolivia believes that there are mutually acceptable and practical solutions to this problem. Bolivia is prepared to immediately work with Chile to put concrete proposals on the negotiating table. Bolivia wants a win-win situation for both peoples."[26]

18. But, Mr. President, Members of the Court, if Bolivia is really ready to take these steps, why did it not just do them before, without putting us through these legal proceedings emphasizing its aspiration to obtain sovereignty over Chilean territory? Bolivia imagines that its legal action facilitates diplomacy and a search for bilateral co-operation. But as my initial presentation demonstrated, Bolivia's adversarial *legalization of diplomacy* only damages diplomacy and obstructs the co-operative enterprise.

19. Mr. President, Members of the Court, that concludes my opening remarks. Thank you all very much for your kind attention. I now ask you to call on Professor Thouvenin.

The PRESIDENT: I thank Professor Koh and I invite Professor Thouvenin to take the floor. You have the floor.

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[25] CR 2018/7, p. 53, para. 35 (Akhavan).

[26] CR 2018/10, p. 68, paras. 22-25 (Llorentty Soliz).

M. THOUVENIN :

**ASPECTS JURIDIQUES**

1. Merci, Monsieur le président. Monsieur le président, Mesdames et Messieurs de la Cour, il me revient ce matin de traiter quatre problèmes et questions juridiques que soulèvent à ce stade les thèses boliviennes. J'aborderai

*a)* le nouveau différend relatif à l'interprétation et à l'application de l'article 2, paragraphe 3, de la Charte des Nations Unies ; ensuite

*b)* la théorie de l'accumulation, comme source des obligations internationales ; puis

*c)* le contenu d'une obligation de négocier ; et enfin

*d)* l'extinction d'une obligation de négocier.

## I. Le nouveau différend relatif à l'interprétation et à l'application de l'article 2, paragraphe 3, de la Charte des Nations Unies

2. Monsieur le président, vous avez pu entendre le professeur Lowe revenir lundi sur l'obligation de négocier un accès souverain à la mer tirée de l'article 2, paragraphe 3, de la Charte des Nations Unies.

3. La Cour se rappellera que ce débat a été initié la semaine dernière de la manière suivante : [projection : onglet n° 98] «as Bolivia made clear in its Application and its written pleadings, [the] duty [to negotiate] would have arisen even in the absence of the specific undertakings by Chile»[27].

4. Voyons ce qu'a dit, au nom de la Bolivie, le professeur Forteau en 2015 sur précisément cette demande bolivienne :

[projection]

> «il ne saurait … y avoir aucun doute quant à l'objet de la demande de la Bolivie : celle-ci demande à la Cour de constater que le Chili s'est engagé, *par une série d'accords, de déclarations et de promesses* qui sont indépendants du traité de 1904 à négocier un accès souverain à la mer au profit de la Bolivie et qu'il n'a pas respecté cet engagement en le répudiant récemment»[28].

[27] CR 2018/6, p. 61, par. 18.

[28] CR 2015/19, p. 20, par. 20 (Forteau) ; les italiques sont de nous.

Le *seul* différend, assurait le même orateur : «C'est *l'engagement* de négocier souscrit par le Chili»[29] ; la *seule* «véritable controverse», vous disait le professeur Chemillier-Gendreau : «porte bien sur les *engagements* d'un Etat à l'égard d'un autre»[30]. «Si *cette* obligation n'existe pas, le Chili ne sera contraint à rien.»[31]

[Projection]

5. *Dixit*, la Bolivie, en 2015, durant la phase des exceptions préliminaires. Les observations écrites de la Bolivie à cette époque étaient tout aussi définitives[32] : le *seul* différend dont vous étiez saisis porte sur l'existence et la violation d'une obligation de négocier *dont la seule source se trouverait dans de prétendues promesses que le Chili* aurait faites à la Bolivie. Sans ces promesses, a-t-on assuré, la demande bolivienne serait sans fondement.

6. Vous en avez été convaincus, Mesdames et Messieurs les juges. Et vous l'avez écrit dans votre arrêt de 2015[33]. Durant les audiences de cette année, c'est le contraire qu'on vous a dit.

7. Trois questions se posent alors à vous.

8. La première est de savoir si la Cour doit donner foi à ce qu'un Etat souverain lui affirme, solennellement, dans ses écritures et ici même, à cette barre, ou bien s'il est permis à un Etat de vous assurer de tout et de son contraire. La réponse appartient à votre Cour.

9. La deuxième question est de savoir si un Etat est recevable à modifier à sa guise les fondements juridiques d'une requête qu'il dépose devant la Cour mondiale.

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[29] CR 2015/19, p. 18, par. 11 (Forteau) ; les italiques sont de nous.

[30] *Ibid.*, p. 26, par. 2 (Chemillier-Gendreau) ; les italiques sont de nous. *Ibid*, p. 51, par. 3 (Akhavan).

[31] CR 2015/21, p. 19, par. 11 (Forteau) ; les italiques sont de nous ; voir aussi CR 2015/21, p. 37, par. 2 (Veltzé).

[32] Observation de la Bolivie sur les exceptions préliminaires, p. 7, par. 21 : «The subject-matter of this dispute is the existence and violation of *the obligation to negotiate a sovereign access to the Pacific Ocean agreed upon* by Chile» ; les italiques sont de nous. P. 8, par. 22 : «Bolivia claims that *this obligation exists on the basis that Chile agreed to negotiate* a sovereign access to the Pacific Ocean independently of the 1904 Treaty, and that Chile has breached that obligation. Bolivia's claim is therefore based on a question of international law (Art. XXXI, *b)*) *which relates to the existence and breach of an international obligation undertaken by Chile by way of agreements and declarations* independent of the 1904 Treaty, to negotiate with Bolivia a sovereign access to the sea (Art. XXXI, *c)*), and to the best way to repair this breach (Art. XXXI, *d)*)» ; les italiques sont de nous. P. 9, par. 25 : «Bolivia is aware that international law does not permit the revision of a territorial treaty without the agreement of both parties. However, it takes seriously the fact that *Chile, on so many occasions has repeated that it will negotiate with Bolivia independently of the 1904 Treaty. That is why Bolivia has brought this claim*, requesting that the Court declare that Chile has an obligation to negotiate in good faith which, in accordance with international law, it must perform in good faith» ; les italiques sont de nous.

[33] *Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili), exception préliminaire, arrêt, C.I.J. Recueil 2015 (II)*, p. 604, par. 31 : «A l'appui de son affirmation, selon laquelle il existe une obligation de négocier un accès souverain à la mer, la Bolivie se réfère, dans sa requête, à des «accords», à une «pratique diplomatique» et à «une série de déclarations attribuables [aux] plus hauts représentants [du Chili]».»

10. Une réponse pourrait être de considérer que le différend dont la Bolivie vous a saisis porte sur une obligation de négocier, peu importe laquelle, qui aurait été violée. Le demandeur serait alors libre de réinventer son différend à chaque étape de la procédure, pourvu qu'il s'en tienne au thème générique de l'obligation de négocier.

11. Mais si vous deviez suivre cette voie, vous devriez non seulement oublier les mots que la Bolivie a solennellement répétés, durant la phase préliminaire, mais aussi oublier les *conclusions* du demandeur, qui ne laissent strictement aucune place à l'argument tiré d'une violation de l'article 2, paragraphe 3, de la Charte. Je cite cette conclusion qui n'a pas varié depuis l'origine : [projection : onglet n° 99] : «*a)* le Chili a l'obligation de négocier avec la Bolivie en vue de parvenir à un accord assurant à celle-ci un accès pleinement souverain à l'océan Pacifique».

12. Est-il simplement *concevable* que l'obligation qui est ici mentionnée puisse trouver sa source dans l'article 2, paragraphe 3, de la Charte ? En aucune manière.

13. Une autre réponse pourrait être de constater l'irrecevabilité du différend juridique relatif à l'article 2, paragraphe 3, de la Charte, qui n'existait tout simplement pas au moment de votre saisine, et dont le Chili, comme la Cour, ignoraient l'existence jusqu'à la semaine dernière[34].

14. La troisième question que vous aurez à trancher est de savoir si le différend concernant l'interprétation et l'application de l'article 2, paragraphe 3, de la Charte est recevable alors même que l'article VI du pacte de Bogotá prive la Cour de compétence sur toutes les questions «réglées» ou gouvernées par des traités en vigueur, et alors même que, comme la Cour le sait, toutes les questions relatives au territoire chilien, y compris l'accès de la Bolivie à la mer, sont régies par le traité de 1904.

15. Mais je ne voudrais pas pour autant esquiver le débat de fond, et, pour surplus de droit, voilà pourquoi l'article 2, paragraphe 3, de la Charte, n'a pas l'effet qu'on vous dit.

16. Premièrement, si on vous assène que le Chili aurait tourné le dos à son voisin en refusant de discuter avec lui à propos de ses problèmes, le dossier témoigne que *c'est très exactement l'inverse qui s'est produit.* Faut-il d'ailleurs rappeler que la Bolivie a rompu les relations diplomatiques avec le Chili depuis 1978 ?

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[34] *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I),* p. 84-85, par. 30.

17. Deuxièmement, le «différend» mentionné à l'article 2, paragraphe 3, ne couvre pas n'importe quel projet avorté. La Bolivie croit pouvoir démontrer le contraire en renvoyant à la résolution 40/9 de l'Assemblée générale des Nations Unies[35]. Mais il suffit d'en lire le titre pour voir que cette résolution n'est d'aucune aide pour le demandeur. Elle rappelle les «Etats en conflit à cesser les actions armées»[36]. Lorsqu'il y a action armée, il y a différend. Nous sommes d'accord. Mais cela n'a rien à voir avec la question qui nous occupe.

18. Troisièmement, la thèse bolivienne est contredite par le texte même de la Charte des Nations Unies.

19. Je rappelle que, selon cette thèse, le Chili serait soumis à une obligation au titre de l'article 2, paragraphe 3, de la Charte, comme conséquence du fait qu'il n'est pas disposé à céder à la Bolivie l'accès souverain à la mer qu'elle lui demande en arguant de son intérêt vital. C'est le refus chilien qui créerait le prétendu différend au sens de l'article 2, paragraphe 3. S'il n'y avait pas refus, il serait manifestement impossible de parler d'un «différend», donc l'article 2, paragraphe 3, serait évidemment inapplicable. Cette thèse, faut-il le rappeler, ne s'appuie pas sur les prétendues promesses chiliennes ; elle est présentée comme une alternative, pour le cas où rien n'aurait été promis.

20. Or, dans cette hypothèse, la conduite du Chili relèverait «essentiellement de [s]a compétence nationale», c'est-à-dire de son domaine réservé.

21. Je sais bien, Monsieur le président, que l'étendue du «domaine réservé» des Etats dépend des obligations qu'ils contractent. Comme l'a indiqué l'Institut de droit international en 1954 :

> «Le domaine réservé est celui des activités étatiques où la compétence de l'Etat n'est pas liée par le droit international.
>
> L'étendue de ce domaine dépend du droit international et varie selon son développement.»[37]

22. Mais, précisément, l'hypothèse que l'on évalue ici postule que la conduite du Chili à l'égard de la demande bolivienne n'est pas encadrée par le droit international : ce que la Bolivie

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[35] CR 2018/10, p. 55, par. 13 (Lowe) ; onglet n° 52 du dossier de plaidoiries de la Bolivie.

[36] http://www.un.org/french/documents/view_doc.asp?symbol=A/RES/40/9&Lang=F.

[37] *Annuaire de l'Institut de droit international*, 1954, vol. 45-II, p. 292.

sollicite du Chili, c'est qu'il exerce sa souveraineté territoriale, certes d'une manière qui lui convienne, mais sans aucunement y être obligé par le droit.

23. Or, l'article 2, paragraphe 7, de la Charte, précise que rien, dans la Charte, y compris, donc, l'article 2, paragraphe 3, n'oblige un Membre à soumettre «des affaires de ce genre à une procédure de règlement aux termes de la présente Charte». L'article 2, paragraphe 3, est donc sans pertinence ici.

24. J'ajoute, Monsieur le président, que l'article V du pacte de Bogotá conduit à considérer que la Cour n'a pas juridiction pour se prononcer sur les affaires relevant essentiellement de la compétence nationale du Chili[38], comme c'est le cas de la question de savoir comment le Chili entend exercer sa souveraineté sur son territoire, indépendamment de toute obligation internationale.

25. Quatrièmement, et enfin, si la thèse de la Bolivie était correcte, tout Etat qui s'estimerait victime d'une injustice, par exemple parce que la géographie de ses côtes a pour effet que les eaux sur lesquelles il exerce sa souveraineté sont réduites, pourrait réclamer de ses voisins la satisfaction d'un intérêt vital de disposer d'une répartition plus juste des aires marines. En cas de refus, il pourrait forcer lesdits voisins, par le jeu de l'article 2, paragraphe 3, à négocier des concessions «souveraines». Ceci ne saurait être exact.

## II. La théorie de l'accumulation, comme source des obligations internationales

26. Monsieur le président, permettez-moi maintenant de passer à la théorie de l'accumulation, comme source des obligations internationales. En bref, une pratique répétée donnerait naissance à une obligation juridique, par le seul fait de cette répétition[39].

27. On a essayé de pénétrer, lundi, les arcanes de ce raisonnement. Non sans peine, car le professeur Akhavan a surchargé sa fresque historique. Un peu comme un peintre moderne insatisfait de son premier jet, il a projeté sur sa toile des formes et des couleurs d'actes unilatéraux, d'accords conventionnels, d'*estoppels*. Toutefois, si on le comprend bien, son tableau d'ensemble

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[38] «The aforesaid procedures may not be applied to matters which, by their nature, are within the domestic jurisdiction of the state. If the parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of any of the parties», pacte de Bogotá, art. V.

[39] CR 2018/10, p. 14, par. 2 (Akhavan).

demeure intitulé, du moins si je pouvais le rebaptiser : «des pratiques dont la répétition seule suffirait à créer le droit»[40].

28. Zéro plus zéro donnerait davantage que zéro. L'hypothèse se discrédite d'elle-même, comme la jurisprudence la mieux établie que sir Daniel évoquera tout à l'heure le confirme. Mais le professeur Akhavan a semé le trouble en invoquant l'affaire du *Droit de passage sur territoire indien*[41]. On peine toutefois, là encore, à le suivre. Ce que cette jurisprudence confirme, c'est la possibilité d'une *coutume* locale, fondée non pas sur une pratique répétée, mais sur une pratique répétée *et* une *opinio juris*. La Cour, dans cette affaire, a sobrement constaté qu'il n'y avait :

> «pas de raison pour qu'une pratique prolongée et continue entre deux Etats, pratique *acceptée par eux comme régissant leurs rapports*, ne soit pas à la base de droits et d'obligations réciproques entre ces deux Etats»[42].

29. Aussi artistique soit-elle, la fresque de l'accumulation n'est pas le chaînon manquant. Si aucun des actes qui forment une prétendue pratique ne s'appuie sur une conviction juridique, leur «cumul» n'aura aucun effet créateur de droits ou d'obligations. L'accumulation n'est pas l'étincelle qui transforme le plomb en or.

## III. Le contenu d'une obligation de négocier

30. J'en viens à présent au contenu d'une obligation conventionnelle de négocier.

31. Il ne s'agit aucunement pour le Chili de concéder l'existence d'une telle obligation. Je vais être très clair : cette obligation n'existe pas. Je vous propose simplement, Monsieur le président, pour surplus de droit, d'évoquer ce qu'est une obligation conventionnelle de négocier, en réponse à ce qu'en disent nos collègues de l'autre côté de la barre.

### A. La différence entre une obligation conventionnelle de négocier et l'obligation de négocier afin de résoudre un différend

32. Je commencerai par évoquer la nature de la négociation prévue par un traité, lorsqu'elle n'est pas sous-tendue par l'obligation de régler un «différend». Contrairement à ce qui a pu être

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[40] CR 2018/10, p. 14-19 (Akhavan).

[41] *Ibid.*, p. 18, par. 12 (Akhavan).

[42] Affaire du *Droit de passage sur territoire indien (Portugal c. Inde), fond, arrêt, C.I.J. Recueil 1960*, p. 39 ; P. Daillier, M. Forteau, A. Pellet, *Droit international public*, L.G.D.J., 8e édition, 2009, p. 361, par. 212 («la simple répétition de précédents ne suffit pas … une règle coutumière n'existe que si l'acte pris en considération est motivé par la conscience d'une obligation juridique»).

suggéré[43], cette dernière hypothèse est sans pertinence ici, comme je l'ai indiqué la semaine dernière[44].

33. Il convient également d'écarter l'hypothèse dans laquelle l'obligation serait subordonnée à un objectif dont il serait convenu d'avance qu'il faudrait absolument l'atteindre. Je sais bien que c'est là que réside l'essentiel de la thèse bolivienne. Et personne, ici, n'ignore que l'accès souverain à la mer est l'objectif poursuivi par la Bolivie. Mais prétendre que c'est là l'objectif du Chili est proprement absurde. Le Chili poursuit évidemment un autre objectif, qui est la satisfaction de ses propres intérêts, élément que le professeur Chemillier-Gendreau feint d'ignorer[45], mais intérêts que le Chili s'est réservé de déterminer librement. Je reviendrai sur ce point dans quelques minutes.

34. Pour le moment, ce qu'il importe de noter est que la mise en œuvre de l'obligation de négocier telle que j'en ai dessiné les contours ne requerrait pas des Parties qu'elles recherchent un *compromis* entre revendications concurrentes, mais les conduirait à chercher à élaborer ce que l'on pourrait appeler un «échange constructif».

35. La négociation ne viserait pas à *partager* une richesse, par exemple un espace marin sur lequel les Parties auraient l'une et l'autre des vues. Je rappelle à cet égard que la Bolivie n'a aucune *revendication* à faire valoir mais seulement une «aspiration», qu'elle analyse comme étant un «besoin». C'est d'ailleurs pourquoi la référence faite par la Bolivie à l'affaire du *Plateau continental de la mer du Nord* marque une profonde incompréhension de cette jurisprudence[46].

36. Le principe de la négociation serait de rechercher une *formule d'échange*, aux termes de laquelle aucune Partie n'abandonnerait quoi que ce soit qui ne serait intégralement compensé par ce qu'elle recevrait en retour. Quand la Bolivie et le Chili ont échangé leurs vues sur l'aspiration bolivienne, le seul objet de ce dialogue a été de vérifier s'ils pourraient éventuellement trouver, chacun, une chose que l'autre pourrait lui concéder, en échange de ce que l'autre pourrait attendre de lui. Il n'a jamais été question que d'essayer de faire un inventaire de ce qui était éventuellement

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

[44] CR 2018/8, p. 55, par. 70 (Thouvenin).

[45] CR 2018/10, p. 60, par. 10 (Chemillier-Gendreau).

[46] *Ibid.*, p. 61, par. 13 (Chemillier-Gendreau).

échangeable, et d'en évaluer la valeur d'échange. Il n'y avait nul compromis à rechercher, mais seulement des choses qui pourraient éventuellement s'échanger, dans la plus stricte réciprocité.

37. C'est en référence à ce type de négociation, la négociation d'un troc, que j'indiquais la semaine dernière qu'elle n'implique rien d'autre pour les Parties que de confronter librement leurs points de vue afin de rechercher si elles peuvent trouver un accord mutuellement acceptable, tant qu'elles ont la conviction qu'une telle solution est envisageable[47]. Ces mots n'ont été que mollement critiqués par le conseil de la Bolivie comme évoquant des obligations «extraminimales»[48]. Mais, à la vérité, ce qui est «extraminimal» dans la présente affaire, ou plus exactement, ce qui est «extra-inexistant», c'est l'obligation de négocier. C'est pourquoi lorsque l'on regarde, *arguendo*, quel pourrait en être le contenu hypothétique, on ne trouve rien qu'y puisse être d'une grande intensité normative.

**B. Obligation de conclure et obligation de comportement**

38. Les développements qui précèdent me conduisent à rappeler que l'obligation de négocier dont il est question ici ne serait évidemment pas une obligation de résultat. Les Parties s'opposent assez radicalement sur ce point, que la Cour a pourtant déjà définitivement tranché dans son arrêt sur l'exception préliminaire. Il n'y aura du reste aucune nécessité pour la Cour d'y revenir puisqu'il n'y a, en tout état de cause, aucune obligation de négocier.

39. Je dirai toutefois un mot de ce débat.

40. La Bolivie prétend opposer au Chili une obligation de négocier qui serait une forme de synthèse, ou d'hybride, entre obligation de se comporter d'une certaine manière et obligation d'atteindre un certain résultat[49]. On se situerait, nous dit-on, quelque part entre les deux, à l'endroit où Reuter plaçait les «obligations liées»[50]. Mais à bien y regarder, ce qui lierait la négociation, selon la Bolivie, serait rien moins qu'un accord, déjà convenu, sur le résultat à atteindre. La Bolivie parle d'un accord sur un objectif à atteindre, mais elle veut dire accord déjà conclu sur le

[47] CR 2018/8, p. 55, par. 69 (Thouvenin).

[48] CR 2018/10, p. 52, par. 44 (Forteau).

[49] *Ibid.*, p. 60-61, par. 12 (Chemillier-Gendreau).

[50] *Ibid.*, p. 60, par. 9 (Chemillier-Gendreau).

«résultat», à savoir un accès souverain à la mer. La négociation serait, à en croire la Bolivie, tributaire de cet accord déjà conclu, auquel elle serait subordonnée[51].

41. Cette thèse ne peut être que rejetée car aucune obligation de résultat ne saurait être tirée du dossier de la présente affaire :

*a)* la Bolivie n'est pas titulaire d'un «droit» d'accès souverain à la mer, qui obligerait le Chili à conclure des négociations donnant effet à ce droit ;

*b)* rien, dans la conduite du Chili, n'a pu concéder un tel droit à la Bolivie ; et

*c)* la Bolivie ne peut, en tout état de cause, pas faire état un tel droit devant vous, en dépit de ses efforts pour contourner votre arrêt sur les exceptions préliminaires.

42. J'ajoute que, pour ce qui est des obligations de négociation se qualifiant comme des obligations de comportement, et non de résultat, la seule règle qui s'impose consiste à les conduire de bonne foi. Non pas, d'ailleurs, parce qu'il s'agit d'une obligation de négocier, mais parce qu'il s'agit d'une obligation internationale, conventionnelle dans l'hypothèse que j'analyse ici, et parce que toute obligation conventionnelle doit être exécutée de bonne foi. La jurisprudence est par ailleurs sans appel : l'absence de bonne foi ne se présume pas, et doit être dûment et solidement démontrée[52].

## IV. L'exécution et l'extinction d'une obligation de négocier

43. Je me tourne enfin vers la question de l'exécution et de l'extinction d'une obligation de négocier.

44. La Bolivie prétend que même lorsque des négociations se sont tenues, leur échec ne conduit pas à l'extinction de l'obligation de négocier, lorsque l'engagement de négocier ne le prévoit pas. J'ai invité le professeur Forteau à préciser sa pensée[53], ce qu'il n'a pas fait.

45. On comprend toutefois que son raisonnement est le suivant : puisque les notes de 1950 et le communiqué conjoint de Charaña sont des traités obligeant à négocier, et que les textes de ces traités ne prévoient pas que l'échec des négociations conduirait à l'extinction des obligations qu'ils

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[51] P. Reuter, «De l'obligation de négocier», *in Mélanges Morelli*, Paris, 1975, p. 721.

[52] *Tacna-Arica* (Chili, Pérou), 4 mars 1925, Nations Unies, *Recueil des sentences arbitrales (RSA)*, vol. II, p. 929-930.

[53] CR 2018/8, p. 56, par. 75 (Thouvenin).

prescrivent, alors ledit échec ne saurait en éteindre les effets[54]. Le professeur Forteau nous renvoie ainsi, au moins implicitement, à l'article 54 de la convention de Vienne sur le droit des traités.

46. Mais, à la vérité, la question n'est pas correctement posée. Dans l'hypothèse où l'obligation de négocier dont j'ai rappelé les bases à l'instant existe, la question de son extinction n'est pas tributaire du point de savoir si les négociations ont réussi ou échoué, ce qui nous ramènerait vers une obligation de résultat. La question est de savoir si les négociations *se sont tenues* conformément à l'obligation. Certes, lorsqu'elles échouent, c'est, par hypothèse même, qu'elles se sont tenues, autant que de raisonnable. Mais ce qu'il importe alors de constater est qu'elle se sont tenues.

47. Or, il est tout à fait incontestable que les obligations conventionnelles peuvent s'éteindre, même en l'absence d'une disposition le mentionnant expressément, lorsque leur objet a été pleinement exécuté. Le professeur Forteau n'a pas trouvé trace de ce principe dans la convention de Vienne sur le droit des traités parce qu'il ne s'y trouve pas, pour des raisons d'ailleurs fort bien expliquées par le professeur Capotorti dans son «Cours» donné en 1971 à l'Académie de droit international de La Haye[55]. Il ne fait pour autant pas le moindre doute que l'exécution de certaines obligations conventionnelles «entraîne automatiquement leur extinction»[56].

48. Et c'est précisément le cas des obligations conventionnelles de négocier, qui ne sont pas des obligations de résultat. C'est ce qui explique que, comme la Cour permanente de Justice internationale l'a constaté il y a déjà bien longtemps, l'obligation de négocier un accord n'implique pas une obligation de le conclure. La raison en est que l'obligation de négocier s'épuise dans la négociation, pas dans la conclusion d'un accord. C'est pourquoi elle cesse de produire ses effets et s'éteint alors même qu'aucun accord n'a été conclu.

49. Or, en l'espèce, l'objet des prétendus «traités» que la Bolivie veut opposer au Chili est typiquement de ceux qui contiennent la «clause implicite» selon laquelle l'exécution entraîne l'extinction.

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

[55] F. Capotorti, «Cours général de droit international public», *Recueil des cours de l'Académie de droit international de La Haye* (ci-après «*RCADI*»), t. 248, 1994-IV, p. 526-527.

[56] P. Daillier, M. Forteau, A. Pellet, *Droit international public*, L.G.D.J., 8e édition, 2009, p. 335, par. 195.

50. Monsieur le président, Mesdames et Messieurs les juges, j'ai conclu mon propos de la semaine dernière en citant une phrase écrite par Paul Reuter en 1975[57], et nos contradicteurs n'en ont pas contesté les termes. J'en rappelle donc la teneur : lorsque «les perspectives de succès semblent définitivement écartées, il est raisonnable d'admettre que l'obligation de négocier est caduque faute d'objet».

51. Monsieur le président, Mesdames et Messieurs les juges, ceci conclut ma présentation de ce matin. Je vous remercie de votre écoute attentive, et vous prie respectueusement de bien vouloir appeler à la barre M. Wordsworth.

Le PRÉSIDENT : Je remercie le professeur Thouvenin. Je donne la parole à M. Wordsworth. You have the floor.

Mr. WORDSWORTH:

## THE DOCUMENTS RELIED ON BY BOLIVIA TO ESTABLISH A "HISTORICAL PRACTICE": FROM THE 1904 PEACE TREATY TO THE CHARAÑA PROCESS OF 1975-1978

1. Mr. President, Members of the Court, I have been asked to deal with the responsive points coming out of Monday's submissions on the documents post-dating the 1904 Treaty, in particular those from the 1920s, the two notes of June 1950, and the 1975 Charaña Joint Declaration.

### I. The early twentieth century documents

2. I start with the post-1904 period, and the first and perhaps most obvious point to make is that Professor Akhavan decided radically to downplay Bolivia's untenable case on the existence of a historical bargain, and instead put forward a new theory on historical practice, as to which you have already heard from Professor Thouvenin.

3. As to the post-1904 facts, the first document relied on is from 1910, when Bolivia asked Chile if it would listen to Bolivia's proposals[58]. Contrary to what you were told on Monday, Chile's response was not to offer to negotiate on sovereign access at some point in the future but, rather, to

[57] CR 2018/8, p. 57, par. 76 (Thouvenin).

[58] Bolivian Memorandum of 22 Apr. 1910, MB, Ann. 18, pp. 89-91. See also Letter from the Minister for Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, 29 Apr. 1910, RC, Ann. 380.

propose facilities for Bolivian commerce in Chilean ports[59], and Bolivia then responded to say that it would be "pleased" to discuss that subject[60]. So,

nothing there on sovereign access.

4. You then heard from Professor Akhavan about an alleged agreement based on the Chilean proposals set out in the 1920 Minutes and correspondence between 1923 and 1926, by which, it was said, that Chile would cede a port in exchange for Bolivia's support in the plebiscite. There are four points here.

5. First: Professor Akhavan's submissions largely consisted of repetition of what Bolivia had said in its first round, without engaging with the evidence that Dr. Parlett took you through last week. So he glossed over Bolivia's refusal to accept Chilean proposals when they were made in 1919[61]; he ignored altogether the reservation in the 1920 Minutes stipulating that the statements contained had no legal effect[62]; and he left out key words from Chile's statement of willingness expressed at the League of Nations in 1921, that is, the wording that the negotiations to which Chile was open were on "the best means of facilitating [Bolivia's] development"[63], not on sovereign access.

6. Second point. Professor Akhavan sought to maintain Bolivia's case on estoppel by reference to alleged Bolivian support for Chile in the then-envisaged plebiscite concerning Tacna and Arica. He asserted that there had been an "offer and acceptance"[64]. But he did not take you to

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[59] Cf. CR 2018/10, p. 16, para. 5 (Akhavan). See Letter from the Minister Plenipotentiary of Chile in Bolivia to the Government of Bolivia, 14 Aug. 1910, RC, Ann. 381, p. 77.

[60] See Letter from the Ministry of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, 29 Aug. 1910, RC, Ann. 382, p. 81.

[61] Note from the Ministry of Foreign Affairs of Bolivia to the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, 21 Nov. 1919, RC, Ann. 384, pp. 97-101. See also pp. 109-111; responding to Chilean Memorandum of 9 Sept. 1919, CMC, Ann. 117. Cf. CR 2018/10, p. 16, para. 6 (Akhavan).

[62] Minutes of 10 January 1920, CMC, Ann. 118, p. 339. Cf. CR 2018/10, p. 16, para. 6 (Akhavan), judges' folder, tab 101.

[63] Statement by the Delegate of Chile, Agustín Edwards, Records of the Twenty-Second Plenary Meeting of the Assembly of the League of Nations, 28 Sept. 1921, CMC, Ann. 120, p. 372. Cf. CR 2018/10, p. 16, para. 6 (Akhavan), judges' folder, tab 102.

[64] CR 2018/10, pp. 20-21, para. 15-17 (Akhavan), referring to Bolivian Memorandum of 27 May 1925, reproduced in note from the Minister for Foreign Affairs of Bolivia, Alberto Gutierrez, to the Minister Plenipotentiary of Bolivia to Chile, Eduardo Diez de Medina, No. 200, 31 Mar. 1926, RB, Ann. 240, p. 77, and Chilean Memorandum, 8 Mar. 1926, reproduced in note from the Minister for Foreign Affairs of Bolivia, Alberto Gutierrez, to the Minister Plenipotentiary of Bolivia to Chile, Eduardo Diez de Medina, No. 200, 31 Mar. 1926, RB, Ann. 240, p. 79.

the next item of correspondence in the series, by which Bolivia withdrew this so-called offer[65]. You can read those exchanges in full at tab 103 of your folders.

7. That leads to my third point. The plebiscite was never held. This is another fact that Professor Akhavan glossed over on Monday. He nonetheless asserted that Bolivia supported Chile's acquisition of Arica[66], and then said that the offer and acceptance in and of themselves are "clear evidence of Bolivia's reliance on Chile's representations"[67]. But, as I have just mentioned, there was no offer and acceptance, and no other form of detrimental reliance was alleged.

8. Fourth point. Professor Akhavan mentioned four documents to you on Monday that I would respectfully ask you to read in full, alongside the transcript where Dr. Parlett dealt with three of the four documents[68], and please note that not a single one of her points was addressed. The fourth document is an internal United States document from 1926, suggesting that cession of Tacna and Arica be proposed to Chile and Peru "in fulfilment of assurances [made by both of them] . . . that Bolivian aspirations for a port on the Pacific would be considered sympathetically"[69]. It is difficult to see how this assists Bolivia in any way.

9. I move on to 1929, when Peru and Chile concluded the Treaty of Lima and its Supplementary Protocol. You heard more than once from Bolivia that this Protocol confirmed that Arica would be ceded to Bolivia[70].

10. Two points.

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[65] Bolivian Memorandum, 29 Mar. 1926, reproduced in note from the Minister for Foreign Affairs for Bolivia, Alberto Gutierrez, to the Minister Plenipotentiary of Bolivia to Chile, Eduardo Diez de Medina, No. 200, 31 Mar. 1926, RB, Ann. 240, p. 81.

[66] CR 2018/10, p. 20, para. 17 (Akhavan). See also p. 14, para. 1 (Akhavan) ("Still others such as Bolivia's support in the Tacna/Arica plebiscite in reliance on Chile's representations between 1919 and 1929 may also qualify as estoppel").

[67] CR 2018/10, p. 20, para. 17 (Akhavan).

[68] CR 2018/8, pp. 64-65, paras. 28-29 (Parlett), referring to note from the Minister for Foreign Affairs of Chile to the Special Envoy and Minister Plenipotentiary of Bolivia in Chile, 6 Feb. 1923, CMC, Ann. 125, p. 405; CR 2018/8, p. 66, para. 34 (Parlett), referring to Minister Plenipotentiary of Bolivia's note of 9 Feb. 1923, MB, Ann. 49, p. 213 and "President Alessandri explains the guidelines of Chile's foreign policy", *El Mercurio* (Chile), 4 Apr. 1923, CMC, Ann. 127, p. 423; and CR 2018/8, pp. 66-67, paras. 36-39 (Parlett), referring to Memorandum of the Minister for Foreign Affairs of Chile Delivered to the Secretary of State of the United States regarding Tacna-Arica, 4 Dec. 1926, CMC, Ann. 129, p. 436.

[69] CR 2018/10, p. 17, para. 7 (Akhavan), referring to Telegram 723.2515/2124 from the United States Ambassador in Chile to the United States Secretary of State, 11 Apr. 1926, RB, Ann. 244, p. 102.

[70] CR 2018/10, p. 17, para. 8 (Akhavan), p. 43, para. 10 (Forteau). See also CR 2018/6, p. 27, para. 18 (Akhavan); and p. 38, para. 25 (Chemillier-Gendreau).

11. First, the Protocol merely envisaged that there could be a future cession of territory to a third State in Tacna by Peru, or in Arica by Chile. It did not suggest in any way that Chile was, or could be, obliged to cede any territory to Bolivia.

12. Second, as Dr. Parlett explained last week, Bolivia did not react to the Supplementary Protocol by claiming that Chile was subject to an obligation to negotiate[71]. You find Bolivia's response at tab 104. It claimed a "right to have its maritime sovereignty restored" but not by reference to any obligation to negotiate[72]. Bolivia does not assert any such right of restoration in these proceedings, and so the document does not assist Bolivia.

## II. The notes of June 1950

13. I move on to the two diplomatic notes of June 1950, as to which Bolivia had four points to make:

*(a)* first, as to continuity with what had gone before, described by Professor Forteau as "30 years of promises"[73];

*(b)* secondly, as to the two notes forming an international agreement;

*(c)* thirdly, as to the notes being followed by a period of entente in which there was no negotiation due to the adverse public reaction in both States; and

*(d)* finally, as to Chile's note of 20 June 1950 being brought back to life by the so-called Trucco memorandum of July 1961.

### A. Bolivia's misplaced reliance on continuity

14. Dealing with these in turn, Bolivia's focus on continuity here merely serves to underline the absence of any international agreement in the notes of June 1950.

*(a)* Mr. Akhavan, in his attempt to build a case on "synergistic legal effect", whatever that might be, referred to a statement of Chile's Foreign Minister of 11 July 1950 as to Chile's traditional policy of "willingness to give an ear, in direct contacts with Bolivia, to proposals from

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[71] CR 2018/8, p. 68, para. 41 (Parlett), referring to Bolivia's Foreign Affairs Minister Memorandum No. 327 of 1 Aug. 1929, MB, Ann. 23, p. 117.

[72] Bolivia's Foreign Affairs Minister Memorandum No. 327 of 1 Aug. 1929, MB, Ann. 23, p. 114.

[73] Cf. CR 2018/10, p. 43, para. 9 (Forteau).

[Bolivia] aimed at satisfying its aspiration to have its own outlet to the Pacific Ocean"[74]. It is difficult to conceive of wording less intended to convey any intention to be bound to negotiate. Or is it being suggested that when, for example, Article VI of the Nuclear Non-Proliferation Treaty was being formulated, the drafting committee was wondering — shall we say "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith" or shall we use a "willing to give an ear" formula instead as, after all, it is all just the same?[75]

*(b)* Professor Forteau[76], and indeed Professor Remiro Brotóns[77], relied once more on the promise referred to in the Chilean Foreign Minister's statement of 13 September 1950[78], although neither sought to address our submission on Friday that the whole purpose of his statement was to emphasize that nothing had been formally agreed with Bolivia[79]. As to the much-relied upon promise, this was "that Chile was willing to hear Bolivia's propositions concerning its port aspiration", nothing more. And it had been so willing in 1950. The only difficulty is that Bolivia chose not to put forward its propositions, for reasons it has elected to keep from you[80].

*(c)* Professor Forteau also places great weight on the fact that Chile's note of 20 June 1950 refers back to the materials that Bolivia had set out in its note and called "important antecedents"[81]. In fact, Chile again did not adopt what Bolivia had said in its note. For example, Bolivia had said in its note

> "The Republic of Chile, on different occasions and specifically in the Treaty of 18 May 1895 and in the Minutes of 10 January 1920 entered into with Bolivia, although not ratified by the respective Legislative Powers, *accepted the cession to my country of its own outlet to the Pacific Ocean*."[82]

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[74] Cf. CR 2018/10, p. 15, para. 3 (Akhavan), referring to the note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, 11 July 1950, CMC, Ann. 145, p. 545.

[75] Treaty on the Non-Proliferation of Nuclear Weapons, signed at London, Moscow and Washington on 1 July 1968 (entry into force 5 Mar. 1970), 729 *UNTS* 161, Art. VI. Cf. CR 2018/10, p. 15, para. 4, first sentence (Akhavan).

[76] Cf. CR 2018/10, p. 43, para. 9 (Forteau).

[77] Cf. *Ibid.*, p. 29, para. 26 (Remiro Brotóns).

[78] "Let us not divide ourselves by political parties in resolving our foreign affairs", *El Imparcial* (Chile), 13 Sept. 1950, RB, Ann. 276.

[79] CR 2018/9, p. 18, para. 55 (Wordsworth). Cf. CR 2018/10, p. 43, para. 9 (Forteau).

[80] CR 2018/9, pp. 14-15, paras. 42-45 (Wordsworth). Cf. CR 2018/10, p. 43, para. 9 (Forteau), judges' folder, tab 105.

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

[82] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Chile, 1 June 1950 RC, Ann. 398, p. 247; emphasis added, judges' folder, tab 106.

Chile did not then endorse this in any way in its note of 20 June. You can see that on the screen, showing how Chile referred to those documents in quite a different and much more accurate terms.

15. And Chile did not refer to any continuum in its 20 June note, but merely stated — and the Court now knows the words well enough — that it had "been willing to study through direct efforts with Bolivia the possibility of satisfying the aspirations of the [Bolivian] Government and the interests of Chile"[83]. That wording is not suggestive of any intention to be bound, whether in the past or in the 20 June 1950 note.

**B. No international agreement was established**

16. This leads to the second area that Bolivia came back to on Monday, and notably briefly I should say, which is its case that the two notes of June 1950 form an international agreement. There were two general, and very defensive, points that Chile is being overly formalistic and that diplomatic language is perfectly compatible with the establishment of legal relations[84]. Neither point helps Bolivia. And there was no come back of any kind on the points that we made last week:

*(a)* As to Chile saying in its note of 20 June that it was "open to"/"*está llano a*" a negotiation, wording that did not signal acceptance of any legal obligation, as indeed was clear from Bolivia's own contemporaneous use of this formulation[85];

*(b)* As to Chile being open in its note "to enter into a direct negotiation" (singular), not to an open-ended obligation to negotiate for ever and for ever across the decades[86]; and

*(c)* As to the contemporaneous understanding of the Bolivian Ambassador who drafted Bolivia's note[87].

17. The only point of substance on the text was that anyone with any good sense could see that the object of the negotiation in Bolivia's note of 1 June 1950 was the same as the object of the negotiation in Chile's note of 20 June[88].

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

[84] CR 2018/10, p. 25, paras. 7-11 (Remiro Brotóns).

[85] CR 2018/8, pp. 71-72, para. 15 (Wordsworth).

[86] *Ibid.*, p. 72, para. 16 (Wordsworth).

[87] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, 25 May 1950, RC, Ann. 397, p. 233.

[88] CR 2018/10, p. 25, paras. 7-11 (Remiro Brotóns). See also p. 55, para. 11 (Forteau).

*(a)* And you see the two competing versions from our slide of last week; judges' folder, tab 107.

*(b)* And further submissions from me are not going to help that much. In short, Bolivia proposed a negotiation to satisfy Bolivia, while Chile was open to a negotiation that would enable Chile, once a formula had been found, evidently to Chile's satisfaction, to give to Bolivia sovereign access in return for compensation. The two State's perceptions of the negotiation were quite different, Chile was not open to the negotiation proposed by Bolivia, and that is presumably why Bolivia's Foreign Ministry reacted to Chile's note by paralysing the negotiations[89]. And I'll come back to that in a moment.

18. Bolivia did reiterate on Monday its reliance on the statement of Chile's President González Videla at a July 1948 meeting[90], but it made no attempt to deal with the points made last week about this being made within what were expressly informal talks on which Bolivia could not rely[91], as well as the fact that it is clear from Bolivia's internal communication of 25 May 1950 that Bolivia was not relying on any prior statement that had been made[92]. Indeed, it would be enough to refer to the Bolivian Ambassador's contemporaneous account of the July 1948 meeting. He said that the statements of President González Videla at that meeting:

> "confirmed the pessimistic impression that I transmitted to you, at the end of my Note [No 598/424] dated 15th of the current month, in regard to the possibility of signing the draft Note that officially opened direct negotiations [and please note the wording] 'to satisfy the fundamental Bolivian need to obtain a proper and sovereign outlet of the Pacific Ocean'"[93].

And in due course, such pessimism was proved to be well founded. Chile never signed a note saying it was open to negotiate on such terms.

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[89] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, 11 July 1950, CMC, Ann. 145, p. 547. See CR 2018/9, pp. 14-15, paras. 42-45 (Wordsworth).

[90] CR 2018/10, p. 28, para. 21(Remiro Brotóns), referring to note from the Bolivian Ambassador in Chile to the Minister for Foreign Affairs of Bolivia, No. 648/460, 28 July 1948, RB, Ann. 259, p. 213. The text of para. 21 incorrectly refers to 28 June 1948.

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

[92] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, 25 May 1950, RC, Ann. 397, p. 233.

[93] CR 2018/10, p. 28, para. 21, referring to Note from the Bolivian Ambassador in Chile to the Minister for Foreign Affairs of Bolivia, No. 648/460, 28 July 1948, RB, Ann. 259, bottom p. 213; judges' folder, tab 108.

**C. The aftermath of the 1950 notes: Bolivia's unexplained decision to "paralyze" negotiations**

19. I move to Bolivia's third point in response on the 1950 notes, which was to accept that there was a hostile reaction in both States to a negotiation, but to say that there was therefore an "entente" on the postponement of what was called the execution phase of the agreement[94].

20. As to this, it is certainly correct that this hostile reaction, including to the water for land formula under consideration[95], and this is of legal significance for the reasons I suggested last Friday[96] — to which there has been no response.

21. But Bolivia's invocation of an agreed postponement ignores the evidence that it was Bolivia's Foreign Ministry that decided on 24 June 1950 to "paralyse" the negotiations, to use the term from Bolivia's own internal communication of 11 July 1950[97].

22. Bolivia has sought neither to challenge nor to explain that evidence. Instead, it has decided to pretend that it does not exist. It has also not said that the relevant communications — that is, Bolivia's cablegrams of 24 and 28 June 1950 — cannot be found. So it would appear that a conscious decision has been made to keep back these key documents, although they would surely tell you how Bolivia really understood and reacted to Chile's note of 20 June.

23. In these circumstances, it appears safe to infer that these internal communications are inconsistent with Bolivia's current case. One obvious inference is that this undisclosed Foreign Ministry cablegram of 24 June made the point that the negotiation which Chile had said it was open to on 20 June was not what Bolivia had asked for, and was not a basis that it wished to proceed on. But in any event, what is certain is that the negotiations were, to use the Bolivian Ambassador's own words, "paralyzed by the answer contained in [the Bolivian Foreign Minister's] cablegram No. 91, of 24 June"[98]. And yet responsibility is now being accorded elsewhere.

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[94] CR 2018/10, pp. 28-29, para. 24 (Remiro Brotóns).

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

[96] CR 2018/9, pp. 14-15, paras. 42-45 (Wordsworth).

[97] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, 11 July 1950, CMC, Ann. 145, p. 547. See also 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. 267 ("At the end of our meeting, Foreign Minister Walker Larraín and I agreed that, once the response note he promised to send me today is signed, we would enter into another stage in the port negotiations and asked me to, in due course, inform him of the plan that will be followed to that end."); judges' folder, tab 109.

[98] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, 11 July 1950, CMC, Ann. 145, p. 547.

24. Bolivia's invocation of an agreed postponement on Monday is also important to its case on continuity, as it wishes to bridge the gap between 1950 and the next document that it relies on, the so-called Trucco memorandum of 10 July 1961[99]. But this was a decade that started with a very hostile public and political reaction to the prospect of a negotiation, where Bolivia's priorities changed radically, and where Chile was not saying that it was willing to listen to Bolivia's aspirations.

25. As to the extent of the hostile reaction in Bolivia, Professor Remiro Brotóns said that the governments in each State became subject to the harassment of the opposition parties[100]. That is a nice understatement. This is what Victor Paz Estenssoro had to say on 25 September 1950, it being recalled that he became Bolivia's President less than two years later:

> "As far as we are concerned, the port problem is not among the priority issues Bolivia is facing. The frequent statement that our underdevelopment results from our lack of an outlet to the sea is not just infantile but biased as well, as it seeks to divert the public attention from the true causes of Bolivia's stagnation."[101]

26. We ask you to review the full statement in due course, including because there is again no suggestion of an understanding that there had been any binding agreement to negotiate. Consistent with this 1950 statement, after the new Bolivian government came into power, the aspiration to a port was no longer a priority. This is from *El Mercurio* of 25 January 1953:

> "Asked if he would raise the claim of the port in his conversations with [Chilean Foreign Minister] Olavarría, the [Bolivian Foreign] Minister Mr. Guevara declared that his Government had no intention to do it as long as the principle of free transit was conveniently solved in favour of Bolivia, as this was of vital importance for his country. [And please note that an important declaration in this respect was agreed between Bolivia and Chile on the very next day after this statement was made.[102]] He added that it was undoubted that all Bolivians kept the latent aspiration of having a port of their own [and one notes, that there is no hint there of any binding agreement to negotiate], but that now there were many and very important problems to be solved . . ."[103]

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[99] Memorandum of the Chilean Embassy in Bolivia, 10 July 1961, CMC, Ann. 158.

[100] CR 2018/10, pp. 28-29, para. 24 (Remiro Brotóns).

[101] Letter from Víctor Paz Estenssoro to Siles Suazo dated 25 Sept. 1950, published in *El Diario* (Bolivia), 19 June 1964, CMC, Ann. 148, pp. 579-580; tab 110, judges' folder.

[102] See Declaration of Arica by the Ministers for Foreign Affairs of Bolivia and Chile, signed at Arica on 25 Jan. 1953, CMC, Ann. 150. See also 1955 Treaty of Economic Complementation, CMC, Ann. 151; Supplementary Protocol to the Treaty of Economic Complementation on Facilities for the Construction of the Oil Pipeline, signed at La Paz on 14 Oct. 1955, CMC, Ann. 153; and 1957 Agreement on the Sica Sica-Arica Oil Pipeline, CMC, Ann. 155.

[103] "Bolivia does not wish to raise the problem of the port, but to ensure the free transit of goods to La Paz", *El Mercurio* (Chile), 25 Jan. 1953, CMC, Ann. 149, p. 589; tab 111, judges' folder.

27. Chile's understanding, as stated at the time, was "that Bolivia had tacitly abandoned its pretensions over a Bolivian port on the coast of Chile"[104], and subsequent statements by Bolivia only confirmed that impression[105]. So, no continuity.

**D. Trucco memorandum**

28. I move on to the so-called Trucco memorandum of 10 July 1961[106].

29. As I explained last week, the handing of this unsigned note to Bolivia was not a moment of any great significance, as is confirmed by the account of the meeting of 10 July prepared by Ambassador Trucco himself[107]. On Monday, there was no challenge to the contents of that account. I do note that, if Bolivia had considered in July 1961 that the memorandum confirmed or created an agreement to negotiate sovereign access, Bolivia would surely have some contemporaneous record. But it has not submitted anything[108]. And Ambassador Trucco's account, which was drafted many months down the line when Bolivia suddenly purported to accept an alleged offer in the memorandum, makes plain his view that the memorandum was being used by Bolivia for political purposes related to the dispute over the Lauca River[109].

30. As to what happened next, we explained last week that when Bolivia purported on 9 February 1962 to express its "full agreement" to negotiations by reference to the memorandum, it did so on its own terms, not on any basis that had ever been put forward by Chile[110]. And there was no comeback on that on Monday[111].

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[104] Memorandum by the Ministry of Foreign Affairs of Chile, 20 Mar. 1964, CMC, Ann. 169, p. 863.

[105] *Ibid.*, p. 865, referring to a report in *La Tercera de la Hora*, 19 Aug 1955.

[106] Memorandum of the Chilean Embassy in Bolivia, 10 July 1961, CMC, Ann. 158.

[107] See 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.

[108] CR 2018/10, p. 30, para. 28 (Remiro Brotóns).

[109] Note from the Chilean Ambassador to Bolivia to the Minister for Foreign Affairs of Chile, 15 Feb. 1962, CMC, Ann. 160, pp. 37, 39-40, 45, 47-49 (full document deposited with the Registry).

[110] 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. As to CR 2018/10, p. 30, para. 30 (Remiro Brotóns), referring to 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, Chile's first round judges' folder, tab 48, see CR 2018/9, p. 19, para. 60 (Wordsworth).

[111] Cf. CR 2018/10, p. 30, para. 29 (Remiro Brotóns).

31. A point now appears to be made that, following Bolivia's 1962 rupture of diplomatic relations over the Lauca River, it conditioned resumption on negotiations on sovereign access[112]. But that position was ultimately not maintained by Bolivia[113]; while Chile's reaction to Bolivia's rupture of diplomatic relations was as follows:

> "my Government states clearly and categorically that once diplomatic relations with Bolivia have been resumed, it is not willing to enter into talks that could affect national sovereignty or involve a cession of territory of any kind. As far as my country is concerned, the borders with Bolivia were established by freely consented international treaties, which are in full force and effect, and are definitive."[114]

32. 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"[115]. So much for Bolivia's case on Monday of a "continuing commitment"[116].

33. Indeed, it was then another 12 years before the two States were willing to sit down at a negotiation table, and this was on a basis that was quite different to what had been contemplated in Chile's note of 20 June 1950.

34. The Court will also recall that Bolivia's new position in 1962, that the 1950 notes had given rise to a commitment to negotiate, was rejected by Chile[117], including in the most public and clear cut of terms[118]. On Monday, Professor Remiro Brotóns said that there was no reason to respond to Chile's 1967 rejection, even though it was addressed to all the Foreign Ministers of

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[112] Cf. CR 2018/10, p. 30, para. 30 (Remiro Brotóns).

[113] See RC, paras. 6.13-6.19.

[114] 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"; judges' folder, tab 112.

[115] Speech of the Minister for Foreign Affairs of Chile, 27 Mar. 1963, CMC, Ann. 164, p. 775.

[116] Cf. e.g. CR 2018/10, p. 18, para. 10 (Akhavan).

[117] 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". See also 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 Conrado Ríos Gallardo, former Minister for Foreign Affairs of Chile, 4 Nov. 1963, CMC, Ann. 166; and 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; and 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.

[118] Letter from the Minister for Foreign Affairs of Chile to all Ministers for Foreign Affairs in Latin America, 29 May 1967, CMC, Ann. 171, p. 913, responding to the 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. See also ILC Guiding Principles on Unilateral Declarations, 2006, A/61/10, Principle 10.

Latin America[119]. It was as if the well-established principle of this Court in the *Preah Vihear* case could just be passed over without comment[120].

## III. The Joint Declaration of Charaña

35. I turn then to the Charaña process. There are four points to be made in response to what you heard from Bolivia on Monday.

### A. Discontinuity

36. First, Professor Forteau, with ever an eye to Bolivia's case on continuity, sought to make a link between the 1950 notes and the Joint Declaration of Charaña, relying on the two alternative wordings for a declaration that had been put forward by Bolivia in 1971[121].

37. But as I explained last week, these merely demonstrate that Bolivia wished — in 1971 — to include in a joint declaration a reference to the 1950 notes, or in the alternative, to the formal commencement of "a direct and bilateral démarche to negotiate Bolivia's own and sovereign access to the Pacific Ocean"[122]. The actual wording of the 1975 Declaration was completely different and indeed incompatible with the wording of Chile's 1950 note, for all the reasons I gave last week and on which Bolivia did not respond.

38. It follows that had the 1950 notes and the Charaña process somehow been treaties, the later treaty would have superseded and terminated the earlier one, on the basis of incompatibility under Article 59 (1) *(b)* of the Vienna Convention, but also on the basis that the two treaties governed the same subject-matter, under Article 59 (1) *(a)*[123].

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[119] CR 2018/10, p. 31, para. 31 (Remiro Brotóns).

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

[121] CR 2018/10, p. 45, para. 21 (Forteau); referring to Meeting held between the Foreign Ministers of Bolivia and Chile in San Jose, Costa Rica, drafted by Undersecretary of Foreign Affairs of Bolivia, 14 Apr. 1971, RB, Ann. 297; see also 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; judges' folder, tab 113.

[122] See CR 2018/9, p. 25, para. 12 (Wordsworth).

[123] See *ibid.*, p. 38, paras. 56-57 (Wordsworth); see Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969 (entry into force 27 Jan. 1980), *1155 UNTS 331*, Art. 59 (1) *(a)* and *(b)*; and as to Art. 59 (1) *(a)*, see Summary records of the fifteenth session, *ILC Yearbook 1963*, Vol. I, 709th meeting, p. 244 (para. 81) (Special Rapporteur Waldock: "There were other cases, however, in which, although the parties did not expressly state their intention to terminate the previous treaty, they nevertheless made it clear that they engaged in the new treaty with the idea of covering the whole of the subject-matter of the old treaty.")

39. As a further point on continuity, there was no evidence from Professor Forteau that, as of 1975, Bolivia was still seeking to rely on the 1950 notes and, even if it had been otherwise, the actual language of the 1975 Declaration and the guidelines points only to a discontinuous approach[124]. Why else would Bolivia be running a case on a degradation between 1950 and 1975[125]? It is admirable in a way to seek to run parallel cases on continuity and degradation, but it is not legally coherent.

**B. No legal obligation**

40. Second point: Bolivia all but gave up on its case that the 1975 Joint Declaration is a treaty giving rise to binding obligations to negotiate; and it said nothing at all on the obvious point that the Declaration refers with quite deliberate vagueness to terms such as "dialogue" and "to seek formulas" and to "the landlocked situation that affects Bolivia", as opposed to negotiation over sovereign access[126].

41. On Monday, Professor Remiro Brotóns made only three points:

*(a)* First, he said that "[l]e langage diplomatique ne peut occulter ses effets"[127]. Well, it is certainly correct that the Joint Declaration merely uses "diplomatic language", and what matters is the language used[128], as to which Bolivia has not made, and could not tenably make, any serious attempt to show that the Declaration establishes any legal obligation.

*(b)* Secondly, it was said that "[l]a ratification n'est pas nécessaire pour établir sa valeur"[129], which merely confirms that Bolivia did not ratify the Joint Declaration of Charaña, so it is scarcely a point in Bolivia's favour, especially given that such would have been required for a treaty under Bolivia's then constitution[130].

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[124] Cf. CR 2018/10, p. 45, para. 21 (Forteau).

[125] Cf. *ibid.*, p. 62, para. 17 (Chemillier-Gendreau).

[126] See CR 2018/9, pp. 26-27, paras. 17-19 (Wordsworth).

[127] CR 2018/10, p. 31, para. 32 (Remiro Brotóns).

[128] See *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 39, para. 96 and pp. 42-53, paras. 103-104; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, pp. 120-121, para. 23.

[129] CR 2018/10, p. 31, para. 32 (Remiro Brotóns).

[130] See Bolivia's Constitution of 1967, Art. 59 No. 12; Art. 68 No. 5 and Art. 96 No. 2, available at http://pdba.georgetown.edu/Constitutions/Bolivia/bolivia1967.html.

*(c)* Thirdly, there was an attempt to play down the significance of the contemporaneous description of the Joint Declaration, made by the former Bolivian Foreign Minister, Guevara Arze. This was where he had referred — not without accuracy — to its "vaporous and imprecise phrases"[131]. Professor Remiro Brotóns said that the assessments of a respected member of the opposition do not have the same force as those of the State's representatives[132], which is of course correct. He did not, however, then go on to deal in any way with the statements that I also took you to last Friday where Bolivia's President Banzer and its then current Foreign Minister said that Bolivia had not made any commitment[133].

42. So, there is no serious attempt made now to say that the Joint Declaration established any legal obligations, and as I now understand the importance of the Charaña episode to Bolivia, it is as part of its case on continuity, to say that Chile was at least willing to negotiate over sovereign access. But this is to bypass two important facts:

*(a)* first, that Chile was only willing to negotiate on the expressly and publicly accepted[134] basis of an exchange of territories[135]; and

*(b)* secondly, that Bolivia was ultimately unwilling to negotiate on this accepted basis.

43. As to Bolivia's explicit acceptance of territorial exchange as a fundamental condition of the negotiation (judges' folder, tab 114), Professor Forteau suggested to you on Monday that I had omitted to address the evidence to the contrary set out in Bolivia's Reply[136]. The passage of

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

[132] CR 2018/10, p. 31, para. 32 (Remiro Brotóns).

[133] See, e.g., "Negotiations will be held with Chile on the basis of territorial compensation", *Presencia* (Bolivia), 29 Dec. 1975, CMC, Ann. 184, p. 1026 (General Banzer: "the Act of Charaña does not include a categorical commitment by Chile to resolve Bolivia's landlocked situation"); Clarification of the Bolivian Ministry of Foreign Affairs, 19 Apr. 1976, RB, Ann. 309, p. 777 (Bolivia's Ministry of Foreign Affairs: "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"); and see also Letter from the President of Bolivia to the President of Chile, 21 Dec. 1977, CMC, Ann. 235, p. 1453 (General Banzer: "lead us to the aims we set at the meeting of Charaña . . .").

[134] "Negotiations will be held with Chile on the basis of territorial compensation", *Presencia* (Bolivia), 29 Dec. 1975, CMC, Ann. 184, pp. 1019-1020.

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

[136] CR 2018/10, p. 43, para. 13 (Forteau).

Bolivia's Reply to which he referred contains references to six annexes, four of which I in fact referred the Court to last week[137]. That leaves two documents, neither of which adds anything.

*(a)* The first is a 2011 account of an interview by General Banzer in January 1976, where it is suggested that General Banzer, who was under immense political pressure, was avoiding talking of territorial compensation. But there is no suggestion in the account that territorial exchange was not the accepted basis for the negotiation. To the contrary[138].

*(b)* The second document is the clarification by Bolivia's Foreign Ministry dated 19 April 1976[139], which I did in fact take the Court to, albeit in a different context[140]. It is a helpful document for Chile. So far as concerns territorial exchange, Bolivia appears to rely on the document because it says that: "All aspects related to the proposed solution are at the negotiating table" and that there have been no "definitive or irreversible agreements"[141]. That is hardly language that helps Bolivia on its case on there being an international agreement, and it does not undercut the "fundamental basis" that had been accepted by Bolivia on territorial exchange. The document also says in terms: "The process of a prompt sovereign return to the Pacific Ocean is currently at a time in which both the Bolivian proposal and the response of the Government of Chile are in force and constitute the global basis for future negotiations."[142]

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[137] See CR 2018/9, p. 29, para. 27 (Wordsworth), quoting from 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 (which is the same statement as appears in Message of President Banzer, 21 Dec. 1975, in "Government 'globally' accepts Chilean response", *Los Tiempos* (Bolivia), 22 Dec. 1975, CMC, Ann. 183); CR 2018/9, pp. 31-32, para. 35 *(b)* (Wordsworth), referring to "Banzer: It will be the people who decide on the agreement with Chile", *Presencia* (Bolivia), 30 Dec. 1975, CMC, Ann. 185, p. 1037; CR 2018/10, p. 32, para. 34 *(b)* (Wordsworth), referring to "Foreign Minister Guzmán Soriano: We will give compensation that does not compromise our development", *Presencia* (Bolivia), 1 Jan. 1976, CMC, Ann. 187, p. 1053 (and see also p. 1047); and CR 2018/10, p. 31, para. 34 *(a)*, fn. 69 (Wordsworth), dealing with "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.

[138] See R. Prudencio Lizon, *History of the Charaña Negotiation* (2011), RB, Ann. 366, p. 1499, addressed in Chile's Rejoinder, para. 6.32 *(a)* and footnote 433.

[139] Clarification of the Bolivian Ministry of Foreign Affairs, 19 Apr. 1976, RB, Ann. 309, p. 775.

[140] See CR 2018/9, pp. 23-24, para. 6 (Wordsworth).

[141] Clarification of the Bolivian Ministry of Foreign Affairs, 19 Apr. 1976, RB, Ann. 309, p. 777.

[142] *Ibid*.

**C. Bolivia's reliance on Peru**

44. I move to the third point on Charaña, as to which it was being suggested that somehow a Chilean failure to negotiate with Peru was the cause of the breakdown.

45. This is a complete non-point. The negotiation broke down because of Bolivia's decision to pull back from its prior position on territorial exchange, and break off diplomatic relations for good measure. A different approach from Peru would have had no influence whatsoever on that issue.

46. Professor Forteau told you that my treatment of the reaction of Chile and Bolivia to Peru's November 1976 proposal was "expéditive et tronquée"[143], which appeared to be his way of declining, in a friendly way, Chile's invitation — issued twice in its written pleadings and repeated by me in opening — to deal at last with the incontrovertible evidence that Bolivia agreed with Chile to reject Peru's proposal (judges' folder, tab 115)[144].

47. It was also said that "Peru was clearly willing to continue negotiations on its proposal"[145]. The only evidence relied on consisted of statements made by Bolivia when it was trying to blame the failure of the negotiations on anything other than its change of position[146], and also there is an at best ambiguous statement made by Peru to the United Nations General Assembly in 1977. Here, Peru was emphasizing the need for "an overall solution of the problems" and also the three States' "respective interests"[147]. Peru was not in any way suggesting that it would back down from pushing its own interests, that is, in an area of shared sovereignty that it had described in November 1976 as a "*sine qua non* condition" to its consent[148].

48. And just so the Court has a further insight into Peru's position and into the level of complexities in this supposedly simple case, in Bolivia's *El Diario* newspaper on 29 March 1974,

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[143] CR 2018/10, p. 44, para. 15 (Forteau).

[144] CR 2018/9, p. 33, para. 39 *(b)*; RC, paras. 6.38-6.40; CMC, paras. 7.31-7.33, referring to Report of the Ministry of Foreign Affairs of Chile on the meetings held by G. Amunátegui, Special Envoy of the President of the Republic of Chile, and President Banzer of Bolivia, 22 Nov. 1976, CMC, Ann. 209. See also Report from Gregorio Amunátegui Prá to the President of Chile, Oct. 1976, RC, Ann. 420, p. 463.

[145] CR 2018/10, p. 44, para. 17 (Forteau).

[146] Letter from the President of Bolivia to the President of Chile, 21 Dec. 1977, CMC, Ann. 235; see CR 2018/10, p. 44, para. 17 (Forteau); the footnote incorrectly refers to RB, Ann. 235.

[147] CR 2018/10, p. 44, para. 17 (Forteau). See Verbatim Record of the Thirteenth Plenary Meeting of the 32nd Session of the UNGA, UN doc. A/32/PV.13, 29 Sep. 1977, CMC, Ann. 230, paras. 145 and 147.

[148] See "Complete version of the Explanations by the Peruvian Minister of Foreign Affairs José de la Puente", *El Mercurio* (Chile), 26 Nov. 1976, CMC, Ann. 213, p. 1207.

Peru's President had been asked about Bolivia being granted territory in the province of Arica, and he said: "Peru will not accept that [Bolivia] be given territories that were 'taken off' [taken off Peru, that is] during the war of the Pacific last century" and he said "that Chile 'cannot give to it (Bolivia) territories that were taken off from us'"[149].

49. We know from the record that these statements were still of concern to Chile and Bolivia in 1977[150].

50. And finally, although there were meetings in September 1977 at the highest levels between Bolivia, Chile and Peru, and it was agreed, then, that they would each appoint Special Representatives to "facilitate ongoing dialogue"[151], it was Bolivia that decided that it would not appoint its Special Representative[152], thus shutting down that potential avenue.

**D. The end of the negotiation**

51. I move to my fourth and final point in response on Charaña. Professor Forteau said that Chile was unable to reconcile its position that the negotiation had been pursued "as far as possible" with the fact that, as he put it, the negotiations had been "relancées" after 1979[153]. But there is no issue here.

52. What in fact happened was that Bolivia brought the Charaña process to a definitive end, and broke off diplomatic relations[154]. Had there been any obligation to negotiate, whether arising in the Charaña process or through the 1950 notes (and there was neither), this would have been discharged. And as I said last week, whether one approaches matters from the perspective of the

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[149] Declarations by President Juan Velasco Alvarado at an Informal Press Conference on the 28th regarding Bolivia's return to the Sea, 29 Mar. 1974, from *El Diario* (Bolivia), and reproduced in L.F. Guachalla, *Bolivia-Chile: The Maritime Negotiation, 1975-1978* (1982), pp. 78-79; tab 116 of the judges' folder. A full copy of this book was deposited with the Registry with Chile's Counter-Memorial in accordance with Article 50 (2) of the Rules of the Court, and an extract of this book was submitted as RB, Ann. 306.

[150] Note from the Bolivian Ambassador to Chile to the Minister for Foreign Affairs of Bolivia, No. 281/140/77, 7 Apr. 1977, RB, Ann. 314, p. 831; Letter from the Minister for Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, No. 22, 15 Apr. 1977, CMC, Ann. 220, p. 1319.

[151] Joint Press Release of the Foreign Ministers of Bolivia, Chile and Peru, 29 Sep. 1977, recorded in an aide-memoire of the Ministry of Foreign Affairs of Chile, 1977, CMC, Ann. 229, p. 1391.

[152] Letter from the President of Bolivia to the President of Chile, 21 Dec. 1977, CMC, Ann. 235, p. 1453.

[153] CR 2018/10, p. 43, para. 12 (Forteau).

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

position outlined by Professor Thouvenin[155], or the perspective of futility as per the Court's most recent cases[156], or by reference to the *Railway Traffic* case[157], the test is plainly met.

53. As to what happened post-Charaña, Chile indicated later in 1979 that it was still willing to negotiate on the basis of a territorial exchange[158]. But, as I said on Friday, and as was not challenged, Bolivia has never once said that it would negotiate on that basis[159]. That resolute refusal on Bolivia's part to return to the one-time accepted "fundamental basis" for the negotiation is as clear a demonstration as there could be that the Charaña negotiation had indeed proceeded as far as possible.

54. Mr. President, Members of the Court, on Monday you were taken to evocative images of declarations being made by Chile like butterflies that flew to their death at sunset[160], and a case has been put forward by Bolivia of promises repeatedly made but repeatedly broken by Chile[161].

55. The true position, however, is that at different times, but without ever either expressing or being understood to engage any legal obligation, Chile has been willing to enter into a negotiation, in particular in 1950 and 1975, and on both those occasions, the negotiation has failed due to Bolivia, and, when it has seen fit, Bolivia has severed diplomatic relations.

56. Professor Lowe said on Monday that Bolivia was confident that a formula for implementing a sovereign access could be found that would accommodate the vital interests of both States[162]. Professor Lowe did not suggest that there was any factual basis for that confidence, and the record shows that it has no factual basis whatsoever. He did not seek to suggest that the

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[155] See also P. Reuter, "De l'obligation de négocier", *in Mélanges Morelli*, Paris, 1975, p. 729.

[156] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 133, para. 159; see also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132.

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

[158] Verbatim Record of the Ninth Plenary Meeting of the Tenth Special Session of the UNGA, UN doc. A/S-10/PV.9, 30 May 1978, CMC, Ann. 245, p. 1617, para. 287.

[159] CR 2018/9, p. 37, paras. 51 and 54 (Wordsworth).

[160] CR 2018/10, p. 26, para. 14 (Remiro Brotóns).

[161] *Ibid.*, p. 66, para. 6 (Llorentty Soliz).

[162] *Ibid.*, p. 53, para. 4 (Lowe).

competing imperatives to which I referred last week[163] could somehow now be aligned in ways that proved quite impossible in 1950, and in the 1970s.

57. The issue that has been presented to you as one of simple reconciliation has been and is, in reality, one of huge complexity and political sensitivity in Bolivia, as in Chile. Professor Lowe said in conclusion that States have no right to turn their backs and to refuse to consider what he called "serious problem[s]"[164], but that of course is not what happened in this case. It is Bolivia that twice walked away, and it has no legal, or indeed any other basis, to say that negotiations on sovereign access should now recommence.

58. Mr. President, Members of the Court, I thank you for your attention and I ask that you call Professor Pinto to the podium, possibly after the morning break.

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

*The Court adjourned from 11.30 to 11.45 a.m.*

Le PRESIDENT : Veuillez vous asseoir. L'audience reprend. Je donne maintenant la parole à Mme la professeure Mónica 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, il me revient de répondre ce matin aux arguments des conseils de la Bolivie sur les résolutions de l'OEA, leurs effets juridiques, la conduite du Chili à leur égard et, enfin, l'absence de pertinence — selon la Bolivie — du silence de l'Organisation au cours de ces trente dernières années.

2. Je vais aborder cinq points successivement :

1) l'absence d'effet juridique contraignant des résolutions de l'OEA ;

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[163] See CR 2018/9, p. 30, paras. 31-32 (Wordsworth).

[164] CR 2018/10, p. 57, para. 24 (Lowe).

2) la conduite du Chili vis-à-vis des résolutions de l'Assemblée générale ;

3) l'obligation de négocier dans le cadre du règlement pacifique des différends ;

4) le silence de l'OEA depuis 1990 ; et

5) les négociations dans le cadre de l'approche nouvelle.

**Effet juridique obligatoire des résolutions**

3. Mon premier point, Monsieur le président, concerne *l'absence* d'effet juridique contraignant des résolutions de l'Assemblée générale de l'OEA.

4. Lundi matin, Mme Sander disait que «it cannot be right» que les résolutions de l'organe suprême de l'Organisation n'ont aucun *effet juridique*[165]. Mais, Mme Sander m'accorde des propos que je n'ai pas tenus. Mon propos ne concernait pas l'effet juridique des résolutions, qui est incontestable, mais plus précisément leur effet juridique *contraignant*.

5. Devant votre Cour, la Bolivie a tenté d'établir une obligation internationale imposant au Chili de négocier un accès souverain à la mer pour elle. Pour la Bolivie, les résolutions de l'Assemblée générale sont capables de créer une telle obligation internationale. Cette position ne peut être soutenue et, au risque de me répéter, la Bolivie était du même avis, au moins dans sa réplique. Elle reconnaissait à ce stade de la procédure que «the Assembly cannot oblige States to adopt a specific course of conduct»[166] et acceptait sans concessions que «the resolutions of the Assembly of the OAS are not, as such, binding»[167].

6. La Bolivie avait déjà été de cet avis en 1979 et en 1990 devant l'Assemblée de l'OEA et sa commission générale[168]. D'autres Etats membres ont également confirmé l'absence d'effet juridiquement contraignant des résolutions de l'Assemblée générale[169]. En 2011, c'est le département de droit international de l'OEA lui-même qui concluait dans une opinion juridique à l'absence d'effet juridique contraignant des résolutions de l'Assemblée : «The practice has been to regard General Assembly resolutions as expressions of a decision of a political nature that do not,

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[165] CR 2018/10, p. 33, par. 1 (Sander).

[166] REB, par. 289.

[167] *Ibid.*

[168] CR 2018/9, p. 41, par. 9 (Pinto).

[169] *Ibid.*, note 111 (Pinto).

in and of themselves, generate international responsibility for the member States.»[170] Le professeur Jean-Michel Arrighi l'a par ailleurs confirmé dans son cours à l'Académie de droit de La Haye en 2012[171].

7. Ceci, Monsieur le président, suffit à disposer de la question. Il ne fait aucun doute que les résolutions de l'Assemblée n'ont pas de valeur juridiquement contraignante pour les Etats membres de l'Organisation.

8. Mme Sander, sans doute consciente de cette faiblesse de la thèse bolivienne, cherche à établir l'effet juridiquement contraignant des résolutions par le truchement d'une obligation de bonne foi issue, dit-elle, de la Charte de l'OEA[172]. Mais, la Bolivie confond effet juridique et effet juridiquement contraignant. Une recommandation est dépourvue d'effet juridique contraignant. L'obligation qui pèse sur les Etats membres de la considérer de bonne foi ne saurait transformer sa valeur juridique ni donner naissance à une obligation d'accepter son contenu. C'est une chose d'examiner une résolution adoptée par l'Assemblée générale de bonne foi — et la Bolivie n'a pas apporté la preuve que le Chili a manqué à ce devoir. Mais, c'est toute une autre chose de soutenir qu'un Etat membre doit respecter le contenu de la résolution alors même qu'elle n'a pas de vocation à être juridiquement contraignante.

9. En tout état de cause, *rien* dans le texte des résolutions de l'Assemblée générale ne permet de conclure à l'existence ou à la création d'une obligation de *négocier un accès souverain à la mer*, comme la Bolivie veut vous le faire croire. Le Chili a examiné les termes utilisés par l'Assemblée d'une façon détaillée dans ses écritures[173], et j'ai également attiré votre attention sur les textes des résolutions dans ma présentation de vendredi dernier[174], sans être contredite par les conseils de la Bolivie.

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[170] OEA, Conseil permanent, opinion juridique du département de droit international concernant la valeur des résolutions de l'Assemblée générale et de documents découlant du sommet des Amériques, CAJP/GT/RDI-169/11, 28 février 2011 ; CMC, annexe 357, p. 2. Voir aussi CMC, par. 8.20.

[171] J. M. Arrighi, «L'Organisation des Etats américains et le droit international», *RCADI*, vol. 355, 2012, p. 328 («The Assembly [of the OAS] adopts resolutions that, as is the case in general for all resolutions of similar international organisations, are binding in so far as the bodies of the Organisation are concerned, but are only recommendations addressed to its Member States.»)

[172] CR 2018/10, p. 34, par. 5 (Sander).

[173] CMC, par. 8.7-8.22 ; DC, par. 7.7.

[174] CR 2018/9, p. 42-44, par. 13-14 (Pinto).

**La conduite du Chili vis-à-vis des résolutions de l'Assemblée générale**

10. J'en viens maintenant à mon deuxième point.

11. L'absence d'une quelconque obligation de négocier un accès souverain à la mer pour la Bolivie ne peut pas non plus être remédiée par la conduite du Chili, sur laquelle Mme Sander a tant insisté lundi matin en s'appuyant une fois encore sur l'avis consultatif de la Cour permanente concernant le *Trafic ferroviaire entre la Lithuanie et la Pologne*[175].

12. La conduite du Chili n'aide pas la Bolivie, et ce, pour deux raisons.

13. D'abord, dans l'affaire du *Trafic ferroviaire*, la Lithuanie et la Pologne avaient formellement déclaré leur acceptation de la résolution du Conseil de la Société des Nations avant son adoption par le Conseil[176].

14. La présente affaire est bien différente : cette acceptation fait défaut, tant s'agissant du caractère contraignant des résolutions que de l'obligation de négocier un accès souverain.

15. En effet, indépendamment des objections exprimées par la délégation chilienne concernant la compétence de l'OEA pour adopter les résolutions en question, le Chili a très nettement exprimé son désaccord avec les résolutions de l'OEA. Il l'a fait au moins dans *huit* cas. Le Chili a alors voté *contre*, ou a *refusé de voter* pour le projet de résolution soumis à l'Assemblée en s'opposant à la compétence de l'Organisation et à l'effet juridiquement contraignant d'une résolution dans une déclaration qu'il a formulée[177].

16. Même en 1980, 1981 et 1983, le Chili n'a pas voté *pour* les résolutions. Il ne s'est tout simplement pas opposé au consensus tout en exprimant ses réserves sur les compétences de l'Organisation[178]. A en croire la Bolivie, le simple fait de ne pas s'opposer au consensus suffirait à transformer une recommandation non obligatoire en obligation internationale. Cela surprendrait un bon nombre de représentants permanents auprès des organisations internationales.

17. Lundi, Mme Sander a tenté de créer l'apparence d'une acceptation en se référant à la participation du Chili aux discussions qui ont permis d'établir le texte des résolutions adoptées

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

[176] *Ibid.* Voir également l'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.

[177] OEA, Assemblée générale, résolution 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.

[178] Voir notamment CMC, annexes 252, 253, 255, 264 et 265.

en 1981 et en 1983[179]. Mais participer à l'élaboration d'un texte et accepter une obligation juridique contenue dans ce texte sont deux choses différentes. Les raisons pour lesquelles un Etat décide de participer à la rédaction d'une résolution peuvent être très diverses. Un Etat peut participer à l'élaboration et l'adoption d'un texte dans le seul but d'en réduire l'importance et la portée ; mais une telle participation ne crée pas d'obligation d'agir en conformité avec ses termes. Monsieur le président, la participation du Chili aux travaux des commissions de l'Assemblée générale de l'OEA ou aux discussions quant à la formulation de certaines résolutions ne permet certainement pas de transformer ces résolutions en textes juridiquement contraignants pour ses auteurs. En effet, l'élément déterminant, à savoir une intention d'être juridiquement lié, fait défaut.

18. J'en viens à la deuxième raison pour laquelle la conduite du Chili est sans pertinence dans notre affaire. Les résolutions qui ont été adoptées par consensus — soit les résolutions 481, 560 et 686 de 1980, 1981 et 1983 respectivement — ne mentionnent *pas* d'obligation de négocier un accès souverain à la mer. En 1980 et 1981, l'Assemblée générale s'est contentée d'inviter les Etats concernés «à ouvrir par les voies appropriées un dialogue qui conduise à la solution la plus satisfaisante de ce problème»[180] — le problème d'accès à la mer. Aucune allusion à une négociation, ni à un accès souverain à la mer. Même si la Bolivie était en mesure d'apporter la preuve de l'acceptation par le Chili de ces deux résolutions (ce qu'elle ne peut pas faire comme je viens de vous le démontrer), elle ne parviendrait toujours pas à prouver l'existence d'une obligation de négocier un accès souverain à la mer.

19. La situation quant à la résolution 686 de 1983 n'est pas différente. Le texte de la résolution — établi à l'issue de discussions entre le Chili, la Colombie et la Bolivie — ne vise *pas* des négociations concernant un accès souverain à la mer, mais concerne (et je rappelle, Monsieur le président, ce que M. Koh a dit ce matin — les termes sont importants) un «rapprochement des relations entre les Etats». La Bolivie a pourtant soutenu le contraire — en prétendant que le rapprochement souhaité par les Parties était conditionné à l'accès souverain. Rien ne confirme cette thèse. Ceci n'était ni dans l'esprit ni dans le sens de la résolution 686. Le Chili l'a expliqué :

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[179] CR 2018/10, p. 36, par. 12 *a)* (Sander).

[180] OEA, Assemblée générale, résolution AG/RES. 481 (X–O/80), Problème de l'accès de la Bolivie à la mer, 27 novembre 1980, CMC, annexe 254 ; OEA, Assemblée générale, résolution 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.

«[A] process of rapprochement must first exist, which hopefully leads to the resumption of bilateral relations, and, subsequently, at a third stage, the existing differences should be addressed, which include any aspects both countries wish to raise.»[181] La clef était donc le rapprochement entre les deux Etats. Les échanges ultérieurs l'ont montré et la déclaration chilienne devant l'Assemblée générale de 1984 à laquelle Mme Sander s'est référée lundi le confirme. Pourtant, elle a omis de lire les raisons qui ont poussé le Chili à participer au consensus de 1983. Je vais le faire en anglais :

> «It did so — c'est-à-dire le Chili — to show its spirit and desire for rapprochement with Bolivia, especially bearing in mind the friendly gesture by the distinguished President of Colombia, His Excellency Belisario Betancur, and the predisposition shown by the Government of Bolivia to channel a fruitful dialogue between both countries through a bilateral route.»[182]

On voit mal comment la Bolivie peut continuer à prétendre devant la Cour que le Chili a accepté *une obligation de négocier un accès souverain à la mer*. Cette obligation est absente de la résolution 686.

**Obligation de négocier dans le cadre du règlement pacifique des différends**

20. Ceci m'amène à mon troisième point.

21. La Bolivie soutient que l'obligation de négocier un accès souverain à la mer qui pèse aujourd'hui sur le Chili découle de son statut d'Etat membre de l'OEA en vertu des dispositions de la Charte concernant le règlement pacifique des différends.

22. Je ne vais pas répéter les propos du professeur Thouvenin sur le sens et la portée de l'obligation de régler pacifiquement les différends. Comme l'article 2, paragraphe 3, de la Charte des Nations unies, l'article 3 i) de la Charte de l'OEA ne saurait être la source d'une obligation qui impose au Chili de négocier avec la Bolivie sur la question de son accès souverain à la mer.

23. Mme Sander a essayé de vous faire croire lundi matin que l'Assemblée générale avait reconnu l'existence d'un différend entre la Bolivie et le Chili. Cela est pour le moins étonnant. Le conseil de la Bolivie a certes «cited in detail directly from the numerous OAS resolutions»[183] ; mais

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[181] Déclaration du sous-secrétaire d'Etat aux affaires étrangères du Chili, 22 décembre 1983, CMC, annexe 270.

[182] Procès-verbal de la 3e réunion de la commission générale de l'Assemblée générale de l'Organisation des Etats américains, 31 octobre 1979, DC, annexe 432, p. 372.

[183] CR 2018/10, p. 34, par. 8 (Sander).

elle n'a jamais trouvé le terme «différend» et encore moins une référence aux dispositions pertinentes de la Charte de l'OEA. Et pour cause, aucune des onze résolutions ne mentionne l'existence d'un «différend». Tout au plus, pour reprendre les termes de Mme Sander, on y trouve «repeated reference … to the need to find an «equitable solution» to the «maritime problem» of Bolivia's «landlocked status»».[184] Un problème, ou une situation pendante, n'est pas un «différend» au sens de la Charte tout au moins. Le choix de ne pas employer ce terme dans les résolutions était délibéré et ne peut pas aujourd'hui être ignoré par l'emploi de traductions qui ne sont pas fidèles à son original.

24. Il ne s'agit pas là d'un hasard. En effet, plusieurs projets de résolutions se référaient aux dispositions pertinentes de la Charte de l'OEA visant le règlement pacifique des différends[185]. Mais — et mes contradicteurs persistent à ignorer ce point — ces références ont finalement disparu des textes de résolutions adoptées par l'Assemblée[186].

25. Dans ses plaidoiries cette semaine, la Bolivie continue de traduire les termes «diferencias pendientes» par «pending disputes»[187]. Mais si, comme l'a suggéré le professeur Remiro Brotóns[188], l'on se tient au texte utilisé par les Parties — c'est-à-dire l'espagnol — cette unique référence des prétendus différends pendants disparaît aussitôt et laisse la Bolivie sans preuve pour ses allégations. Une «diferencia» — *différence* —, Monsieur le président, n'est pas un différend.

26. De plus, lorsque l'OEA rentre dans le cadre du règlement pacifique des différends entre ses Etats membres, elle utilise des termes précis. A titre d'exemple, la résolution prise par le Conseil permanent en 2003 relative au règlement du différend entre le Belize et le Guatemala se réfère expressément à la notion de règlement des différends[189].

27. Il en résulte que dans l'appréciation de l'Organisation, il n'y avait pas de différend entre le Chili et la Bolivie, et partant, pas d'obligation de régler ce différend. Il s'agissait d'un problème

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[184] CR 2018/10, p. 35, par. 8.

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

[186] CR 2018/9, p. 44-45, par. 17 (Pinto).

[187] Voir onglet n° 41 du dossier de plaidoiries de la Bolivie.

[188] CR 2018/6, p. 47, par. 8 (Remiro Brotóns).

[189] OEA, Conseil permanent, résolution CP/RES. 836 (1353/03), Appui au règlement pacifique du différend territorial qui oppose le Belize au Guatemala, 12 février 2003.

purement politique. L'interprétation bolivienne en vertu de laquelle l'article 2, paragraphe 3, de la Charte des Nations Unies et l'article 3 de la Charte de l'OEA s'appliqueraient non seulement à des différends proprement dits mais aussi à tout désaccord et toute question pendante est-elle réellement concevable ? En aucun cas.

**L'absence de résolutions depuis 1990**

28. Mesdames et Messieurs de la Cour, j'en viens à mon quatrième point : l'absence d'action prise par l'organisation régionale au cours des trente dernières années. Contrairement à ce qu'affirment mes contradicteurs, il n'y a pas de «narrative from 1990 onwards» au sein de l'OEA. Il y a au contraire une nette rupture dès 1989.

29. Mme Sander considère que le simple fait que le problème de l'accès à la mer continuait à être inscrit à l'ordre du jour de l'Organisation par la Bolivie entre 1990 et 2013 constitue la preuve d'une «express and continuing recognition by the Assembly that there is a pending issue, a dispute between the two Member States»[190]. Ceci est pour le moins surprenant. C'est la Bolivie elle-même qui a inscrit ce sujet à l'ordre du jour, année après année, conformément à l'article 29 du Règlement de procédure de l'Assemblée. Mais au-delà de cette inscription unilatérale, elle n'a présenté *aucun* projet de résolution et *aucune* résolution n'a été adoptée par l'Assemblée depuis 1990. Monsieur le président, le chapitre de l'OEA et l'instrumentalisation de l'Organisation et de l'isolement politique du Chili sous le régime de Pinochet, a bien pris fin en 1989.

30. Les déclarations du secrétaire général de l'OEA et de certains Etats membres confirment cette absence de continuité. Il n'est plus question d'une quelconque implication de l'Organisation, mais de dialogue bilatéral[191]. L'OEA refusait «mediating in the process of dialogue»[192]. La Bolivie elle-même confirmait en 1990 qu'avec la dernière résolution de 1989 : «one phase is drawing to a close and making way for another»[193].

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[190] CR 2018/10, p. 38, par. 18 (Sander).

[191] «Insulza : Il est temps de faire des propositions concrètes pour la Bolivie sur un débouché maritime», *Cooperativa*, 29 novembre 2010, MB, annexe 141, p. 527.

[192] «L'OEA ne fera pas de médiation sur la revendication maritime entre la Bolivie et le Chili», *El Diario*, 21 avril 2006, MB, annexe 134, p. 511.

[193] Procès-verbal de la 2e réunion de la commission générale de l'Assemblée générale de l'Organisation des Etats américains, 6 juin 1990, CMC, annexe 307, p. 2121.

31. L'épisode OEA a pris fin en 1989. Dans sa dernière résolution, l'Assemblée générale a simplement affirmé «l'importance que revêt la solution du problème de l'accès de la Bolivie à la mer … en exhortant les parties au dialogue»[194]. Il n'y a pas de reconnaissance de l'existence d'un différend. Il n'y a plus de recommandation aux Parties d'entrer en négociations. Il n'y a plus de mention d'un intérêt de l'hémisphère. Et surtout, il n'y a plus de mention du caractère souverain de l'accès à la mer, ce qui est incompatible avec la théorie nouvelle de la continuité développée par la Bolivie. Les discussions engagées en 1990 ne portaient plus non plus sur l'accès souverain à la mer, comme l'a expliqué le docteur Juratowitch la semaine dernière[195].

32. Les trente ans de silence de la part de l'Organisation corroborent l'absence d'une obligation de négocier ou de régler pacifiquement le soi-disant différend. Ce silence est particulièrement pertinent eu égard au fait que l'organisation régionale aurait été seule habilitée à vérifier l'exécution et le respect d'un engagement pris à son égard[196]. Jamais l'Organisation — voire même la Bolivie — a accusé le Chili d'avoir manqué à une quelconque obligation.

**L'approche nouvelle (1986-1987)**

33. Ceci m'amène, Monsieur le président, à mon cinquième et dernier point : l'«approche nouvelle».

34. Les conseils de la Bolivie sont restés silencieux sur cet épisode, certes court mais riche d'enseignements. Le professeur Forteau a simplement affirmé que le Chili avait cru bon dans son rappel des faits de «sauter directement de 1978 à la période postérieure à 1987»[197]. Il n'en est rien, mais je m'abstiendrai de répéter les faits qui sont, j'en suis sûre, connus de la Cour et me référerai à ma plaidoirie de la semaine dernière, laquelle décrit les discussions et négociations bilatérales qui

[194] 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.

[195] CR 2018/9, p. 57-61, par. 24-41 (Juratowitch).

[196] *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.

[197] CR 2018/10, p. 47, par. 29 (Forteau).

ont eu lieu en 1986 sur une multitude de sujets d'intérêt commun[198], y compris sur la question de l'accès à la mer[199].

35. J'aimerais toutefois rappeler quelques éléments qui, nous semble-t-il, caractérisent les échanges entre la Bolivie et le Chili dans le cadre de cette «approche nouvelle».

*a)* L'approche nouvelle était, comme son nom l'indique (nom que la Bolivie a d'ailleurs choisi elle-même) «nouvelle». Il ne s'agissait ni de la poursuite du dialogue de rapprochement échoué en 1983 et 1984, ni d'une nouvelle négociation de Charaña. Lors de la rencontre d'avril 1987, le ministre des affaires étrangères du Chili saluait cette initiative qu'il caractérisait comme une «new atmosphere»[200].

*b)* Ni la Bolivie, ni le Chili ne s'est senti obligé d'entrer en négociation sur la question de l'accès à la mer en 1987. Le ministre bolivien des affaires étrangères soulignait que la présence de la délégation bolivienne «essentially reflect[ed] [the] testimony before Chile and the international community of the desire that assists us to seek solutions to our problems through dialogue, understanding, and fraternity»[201]. Aucune mention donc d'une quelconque obligation assumée par les deux Etats.

*c)* La Bolivie a soumis plusieurs propositions relatives à l'accès à la mer, toutes impliquant une cession d'une partie du territoire chilien à la Bolivie[202]. Le Chili a soigneusement pris en compte ces propositions[203], il a demandé des précisions quant à leur teneur[204], à la suite de quoi il a engagé des consultations au niveau interne.

*d)* A l'issue de ces consultations menées de bonne foi par le Chili, il était clair que la cession d'une partie du territoire chilien était inacceptable pour le peuple chilien[205]. C'est ce que le ministre

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[198] CR 2018/9, p. 49-50, par. 27-29 (Pinto) ; 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.

[199] CR 2018/9, p. 50-51, par. 30-31 (Pinto).

[200] Discours du ministre des affaires étrangères du Chili, 21 avril 1987, CMC, annexe 291, p. 1949.

[201] Discours du ministre des affaires étrangères de la Bolivie, 21 avril 1987, DC, annexe 435, p. 647.

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

[203] 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.

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

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

chilien a rapporté à son homologue bolivien à l'issue de ces négociations, tout en rappelant que le Chili restait disposé à continuer les discussions, pour autant que celles-ci ne portaient pas sur la question d'un accès souverain[206].

*e)* Les résolutions adoptées par l'Assemblée générale en 1987 et 1988 ne condamnent pas le Chili pour avoir violé une quelconque obligation internationale et n'attribuent pas la responsabilité de la rupture des négociations au Chili.

*f)* Ni la Bolivie ni l'OEA ne considérait à l'époque que ces négociations avaient créé une nouvelle obligation pour le Chili de négocier l'accès à la mer de la Bolivie.

36. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie pour votre bienveillante attention. Monsieur le président, je vous prie d'appeler sir Daniel Bethlehem à la barre.

The PRESIDENT: I thank Professor Pinto and I now give the floor to Sir Daniel Bethlehem. You have the floor.

Sir Daniel BETHLEHEM:

## WRAP-UP

### Introductory remarks

1. Mr. President, Madam Vice-President, Members of the Court, I am going to attempt to draw some of the threads together, there are three parts to my submissions. First, I will make some general observations on the arguments we heard from Bolivia on Monday. Second, I will pick up where Professor Pinto has just left off on the OAS and I will address Bolivia's argument endeavouring to maintain its claim through the 1990s and 2000s until it instituted these proceedings in 2013. Third, I will conclude with some brief observations on Bolivia's continuity and accumulation arguments.

[206] Déclaration du ministre des affaires étrangères du Chili, 9 juin 1987, CMC, annexe 296, par. 3 ; CR 2018/9, p. 51, par. 32 (Pinto) ; voir aussi le dossier de plaidoiries du Chili, onglet n° 74.

**General observations**

2. Turning to some general observations, as I listened to Bolivia's submissions on Monday, I could not escape the image of decoy flares being fired off to distract attention from the real issues that are engaged by this case. We heard a new theory from Professor Akhavan, invoking local custom and the *Right of Passage* case[207]. A theory of accumulation finally got its outing. Professor Lowe, in sonorous tones, expressed indignation that Chile was refusing the most basic international courtesy of opening letters of entreaty by its impoverished neighbour who sought only to discuss matters of vital interest. For Professor Chemillier-Gendreau, Chile was the jailor of a captive Bolivian people. The imagery of historic injustice was conjured up everywhere by our friends on the other side of the room.

3. Chile does not does not accept Bolivia's vision of history, nor the manner in which it carries it forward into the present. It is partial, it is self-serving and it is indignant. Article 38 (1) of the Statute of the Court provides that it is the function of the Court to decide "in accordance with international law" such disputes as are submitted to it. Bolivia sought to contrast justice with law and suggested that perhaps Chile would like to rename the Court the International Court of Law[208], as if somehow invoking law in support of one's case is a grubby distraction from the pursuit of a higher goal, the righting of perceived century-old wrongs.

4. Chile is not embarrassed to root its case in law, and it is in an adjudication based on law that justice between the Parties in this case will be found. This Court and courts and tribunals the world over are required, time and again, to determine that the claims of one side or other fail or are excluded for reasons of want of jurisdiction, temporal or material, are inadmissible, or are not properly justiciable for some other reason, notwithstanding appeals to sentiment and claims of injustice.

5. Bolivia, through its counsel, passes in silence over the injunction to decide in accordance with international law in Article 38 (1) of the Statute and, although without identifying it in these terms, it lights comfortably on Article 38 (2) of the Statute. The Court must be swayed by claims of injustice, Bolivia pleads. Professor Lowe intones that the Court must choose between impotence

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[207] *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, p. 6.

[208] CR 2018/10, pp. 62-63, para. 19 (Chemillier-Gendreau).

and aimlessness or the path of righteousness laid out by Bolivia that would found an obligation to secure for Bolivia some cession of sovereign Chilean territory[209]. Although not expressed in these terms, Bolivia is in effect seeking from the Court a decision *ex aequo et bono*. But, a solution *ex aequo et bono*, or — to better capture the way in which Bolivia has put it: a solution that turns on justice *extra legem* — "is by definition *not* a decision 'on the basis of international law'"[210].

6. In my submissions last week, I addressed the change in Bolivia's case. There was more change from Bolivia on Monday. Others have remarked on this already. I also drew attention to the discordance in Bolivia's case in the different claims advanced by different counsel — an obligation of result by some and an obligation of conduct advanced by others. Now Bolivia made no attempt at all to reconcile this discordance in its reply. On the contrary, Bolivia continues to ride two horses, content to leave the direction of travel to what it hopes will be a sympathetic Court, plucking from the chaff of Bolivia's argument a legal theory on which to found a judgment. Bolivia's final submissions, though, affirm the Prayer for Relief in Bolivia's written pleadings. Bolivia maintains its request for an order declaring that Chile has an obligation to negotiate to achieve a specific result. This is inconsistent with the Court's 2015 preliminary objections Judgment.

7. Mr. President, Members of the Court, Professor Lowe said on Monday that Bolivia submits "that a State should open an official letter from another State, read it, consider it, and respond to it. What does Chile suggest as an alternative?", he asks. "Leaving the letter unopened? Throwing it in the bin?"[211]. His indignation was noted, I am sure, by his National Authority but this is the stuff of theatre, this is not law. The reality is that Chile has been very attentive to Bolivia's correspondence, has opened Bolivia's letters and has replied to them. Professor Lowe's unopened-letter refrain corrupts the reality of the Parties' engagement over decades. On occasion, Chile engaged with Bolivia on the issue of sovereign access. On each occasion, for different reasons, those discussions came to nothing. The negotiating moment was spent. As I observed last week,

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[209] CR 2018/10, p. 54, para. 7 (Lowe).

[210] H. Thirlway, *The Law and Procedure of the International Court of Justice*, Vol. I (2013), p. 233, fn. 401; emphasis added.

[211] CR 2018/10, p. 56, para. 15 (Lowe).

Bolivia was adept at walking away, it was adept at breaking diplomatic relations, it was adept at making demands.

8. Today, Chile no longer receives official letters from Bolivia on the subject of sovereign access that require opening. Today, rather, Chile receives ultimata from Bolivia calling for negotiations with conditions, as in the case of President Morales' 17 February 2011 missive demanding that Chile submit a maritime proposal for negotiation by 23 March 2011[212]. Today, we are here addressing Bolivia's claim of historic injustice. Today, Bolivia communicates with Chile through the tweets of its President, even in the midst of these proceedings.

9. In our opening submissions, we noted the latest presidential tweet, but we did not exhibit it to you. It is now up on the screen, and I note in particular the last sentence of that tweet: "*Antofagasta was, is, and will be Bolivian territory*."

10. This is not exactly the stuff of good-faith outreach by Bolivia suggested by Professor Lowe. If, at some point, the moment comes that Bolivia sends a letter that requires reading, that merits consideration, and calls for a response, and then Chile stays silent, then Professor Lowe will be entitled to his indignation. Until then, Bolivia should stick with the law.

11. Mr. President, Members of the Court, turning to Bolivia's argument about an obligation to negotiate writ large, in Article 2 (3) of the United Nations Charter and Article 3 (i) of the OAS Charter, Professor Thouvenin has already had something to say on this. I would only like to add something brief.

12. Bolivia's argument under this heading hinges on two points. The *first* is the contention that Article 2 (3), and Article 3 (i) of the OAS Charter create an actionable obligation to negotiate, justiciable in its own right, that is to be read into the obligation to settle international disputes by peaceful means. The *second* is that Articles 2 (3) and 3 (i) establish an obligation of membership that must be taken seriously. And Ms Sander goes on to root in this obligation of membership a requirement of respect for recommendatory resolutions of the OAS General Assembly.

13. On the first of these contentions, Bolivia failed to engage with the point that it is in fact seeking from Chile is not a good-faith engagement without preconditions, but rather a compulsory

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[212] See CR 2018/9, p. 64, para. 51 *(b)* (i)-(iii) (Juratowitch); CMC, para. 9.23.

process that has as a predetermined outcome. Nowhere in Article 2 (3) or Article 3 (i) is such an obligation to be found. Nor can such an obligation be there implied. These provisions do not give one State a right to summon another to the negotiating table on a skewed prospectus that already has the outcome preordained. This is the very antithesis of good faith. Yet this is the interpretation that Bolivia would have you read into these provisions.

14. And it also cannot escape comment that, in his zeal to urge the Court not to be impotent and aimless, and to imbue his Article 2 (3) case with substance and urgency, Professor Lowe held out the spectre of a threat to international peace and security. A failure to resolve Bolivia's sovereign-access aspiration, he said, "can only result in tensions that could in the long term endanger peace and security"[213]. Quite remarkable! This also does not sit well with Bolivia's entreaty to good faith.

15. On the second contention, obligations of membership of the United Nations and the OAS must be taken seriously. As Professor Pinto has observed with regard to the OAS, the OAS has mechanisms of action. These have not been engaged on this matter. Indeed, since 1990, the OAS has failed to lend any support to Bolivia on this issue. The OAS General Assembly has now been silent on the issue of Bolivia's claim for more than two decades. The Organ of Consultation has not picked up the baton[214]. The Permanent Council has not taken any action pursuant to its remit under Articles 84 to 88 of the OAS Charter. The motivations that drove OAS engagement in the 1980s no longer do so today.

16. There is an additional consideration already remarked on by Professor Pinto, but to which I should add my voice. There is a reality that will be familiar to anyone who has participated as the representative of their State in plenary meetings of the General Assembly, whether of the United Nations or the OAS. Joining consensus does not mean agreement. It indicates a sensitivity to process and a disinclination to object. Participating in the drafting of resolutions, shaping their content, may be about affirmation but it equally may be about revision and deletion to avoid the need for dissent. Exhortatory resolutions are important. They are part of the diplomatic process. But they do not create legal obligations. For that, we need institutional action, we need binding

[213] CR 2018/10, p. 54, para. 6 (Lowe).

[214] OAS Charter, Art. 61.

decisions or we need customary international law. And we have none of these in the present case. Whatever the interpretation to be placed on the OAS resolutions, we also now have more than two decades of silence since the last resolution was adopted.

**The 1990s and beyond**

17. Mr. President, Members of the Court, I turn now to address Bolivia's argument about the post-OAS period.

18. There is an overarching point that warrants comment which I hope will have emerged from my colleagues' submissions to this point. Since the start of this hearing, Bolivia has progressively retreated from the law. Its reply on Monday was striking for its emphasis. There was a little comment on the 1920s, the 1950s and Charaña. But the real emphasis came on other points. The first was Bolivia's historic injustice claim. And this case has become all about the righting of perceived historic nineteenth century wrongs. The second point was Professor Lowe's obligation to negotiate derived from the United Nations and OAS Charters. The third point was the OAS. Although not cast in these terms, the OAS, and the weight to be given to non-binding resolutions, took on, as we perceive it, a three-fold importance: *first*, to take Bolivia's claim beyond Charaña — it needs to do this to sustain its case; *second*, to imply that a forward-leaning judgment of this Court would have hemispheric cover; *third*, to suggest that the hemisphere, expressing itself through General Assembly resolutions, considered that negotiations were warranted and necessary.

19. Mr. President, Members of the Court, *as I suggested last week, what is striking about Bolivia's case, again and again, is that they are making it up as they go along.* What began life as a case that purported to be simple and straightforward has become unknowable, with Bolivia in effect saying to the Court: "Here are some theories on which you may be able to find an obligation to negotiate. Please complete the analysis for us. Historic injustice demands it."

20. Mr. President, Members of the Court, Professor Forteau reeled off a list of dates after 1987 in which he said Bolivia had asserted a legal obligation to negotiate[215]. He began in 1988, citing a statement of the Bolivian Foreign Minister in OAS meeting minutes. He did not though put those minutes in your judges' folder. You will find them at tab 120 of our judges' folder. I do not

[215] CR 2018/10, p. 41, para. 4 (Forteau).

suggest that you turn them up now, but they are there for your convenience to look at in due course. Let us see what the Bolivian Foreign Minister said, and the Representative of Chile in response. It is instructive.

21. You now see on the screen an extract from the statement by the Bolivian Foreign Minister. And as will be evident — and you will see this in context when you look at the fuller document — he twice characterizes the engagement of the Parties prior to 1987 as "diplomatic efforts"[216]. There is nowhere in this document any suggestion on his part that these engagements were driven by a sense of legal obligation. And I do invite, with respect, the Members of the Court to have a look at the document more fully.

22. We then come to the statement of the representative of Chile. And what do we see? You have a paragraph extracted on the screen. And we see here an explicit enquiry by Chile of Bolivia about the source in law of Bolivia's "alleged right to reclaim from Chile its own sovereign access to the Pacific"[217]. Chile asks the question of Bolivia directly.

23. And what is the response of the Bolivian Foreign Minister? It is not to assert a legal obligation to negotiate on Chile's part. Rather — and you will see an extract of the response on the screen — rather, Bolivia roots its claim in "rights over the territories of the Atacama along the Pacific Ocean [that] go back to times even before our independence"[218]. In other words, in Bolivia's own words, it is a claim of historic entitlement. But there is no suggestion anywhere from Bolivia's Foreign Minister that Bolivia considers Chile to be subject to a legal obligation to negotiate.

24. Let me take another example from Professor Forteau's list of dates. He referred to a 1992 Statement by the Bolivian Foreign Minister also reflected in an OAS meeting minutes[219]. Once again, he did not take you to the document, but suggested vaguely that there was something on page 671 — presumably Bolivia's use of the word "agreed" — which indicated that Bolivia was asserting the existence of an obligation to negotiate. The document is at tab 124, again I do not

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[216] Minutes of the Third Meeting of the General Committee of the OAS GA, 16 Nov. 1988, CMC, Ann. 302, p. 2078.

[217] *Ibid.*, p. 2084.

[218] *Ibid.*, p. 2087.

[219] CR 2018/10, p. 41, para. 4 (Forteau); CR 2018/7, pp. 55–56, para. 6 *(v)* (Forteau), citing RC, Ann. 437, p. 671.

propose to take you to the text now. There are two tabs — tab 125[220] and tab 126[221] — which have extracts. Mr. President, Members of the Court, in the interest of not trespassing into the time of the Chilean Agent, I just draw your attention to those extracts at tab 125 and tab 126, and invite you to have a look at those in slower time.

25. And what you will see from these extracts, and from the document as a whole, is that Bolivia's wish to negotiate sovereign access is evident from these extracts. But there is no assertion that Chile is bound by an obligation to negotiate. On the contrary, the whole tenor of the statement by the Bolivian Foreign Minister, in these documents, is one of a hoped for diplomatic engagement — not one of binding legal obligation.

26. Mr. President, Members of the Court, if there is a persistent theme in Bolivia's pleadings, it is that they refer you to documents but seldom take you to the text. They invoke language but the invocation cannot be sustained when it comes to scrutinizing what the text actually says. Mr. President, Members of the Court, there is an aphorism, more poignant today, perhaps, than when it was first made, which is attributed to a former, much admired, United States Permanent Representative to the United Nations, Daniel Patrick Moynihan. As he put it: "Everyone is entitled to his own opinion, but not to his own facts". Mr. President, Members of the Court, in this era of Presidential tweets in the middle of legal proceedings before the Court, this aphorism goes to the heart of Bolivia's case. Bolivia is entitled to its own opinion. It is not entitled to its own facts. Bolivia has brought Chile to the Court. If Bolivia is to sustain its case, it must do so on the evidence, on the facts, not on assertions that cannot be sustained through an examination of the documents.

27. Mr. President, Members of the Court, there is a great deal of additional documentary evidence in the record of this case to which you will have to have regard. As an examination of this material will show, there was no continuity between the period before 1987 and the period after 1987. By the time we get to 1990, and Chile's return to democracy, the focus of the Parties shifted to a pragmatic approach and a wider agenda of normalization. An example of this is the

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[220] Minutes of the Second Meeting of the General Committee of the OAS GA, 19 May 1992, RC, Ann. 437, p. 671; judges' folder, tab 125.

[221] *Ibid.*, p. 673; judges' folder, tab 126.

1993 statement, once again, by the Bolivian Foreign Minister in the meeting minutes of the OAS — there is now an extract on the slide — when he affirmed "the efforts made by Bolivia and Chile in the passing of the last three years, for the purpose of implementing a new approach in the treatment of different questions included in the agenda of the bilateral relations"[222]. This new approach manifested discontinuity between the new pragmatism and what went before. There was no continuity between what took place before 1990 and what took place afterwards.

28. As in the case of disputes the world over, when two States, faced by a long-running difficulty, would like to work towards a reset in relations, the thorny issue between them is relegated down the agenda. It is described in technical terms. It is placed on the back burner of exchanges. In this way, both parties preserve their own narrative but proceed on the shared understanding that the way forward is not to headline issues of contention.

29. Including an item on an agenda does not create an obligation to negotiate. Still less does it create an obligation to negotiate a preordained outcome, with only the modalities being left for discussion. Bolivia accuses Chile of raising spectres of diplomatic apocalypse by highlighting the systemic unreality of what Bolivia is saying. But, Mr. President, Members of the Court, there *is* an unreality about what Bolivia is saying. No one enters into a negotiation thinking that they are legally bound to negotiate or that they are legally obliged to reach a specific outcome.

30. Mr. President, Members of the Court, after 2011, further negotiations became futile[223]. There was no repudiation by Chile of any obligation to negotiate[224]. What became evident was that the Bolivian President was set on a different path[225]. By 2011, Chile and Bolivia had "exhausted

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[222] Minutes of the Third Meeting of the General Commission, 23rd Regular Session of the OAS GA, 9 June 1993, RB, Ann. 338, p. 1143.

[223] See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 134, para. 162 ("[T]he Court would examine whether Georgia pursued these negotiations *as far as possible* with a view to settling the dispute. To make this determination, the Court would ascertain whether the negotiations failed, *became futile*, or reached a deadlock"; emphasis added); MB, para. 281 ("*The obligation to negotiate ceases* only once negotiations have succeeded or have been properly and fully exhausted and/or *become futile*"; emphasis added). See also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132 ("The Court notes that the meaning if negotiations for the purposes of *dispute settlement or the obligation to negotiate*, has been clarified through the jurisprudence of the Court"; emphasis added).

[224] This is addressed by Chile in CR 2018/9, pp. 63–65, para. 51 *(b)* (Juratowitch). See also RC, paras. 8.18-8.32.

[225] See Minutes of the Fourth Plenary Meeting of the OAS GA, 5 June 2012, CMC, Ann. 363, p. 2969, paras. 4-6; "The Unknown offer from Piñera to Bolivia", *La Tercera* (Chile), 11 Jan. 2015, RB, Ann. 369.

such possibilities of negotiations as were open" to them[226]. Chile had made it clear that it would not cede territory to Bolivia. Bolivia had made it clear that its Constitution required nothing less. There was nowhere further to go. Even assuming, *arguendo*, that Chile was under an obligation to negotiate on the issue of sovereign access, by the time we get to 2011, that obligation had run its course. There was no scope for any meaningful further negotiations between the Parties.

**Bolivia's continuity and accumulation arguments**

31. Mr. President, Members of the Court, I come now very briefly to Bolivia's continuity and accumulation arguments. Professor Thouvenin has already addressed this, so I can indeed be brief.

32. As with much of Bolivia's submissions, the edges of Bolivia's continuity and accumulation arguments are neither well defined nor clearly delineated. Their continuity argument appears to be that an obligation to negotiate came into existence at some point, although they cannot say not when, and has survived through successive iterations of conduct as well as through periods of no engagement. Accumulation, in contrast, appears to rest on a theory of accretion of conduct, the whole is greater than the sum of the parts, that is what we heard from Professor Akhavan. Chile's response to both arguments can be briefly stated.

33. On continuity, Chile's case is straightforward. Bolivia has been unable to identify when its claimed obligation to negotiate arose and from what circumstances. In its most recent submissions on Monday, Bolivia recast yet again its theory of creation to cover the period 1879 to 1929, a 50-year period. Its reluctance to be more precise is evidently motivated by a concern to avoid having to tie itself to particular conduct to found its claim, because to do so would enable both Chile and the Court to subject its analysis to a more exacting, and I would suggest, a more withering scrutiny.

34. Chile's case on continuity is consistent with its case more generally. Chile is not now and has never been subject to an obligation to negotiate sovereign access. No such obligation ever came into being and no such obligation can be created by a litigation device that seeks to hide the inability to identify the point and cause of creation of the claimed obligation by saying simply that

[226] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 33, para. 55.

the obligation was always there and that the Court need look no further. This is simply not a credible theory of legal obligation.

35. If, contrary to Chile's submission, an obligation to negotiate did arise at any point, out of any given circumstance, it is Chile's case that the obligation was discharged. You have heard more on this from each of Chile's counsel as regards particular instances of engagement and particular periods of time. There is no need for me to elaborate on this further at this point.

36. I add one last point on this. Bolivia asserts that there has been an "overall pattern" of conduct or "consistent and continuous" conduct. But, for this claim to be sustained, there must *in fact* be a thread of consistent and continuous conduct that runs between all of the claimed conduct, joining them together in cumulative effect. This is where Bolivia's continuity argument blends in seamlessly into its accumulation argument. But there is no such golden thread of continuity. It is not simply that all of the exchanges between the Parties are disparate and took place intermittently over time. It is not just that these exchanges were separated at times by long periods of silence or of qualitatively different pragmatic engagement. It is not just that the exchanges were all demonstrably different in form. Each of these points is compelling in its own right and would be fatal to Bolivia's case. But the most important is that there was no thread of common appreciation that the conduct in question was required by law.

37. On accumulation, and this is where I will end, Professor Akhavan contended that the whole is greater than the sum of the parts[227]. But, as you have heard from us before, 0 + 0 + 0 = 0. And this is not just mathematics; this is the law. Settled jurisprudence makes clear that the mere repetition or accretion of statements or conduct that do not individually give rise to legal obligations do not without more imbue them with a binding quality[228]. We have referred to the settled jurisprudence in our written pleadings and there are footnote references which will direct you to these in the transcript. When it comes to founding a legal obligation, and especially one that, however it is packaged, is focused on the specific outcome of a cession of sovereign territory, the whole is not greater than the sum of the parts. Bolivia cannot found a legal obligation to negotiate

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[227] CR 2018/10, p. 14, para. 2 (Akhavan).

[228] See *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, pp. 35-36, paras. 92-98. Also, the *South China Sea Arbitration (The Republic of the Philippines* v. *The People's Republic of China)*, PCA Case No. 2013-29, Award on Jurisdiction and Admissibility, 29 Oct. 2015, para. 244.

on a pattern of conduct that invokes a series of exchanges or engagements that, when individually assessed, are unable to sustain the claim that is advanced.

38. Mr. President, Members of the Court, that concludes my submissions. I thank you for your attention. Mr. President, may I ask you to call upon Chile's Agent to the podium to conclude Chile's case.

The PRESIDENT: I thank Sir Daniel Bethlehem and I now invite the Agent of the Republic of Chile, Professor Grossman, to take the floor for the final submissions of his country. You have the floor, Sir.

Mr. GROSSMAN:

1. Mr. President, Madam Vice-President, Members of the Court, it is an honour to appear before you again as the Agent of Chile, to conclude Chile's case. I would like to take this opportunity to acknowledge the delegation of Chilean Senators and Members of Congress who have joined us for the second round, as well as the continued presence of our Foreign Minister, His Excellency Roberto Ampuero.

2. Bolivia has presented a case of hyperbole and distortion. Bolivia has painted Chile as asphyxiating Bolivia, as a jailer of the Bolivian people, as a State that even refuses to open an envelope from a neighbouring State[229]. Chile firmly rejects those mischaracterizations. Chile has been, and continues to be, a co-operative and friendly neighbour, and again reminds Bolivia that it has brought Chile before the International Court of Justice, charged by its Statute with applying relevant international law to Bolivia's claims.

## I. Chile's case

3. The question before the Court is whether Chile is under a legal obligation to negotiate sovereign access to the sea with Bolivia. As we have shown over the first round and today, there *is not* and *never has been* any legal obligation compelling Chile to negotiate sovereign access to the sea for Bolivia, whether an obligation of conduct, or of result.

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[229] CR 2018/10, p. 68, para. 28 (Llorentty Soliz), p. 64, para. 26 (Chemillier-Gendreau) and pp. 55-56, para. 15 (Lowe).

4. Chile's counsel have taken you carefully through the evidence and the relevant legal principles. Bolivia is simply unable to satisfy the legal test for the creation of an obligation on any ground it invokes.

## II. Bolivia's case

5. Mr. President, Members of the Court, your Judgment on the Preliminary Objection[230] established that this is not a case about whether Bolivia has a *right* of access to the sea. It is not a case about a predetermined result. It is not a case about the 1904 Treaty of Peace and Amity.

6. Bolivia's case has changed many times over the course of these proceedings, but its formal submission has remained the same. Bolivia asks the Court to find that Chile is under a legal obligation "to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean" and that to perform that obligation, Chile must promptly and effectively "*grant* Bolivia a fully sovereign access to the Pacific Ocean"[231].

7. The submission seeks an obligation of result that would continue until Bolivia decides that it is satisfied. Unmasked, such an argument is one that Bolivia has a *right* to Chilean territory. This would unsettle the 1904 Peace Treaty.

8. On Monday, counsel for Bolivia showed you a slide titled "Proposed coast for Bolivia". In the *Chilean* territory identified as the proposed Bolivian coast, thousands of Chilean families, including indigenous Chilean Aymara, live, work and transit. [Slide on] The map on your screen shows the towns in that area. This is not a deserted, barren border area. This is a populated, diverse and productive region. [Slide off]

9. Bolivia's constantly shifting case demonstrates Bolivia's weakness. Bolivia has continually misrepresented the factual record by suggesting that anything Chile ever said or did that was connected to the sea created or reaffirmed an obligation to negotiate sovereign access for Bolivia.

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[230] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, pp. 604-605, paras. 32-33. See also RB, paras. 26-27.

[231] Bolivia's formal submission: AB, paras. 32 *(a)* and *(c)*; MB, paras. 500 *(a)* and *(c)*; RB, p. 192, paras. *(a)* and *(c)*; CR 2018/10, p. 70, para. 10 (Rodríguez Veltzé); emphasis added.

10. Mr. President, Members of the Court, international law has always treated matters of sovereignty over territory with grave regard. Presumptions are not easily made, and the burden for establishing obligations with respect to sovereignty is high[232].

11. Chile is baffled — and the countries of the Americas would be equally perplexed — to hear *from Bolivia* that there may be obligations arising from OAS membership with which Chile is not complying. Contrary to what Bolivia suggests, Chile respects the rule of law and its obligations under the OAS Charter, the American Convention on Human Rights and the Inter-American Democratic Charter. Chile fully complies with those obligations, and respects international treaties in force.

12. The OAS engaged with the issue of Bolivia's aspirations from 1979 to 1989. What happened then has not continued for the three decades since. There were no General Assembly resolutions on this question prior to 1979, and there were no resolutions on this question after 1989. Despite what you have heard from Bolivia, the OAS does not consider Bolivia's aspirations following 1989 to be a matter of "continuing hemispheric interest"[233]. If it were still a matter *of hemispheric interest*, one would expect that the OAS or relevant actors *in the hemisphere* would be *taking steps to express that interest within the OAS*, but they are not.

13. Bolivia has not explained *why* there has not been any OAS General Assembly resolution since 1989 concerning this issue. With the passion that Bolivia has presented its case here, the Court would be right to ask *why* Bolivia has not brought back this issue to the OAS, availing itself of the OAS's mechanisms for the peaceful settlement of disputes[234]. The answer is clear: Bolivia knows that it does not have support.

14. It matters little that Bolivia's aspirations, as explained by Professor Pinto, were on the agenda until six years ago. The *only* reason that the matter appeared on the agenda was because Bolivia had a unilateral entitlement to put it there. There was no assessment on the part of the OAS as a whole, either of the importance of the matter to the Organization or the region, or on the

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[232] See, e.g., *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253.

[233] See CR 2018/7, p. 33, para. 14, p. 34, paras. 17 and 19, and pp. 35-36, para. 23 (Sander); CR 2018/10, p. 38, para. 19 (Sander).

[234] Such as the mechanisms under the 1947 Inter-American Treaty of Reciprocal Assistance to which Bolivia had resort in 1962 regarding a difference with Chile concerning the River Lauca.

substance of that issue. To the contrary, the OAS General Assembly's silence on this topic since 1989 speaks volumes. No Secretary-General of the OAS since 1989 has, in respect of Bolivia's aspirations, taken steps consistent with their right of initiative pursuant to Article 110 (2) of the OAS Charter.

## III. Chile's good neighbourliness

15. Mr. President, Members of the Court, Chile pursues policies of co-operation and integration with all its neighbours, including Bolivia. Bolivia is a crucial neighbour not only because of its closeness, but also because of its size and importance. Bolivia is a country that is one third larger than continental Chile[235], is rich in natural resources and has access to the Pacific Ocean through Chile and Peru, and to the Atlantic through the waterways and ports of its other neighbouring countries. Today, Bolivia has one of the highest rates of GDP growth of any Latin American country[236]. Chile desires a close relationship with Bolivia, grounded in mutual respect and in promoting and protecting the common interest of the peoples of both States. There are, however, complexities in that relationship, including when one neighbour deceptively emphasizes external issues to blame others for, and distract attention from, shortcomings in internal democratic accountability and institutions.

16. Despite our differences and Bolivia repeatedly breaking off diplomatic relations when it was dissatisfied with the bilateral relationship, Chile and Bolivia continue to co-operate, even without formal diplomatic relations, on many issues of importance to our integration, including on issues related to education, health, trade, migration, and law enforcement. In 1993, for example, our countries signed an Economic Complementation Agreement, aimed at strengthening our economic relations and trade. This Agreement created non-reciprocal benefits for Bolivia in the form of tariff-free access for most Bolivian goods to the Chilean market, while maintaining tariffs for Chilean goods sold in Bolivia[237].

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[235] Cf CR 2018/6, p. 19, para. 14 (Rodríguez Veltzé).

[236] World Bank, Increase of GDP (annual percentage) — Bolivia, 2016, https://datos.bancomundial.org/indicador/NY.GDP.MKTP.KD.ZG?locations=BO.

[237] Agreement on Economic Complementation between Bolivia and Chile, signed at Santa Cruz de la Sierra on 6 Apr. 1993, POC, Ann. 45 (B).

17. Bolivia has said that Chile holds the key to Bolivia's development[238]. Chile does not hold the key. Instead the two States co-operate in the framework of a century-old treaty that grants Bolivia free transit to the sea in perpetuity. Bolivia's treaty-based, free and unrestricted commercial transit to the sea continues to develop and grow constantly, reflecting that dynamic reality. [Slide on] As a matter of fact, this phenomenon has occurred since 1904 in the form of subsequent agreements and preferential treatment, at a significant financial cost to Chile. In the last decade, Chile has invested over US$250 million to facilitate Bolivia's free transit to the Pacific Ocean, pursuant to the 1904 Peace Treaty[239]. What is more, Chile *also* goes above and beyond the requirements in the 1904 Treaty. It has, among other things, provided free storage for Bolivian exports, constructed additional storage facilities for Bolivian cargo at Chilean ports, offered Bolivia new facilities at the Port of Iquique which Bolivia still has not used, and built new border complexes and road upgrades to facilitate toll-free ground transportation between Bolivian metropolitan centres and Chilean ports. [Slide off] Today, more than 200,000 trucks cross annually from Bolivia to Chile transiting 3 million tonnes of Bolivian cargo to Chilean Pacific ports[240]. This is hardly asphyxiation. Bolivia also continues to exercise, pursuant to the 1904 Peace Treaty, its customs powers in Chilean ports and to charge customs duties on imports to and exports from Bolivia in transiting through Chilean ports.

18. There is no wall between Chile and Bolivia. There is no wall between Bolivia and the Pacific Ocean. There are no walls between Bolivia and its other neighbours: Peru, Brazil, Paraguay, and Argentina, or with Uruguay. Bolivia is not jailed. Bolivia is *certainly* not jailed *by Chile*. I know what jails are, and this is not it. We take national, professional, and personal offence to those words. Contrary to Bolivia's distortion, the border between Chile and Bolivia is open and sees a constant flow of people and business, to and from our country. Chile is a diverse country and one of the most open societies in Latin America.

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[238] CR 2018/10, p. 22, para. 22 (Akhavan).

[239] "Chilean state has invested US$215 million to facilitate transit of Bolivian merchandise", *El Mercurio* (Chile), 8 Mar. 2018.

[240] *Ibid.*

19. Mr. President, Members of the Court, counsel for Bolivia challenged this Court not to be impotent and aimless[241] and to address what Bolivia claims is an historical injustice. But this is a court of law. This Court has recognized time and again that it is concerned with the application of international law. Chile comes to you with the expectation that this case, which at its core concerns Chile's sovereign territory, will be resolved in accordance with international law.

20. As we have shown, Chile has never been subject to any legal obligation to negotiate on the topic of sovereign access, and has no such obligation today.

21. Before concluding, Mr. President, Members of the Court, please let me express my profound appreciation to the Court on behalf of the Government of Chile, for its consideration and attentiveness during these proceedings. I would like to especially thank the Registrar, Mr. Philippe Couvreur, and all his staff, including the interpreters and translators, who have allowed our countries to follow the developments in "La Haya". Additionally, I would like to express my deepest gratitude to Chile's distinguished counsel and the entirety of the Chilean team who has worked on this important case.

22. As I now conclude, please allow me to read the formal submission of the Republic of Chile, the signed text of which I have submitted to the Court:

> "The Republic of Chile respectfully requests the Court to:
>
> DISMISS all of the claims of the Plurinational State of Bolivia."

23. Thank you for your kind attention.

The PRESIDENT: I thank the Agent of the Government of Chile, Professor Grossman. The Court takes note of the final submissions which you have now read on behalf of the Republic of Chile.

This brings us to the end of the hearings devoted to the oral argument on the case. I would like to thank the Agents, counsel and advocates for their statements. In accordance with usual practice, I shall now request both Agents to remain at the disposal of the Court to provide any additional information it may require. With this proviso, I now declare closed the oral proceedings in the case concerning the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*.

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[241] CR 2018/10, p. 54, para. 7 (Lowe).

The Court will now retire for its deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its judgment. As the Court has no other business before it today, the sitting is declared closed.

*The Court rose at 1 p.m.*

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