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CR 2015/20

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2015

Public sitting

held on Thursday 7 May 2015, at 4.30 p.m., at the Peace Palace,

President Abraham presiding,

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

Preliminary Objection

VERBATIM RECORD

ANNÉE 2015

Audience publique

tenue le jeudi 7 mai 2015, à 16 h 30, au Palais de la Paix,

sous la présidence de M. Abraham, président,

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

Exception préliminaire

COMPTE RENDU

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

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

M. Couvreur, greffier

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Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le second tour de plaidoiries du Chili. Je donne à présent la parole à M. Bethlehem.

Sir Daniel BETHLEHEM:

1. Mr. President, Members of the Court, Chile struggled to identify a coherent thread to Bolivia's argument yesterday. There was a gulf between their opening and closing speeches. The Honourable Agent for Bolivia expressed the case for the first time in terms of a *pactum de contrahendo*[1]. We heard subsequently, however, that it is a *"mere" pactum de contrahendo*[2], with counsel trying to downplay the significance of the request. We also heard a new theory of the case yesterday, a theory of parallel ***obligation*** to negotiate, existing side-by-side with, but never touching upon or engaging with, the 1904 Treaty. Parallel universes! Sliding doors! The 1904 Treaty and the *pactum de contrahendo* existing side-by-side but never intersecting. It is a surreal reality; an exercise in legal dadism. We heard nothing from Bolivia about the terms of its prayer for relief, to which Chile drew attention on Monday, and yet it is that prayer for relief that makes the intersection inevitable. Bolivia is throwing arguments into the air in the hope that the Court will catch on to something.

2. Mr. President, Members of the Court, you heard a great deal about the 1904 Treaty of Peace and Amity from me on Monday[3]. You heard virtually nothing of that Treaty from Bolivia yesterday. There was no reference to the comprehensive territorial settlement of the Treaty. There was no reference to Bolivia's treaty-based right of access to the Pacific Ocean pursuant to Article VI of that Treaty. What you did hear from Bolivia, though, was an affirmation that it accepts that the 1904 Treaty was in force in 1948 and continues to be in force today[4]. Indeed, Bolivia relies on its Article VI treaty-based right of access to the Pacific Ocean day-in and day-out, through sovereign Chilean territory and ports. This Treaty is therefore alive and well and the

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[1]CR 2015/19, p. 11, para. 6 (Rodríguez-Veltzé).

[2]*Ibid.*, p. 52, para. 6 (Akhavan).

[3]CR 2015/18, pp. 33-46, paras. 1-57 (Bethlehem).

[4]CR 2015/19, p. 40, para. 6 (Remiro Brotóns).

governing font of Bolivia's access to the Pacific Ocean today, as it was on 30 April 1948, the date of the conclusion of the Bogotá Pact.

3. Professor Chemillier-Gendreau yesterday traced Bolivia's theory of a parallel obligation to negotiate back to a Note by the Chilean Foreign Minister Santa María of 26 November 1879[5]. We also had put on the screen a Note by the President of Chile of 7 January 1884 referring to a right of access for Bolivia to the Pacific Ocean. Interestingly, we only had passing comment from Professor Chemillier-Gendreau on the Transfer Treaty of 1895, although we subsequently had an admission from Professor Remiro Brotóns about this, to which I will return shortly[6].

4. Mr. Wordsworth will have more to say about this theory of parallel obligation in just a moment. As a prelude to his comments, two preliminary observations are warranted.

5. My first observation in response to Professor Chemillier-Gendreau's invocation of the Notes of 1879 and 1884 is to invite you to read them for yourselves[7]. She seeks to found a claim to sovereign access to the Pacific Ocean on these Notes, but that is not what those Notes say. They do not talk about sovereign access, or about corridors or enclaves or coastal zones or special zones, as you heard from Professor Akhavan[8]. They talk simply about access to the Pacific Ocean. Access to the Pacific Ocean — in perpetuity, the fullest and most unrestricted right of commercial transit — is what was afforded to Bolivia by Article VI of the 1904 Treaty. And, as the 1905 statements by the Chairman of the Bolivian National Congress and the Bolivian President, to which I took you on Monday[9], indicate, Bolivia saw as one of its notable successes in the negotiations leading up to the 1904 Treaty that it secured in the negotiations its autonomy in trade and customs matters.

6. My second point is simple. It is that Bolivia cannot erect a sustainable claim based on pre-1904 instruments. The 1904 Treaty drew a line, formally and comprehensively, under what went before. It occupied the space. It was intended by the parties to be a definitive treaty of peace. Nothing that went before is relevant.

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[5]CR 2015/19, p. 29, para. 10 (Chemillier-Gendreau).

[6]*Ibid.*, p. 44, para. 16 (Remiro Brotóns).

[7]*Ibid.*, p. 29, para. 10 (Chemillier-Gendreau).

[8]*Ibid.*, p. 4, para. 51 (Akhavan).

[9]CR 2015/18, p. 42, paras. 41-42 (Bethlehem).

7. A brief comment is required on the 1895 Transfer Treaty. At paragraph 228 of its Memorial, Bolivia says as follows:

> "The obligation to negotiate in the present case arises from the legal commitment made by Chile to negotiate a sovereign access to the sea for Bolivia. The obligation was spelled out expressly in the 1895 Transfer Treaty and subsequent legal instruments, and repeatedly reaffirmed by Chile at intervals over the decades."[10]

8. This argument is developed further at paragraphs 338 and following in Bolivia's Memorial. Bolivia there asserts that Chile and Bolivia reached agreement that Bolivia should not remain landlocked and that Chile explicitly bound itself to transfer territory to Bolivia to provide it with sovereign access to the Pacific Ocean.

9. Mr. President, Members of the Court, Bolivia's reliance on the 1895 Transfer Treaty in its written case is unambiguous. It is the very font of its claim.

10. We note, however, that, in his submissions yesterday, Professor Remiro Brotóns rowed back from this claim, stating *now* that the 1895 Transfer Treaty was *not* a source of obligation but only relied upon as a precedent to show that the Parties had agreed on a transfer of territory[11].

11. Chile notes this reluctant and even now half-hearted admission that the 1895 Transfer Treaty was "wholly without effect". Chile also notes that a pre-1904 treaty that never entered into force is not illustrative of anything of any enduring character whatever. It is a telling indictment of Bolivia's case that it is rooted in an instrument that never entered into force. I note also that, quite apart from its failure to enter into force, the 1895 Treaty is superseded and trumped by the 1904 Treaty. Further, as I observed on Monday, the 1896 Exchange of Notes, which provided that the 1895 treaties would be "wholly without effect", are themselves subject to the exclusion in Article VI of the Bogotá Pact[12].

12. Mr. President, Members of the Court, you heard from Bolivia yesterday that the case that it seeks to bring to you has nothing to do with the 1904 Treaty. It is a separate, parallel obligation to negotiate, the subject-matter of the negotiations, and the outcome of the negotiations, being separate and distinct from the 1904 Treaty. Professor Akhavan put it in the following terms: "A

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[10]Memorial of Bolivia (MB), para. 228.

[11]CR 2015/19, p. 44, para. 16 (Remiro Brotóns).

[12]CR 2015/18, pp. 44-45, paras. 47-53 (Bethlehem).

treaty may touch upon a dispute, without settling it."[13] I will return to this point in just a moment, as it goes to the heart of the matter. An initial observation is warranted, however.

13. This dispute, this claim, that Bolivia brings to the Court is by any assessment highly artificial in its packaging. This will be evident to you both from Chile's submissions on Monday and, indeed, from Bolivia's submissions yesterday. There is no escaping the point. Bolivia seeks, in its prayer for relief, an order from the Court that Chile must perform its claimed obligation to negotiate "in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean"[14]. In the face of this prayer for relief, how can Bolivia, with any credibility, simply side-step, simply fail to engage with, the 1904 Treaty, with its comprehensive territorial settlement, which gives to Bolivia a treaty-based right of access, in perpetuity, to the Pacific Ocean through Chilean territories and ports?

14. Mr. President, Members of the Court, however Bolivia packages its case, it should be plain as day that the claim that Bolivia seeks to bring to the Court intersects fundamentally, necessarily, unavoidably with the 1904 Treaty. Indeed, the veil was lifted on Bolivia's case by Professor Remiro Brotóns yesterday when he said that nothing prevents the renegotiation of a treaty or the conclusion of a complementary agreement[15]. True indeed! But here is the point. What Bolivia is indeed seeking is a renegotiation of the 1904 Treaty or the conclusion of a complementary agreement; and this by way of court-ordered negotiations to compel a specified result. We heard a lot of colourful language from Bolivia's counsel yesterday about Chile's claimed hallucinations about the nature of Bolivia's case, about the floral wonders of the Atacama Desert, and more. But it is Bolivia that is the contortionist here, desperately trying to avoid any contact with the 1904 Treaty as if it is somehow toxic. Well, it is indeed toxic to Bolivia's case, as its contortions plainly evidence.

15. Mr. President, Members of the Court, the Court is an instrument of judicial settlement. Bolivia, however, through its endeavour to detach its claim from the 1904 Treaty, is coming to you

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[13]CR 2015/19, p. 54, para. 13 (Akhavan).

[14]MB, para. 500 *(c)*.

[15]CR 2015/19, p. 46, para. 25 (Remiro Brotóns).

with an application to intercede between the Parties as a compulsory mediator. It should not be permitted to get away with such antics.

16. This brings me to Professor Akhavan's point, on which this case must turn. He says, and I repeat, that "[a] treaty may touch upon a dispute, without settling it". With this sentence, Professor Akhavan both acknowledged the connection between Bolivia's claim and the 1904 Treaty and sought to minimize it. Professor Remiro Brotóns sought to do the same when he caricatured Chile's submissions with his observation that Chile argues that a single point of contact with the 1904 Treaty would suffice to deny the Court jurisdiction[16]. He further argued that the effect of Chile's argument would be to turn Article VI of the Pact into a black hole that would swallow up everything that took place subsequently[17].

17. Let me not minimize the point. It is important. But it shows precisely the gaping hole at the centre of Bolivia's argument.

18. Professor Remiro Brotóns and Professor Akhavan admit the connection between Bolivia's case and the 1904 Treaty. The question that remains is what kind of connection? Is it the single point of contact connection that Professor Remiro Brotóns would have the Court believe? Is it a mere touch connection, as Professor Akhavan would urge on the Court? Is it in some other manner peripheral or ancillary or incidental or passing or remote or indirect?

19. The 1904 Treaty, and its comprehensive territorial settlement and treaty-based right of access to the Pacific Ocean is hardly remote or peripheral or ancillary or incidental to Bolivia's claim that it seeks an order that Chile negotiate "to grant Bolivia a fully sovereign access to the [sea]". Bolivia's claim goes to the very essence of the 1904 Treaty; to the core of its settlement; to the matter that is governed by its terms.

20. To meet Bolivia's argument, Chile does not need to identify where the line ***is*** between peripheral, and merely incidental connections, that might escape the terms of Article VI of the Pact, and inextricably intertwined connections, that require that a pre-1948 treaty or arrangement retains a controlling hand on post-1948 conduct. Identifying such a line is an exercise of legal hypothesis that lies in the realm of theoreticians. The critical appreciation is whether the connection here in

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[16]CR 2015/19, p. 41, para. 8 (Remiro Brotóns).

[17]*Ibid.*

issue, *in this case*, falls manifestly on one side of the line or the other, wherever that line may ultimately be drawn.

21. Mr. President, Members of the Court, there can be no shadow of a doubt that the connection between the 1904 Treaty and the subject-matter of Bolivia's claim is direct, is proximate, is central, is substantial. The sovereign right of access to the Pacific Ocean that Bolivia claims would necessarily and unavoidably require modification of the 1904 Treaty. Bolivia acknowledges as much through Professor Remiro Brotóns'~~s~~ assertion that nothing prevents renegotiation of the terms of the 1904 Treaty or the conclusion of a complementary agreement.

22. Mr. President, Members of the Court, Bolivia attempts to address this central difficulty in its case by advancing two arguments. First, it contends that a matter cannot be settled and in dispute at the same time[18]. Second, it contends, by reference to Article 27 of the OAS Charter and Article XXXIV of the Pact, that absolute finality is required[19].

23. These assertions go to the same contention, namely, that, because Chile and Bolivia have had exchanges and negotiations over the years about sovereign access to the Pacific Ocean, the matter cannot be regarded as settled. Negotiations, in Bolivia's contention, mean that nothing is settled.

24. There are a number of points in response to this argument. First, I would simply recall the submissions on Monday of Professor Pinto. Unlike the circumstances of the *Nicaragua* v. *Colombia* case, the two limbs of Article VI of the Pact — settled by arrangement between the Parties and governed by a treaty in force — mean different things[20]. Bolivia was so focused on searching for the cover of the *Nicaragua* v. *Colombia* Judgment that it failed to address whether the circumstances of *that* case, circumstances to which the Court made explicit reference in its Judgment, are germane to *this* case. They are not! Bolivia also failed to address at all whether the matter of its claim is "governed" by the 1904 Treaty. I will not repeat Professor Pinto's submissions here, but simply recall that she addressed this issue in detail.

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[18]CR 2015/19, p. 55, para. 16 (Akhavan).

[19]*Ibid.*, pp. 54-55, para. 14 (Akhavan).

[20]CR 2015/18, pp. 25-27, paras. ***17-19*** (Pinto).

25. Second, there is nothing in Professor Akhavan's point on Article XXXIV of the Pact. Article XXXIV is a jurisdictional provision, addressing the jurisdiction of the Court to hear a controversy. If the Court does not have jurisdiction in consequence of Articles V, VI or VII of the Pact, the dispute settlement mechanisms of the Pact are exhausted.

26. Third, the meaning of the term "settled" was also addressed by Professor Pinto in her submissions on Monday[21]. As she noted, a matter is "settled" by arrangement if it is resolved by that arrangement. As a matter of textual interpretation, the term "settled" does not connote or require the end of any and all disagreement. In a legal context, that something is "settled" indicates that the parties to the transaction have committed themselves to a binding legal instrument. In the case of the 1904 Treaty, Chile continues to this day, and every day, to afford to Bolivia its in perpetuity, fullest and most unrestricted right of commercial transit through Chilean territory and ports. Chile is every day performing its obligations under the Treaty. These are settled obligations. Bolivia, of course, wants to rely on continued performance of the 1904 Treaty by Chile. But it wants to unsettle the Treaty too. There is a manifest lack of internal coherence to Bolivia's claim.

27. Fourth, Bolivia relies on the fact of exchanges and negotiations over the years to contend that the matter in issue in these proceedings is somehow unsettled. I will be brief on this point, and I will end with it, as others following me will address it further. The point is, however, important enough to bear repetition. This case is about the sanctity of treaties and the without prejudice character of political negotiations. This is not a merits point. It goes to considerations of jurisdiction now in issue. Negotiations do not create jurisdiction. Bolivia cannot unsettle a *treaty* that, as of 30 April 1948, governed the matter in issue in these proceedings by resorting to inconclusive negotiations.

28. Mr. President, Members of the Court, that concludes my submissions this afternoon. Mr. President, may I invite you to call Mr. Wordsworth to the Bar.

Le PRESIDENT : Merci. Je donne maintenant la parole à M. Wordsworth.

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

Mr. WORDSWORTH:

CHILE'S PRELIMINARY OBJECTION TO JURISDICTION

Article VI of the Pact of Bogotá applied to Bolivia's Claim

I. Introduction

1. Mr. President, Members of the Court, I will be developing four points in response to Bolivia's submissions of yesterday.

2. First, on characterization of the matter before you, both Parties are evidently agreed that identification of the real issue in the case is a fundamental part of the function of the Court at this preliminary phase. There are differences in what Chile and Bolivia say is the weight to be placed on the Applicant's own characterization of its claim, but the central point is that Bolivia ultimately wants you to characterize its claim by focusing only on *parts* of its Application, and without saying anything more, or without paying anything more than a passing glance at the relief that is sought. That is not a tenable approach, and the relief that Bolivia seeks is vital to the Court's task of identifying the real issue in the case, and the real matter before it.

3. Secondly, Bolivia wishes you to focus on what is said to be a parallel track of negotiations, portrayed as if these had an existence independent of the 1904 Treaty. In particular, Bolivia places a notably new weight on exchanges on negotiations up to 1948, aiming to establish that the matter of sovereign access to the sea was not settled by the 1904 Treaty as of 1948. Yet, the mere fact of negotiations, and still less exchanges about negotiations, cannot somehow unsettle a pre-existing treaty. If it were otherwise, States would simply never be willing to talk with each other. It is only if the given negotiations lead to an agreement that changes the pre-existing legal situation that there can be said to be an unsettling of the pre-existing legal situation, that there can be said to be an unsettling of what has gone before. And although Bolivia contends that a *pactum de contrahendo* was reached, the critical point is that nowhere in the pre-1948 documents can it point to any such *pactum*, or to any agreement of any kind that has the effect of displacing the key juridical fact that, as of 1948, the matter of whether Bolivia had sovereign access to the sea was one settled in, and governed by, the 1904 Peace Treaty.

4. Thirdly, the focus on the allegedly parallel track of negotiations — both before and after 1948 — is a diversion away from the point that, looked at objectively, the relevant exchanges all concerned the matter of Bolivia's access to the sea. As to this:

(a) At all material times, the nature of Bolivia's access to the sea has always remained, and still remains, a matter settled in and governed by the 1904 Peace Treaty.

(b) Bolivia has no answer to this basic point, which is not solved by highlighting up on the screen the words "independently of" as frequently as Bolivia is able. Whatever the point behind those words may have been, Bolivia is not *now* seeking access to the sea that *is* independent of the legal situation settled in and governed by the 1904 Peace Treaty.

(c) To the contrary, the sovereign access to the sea that Bolivia seeks in its claim without any doubt requires that the settlement reached in the 1904 Peace Treaty be revised, whilst there is no hint in *any* of the documents that Bolivia relies on of any intention to establish the compulsory jurisdiction of the Court with respect to the matters settled in and governed by the 1904 Treaty.

5. Finally, Bolivia has no answer to the point that it is substance here, not form, that counts. It is self-evident that, if the words referring to the alleged obligation to negotiate were removed from Bolivia's prayer for relief, the Court would lack jurisdiction by virtue of Article VI of the Pact of Bogotá. The question for the Court thus ultimately comes down to whether you can change the nature of a matter otherwise caught by Article VI by putting the words "obligation to negotiate" before it. Chile submits that you cannot, and that the attempt to do so is pure artifice.

II. The correct characterization of the claim

6. I turn to the details on these four points, starting with what was said yesterday about the correct characterization of the issue before you in this case.

7. My friend Professor Forteau put some extracts from Bolivia's Application on the screen, reading out paragraphs 1, 2 and 31, but not 32, which is the key paragraph on which I focused on Monday now on your screens[22]. [Slide on] And I say key paragraph because this is the part of

[22]CR 2015/19, pp. 18-19, paras. 14-15 (Forteau).

Bolivia's pleading that identifies in the most ready and also incontrovertible way that, like it or not, the current claim *is* on a collision course with the 1904 Peace Treaty.

8. To recall, as follows from what Mr. Bethlehem has just said, Bolivia cannot contest the juridical fact that the 1904 Peace Treaty is in full force and effect between the Parties and establishes that Bolivia's access to the sea is non-sovereign in nature. The claim, and the 1904 Treaty, are thus indeed set on a collision course, as I said on Monday. And however much my friend Mr. Akhavan may refer to parallel lanes, a suggestion that the traffic in Tehran is not in a constant state of collision does not constitute an explanation of why we are wrong to say that Bolivia's claim inevitably seeks and requires the revision of what was settled and is governed by the 1904 Peace Treaty[23]. Likewise, Professor Forteau's protestation that there has been "une déformation aussi radicale qu'inacceptable de la demande de Bolivie"[24]. Well, there most certainly has not been — we are just reading the words on the page that Bolivia has put up before you, and the supposedly parallel lanes necessarily converge at the point that one reads the relief that Bolivia in fact claims. Indeed Bolivia's invocation of the concepts of *lex specialis* and *lex posterior*[25] confirms that it well knows that the alleged lanes could not stay parallel.

9. Three of my colleagues from the Bolivian side also say *"pacta sunt servanda"*, as if that were an answer[26]. It is not.

(a) First, in fact, Bolivia is saying that *some* are *pacta sunt servanda*, and some are not, and notably not when it comes to the settlement reached in the long-standing 1904 Peace Treaty.

(b) Secondly, a reiteration of basic principles misses the point of this jurisdictional phase, which is not whether there is an obligation to negotiate that Chile must perform. Rather, the question is whether the existence and performance of that alleged obligation is an issue over which this Court has jurisdiction. And it is not, because it concerns a matter that was, as of 1948, settled in and governed by the 1904 Treaty. And, even if it were correct to look beyond 1948, the short point is that everything on which Bolivia relies after that date concerns the same matter

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[23]CR 2015/19, p. 51, para. 4 (Akhavan).

[24]*Ibid.*, p. 18, para. 11 (Forteau).

[25]*Ibid.*, p. 52, para. 6 (Akhavan).

[26]*Ibid.*, p. 27, para. 2 (Chemillier-Gendreau); pp. 47-48, para. 27 (Remiro Brotóns); p. 51, para. 5 (Akhavan).

that was, in 1948, settled and governed by the 1904 Treaty, and Bolivia can point to no intention of the Parties to establish the compulsory jurisdiction of this Court.

10. The other materials that I took you to in opening, in particular those concerning Bolivia's 2009 Constitution and its 2013 Bond Offering, also confirm that the current claim aims at and seeks the revision of the settlement in the 1904 Peace Treaty[27].

11. Professor Forteau had nothing to say about these materials, adopting instead the line that what counts is what is said in any given application[28]. As with Bolivia's Written Statement[29], that is not a fair reflection of the jurisprudence. I note that the most relevant passages of *Nuclear Tests*[30] were passed over, while the passage from *Diallo* that was cited concerns the quite separate issue of admissibility of new claims[31], and the passage from *Certain Interests in Polish Upper Silesia* concerned the Court's refusal to reformulate a party's submissions in circumstances where claims supporting them had not been properly set out[32]. All quite different.

12. And I should add that, as a matter of basic proposition, it is of course *not* the case that it is up to an applicant to characterize as it sees fit the precise lines of a given dispute or the real issue in the case. Were it otherwise, the jurisdictional limitations in provisions such as Article VI of the Pact or indeed, to take another example, Article 288 of UNCLOS as considered by the Annex VII tribunal in the recent *Mauritius* v. *United Kingdom* award, could be bypassed by the carefully formulated claims of any given applicant. There is no shortage of examples where, in recent years, claimants before this and other international courts and tribunals have sought to repackage their territorial or other claims so that they suddenly become claims under UNCLOS, or under long-standing human rights treaties such as the CERD, and Chile submits that such claims have

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[27]CR 2015/18, pp. 50-52, paras. 18-24 (Wordsworth).

[28]CR 2015/19, pp. 20-21, para. 21 (Forteau).

[29]Written Statement of the Plurinational State of Bolivia on the preliminary objection to jurisdiction filed by Chile (WSB), paras. 13 and 20.

[30]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30.

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

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

quite correctly been approached with very considerable caution when it comes to assessing the issue of jurisdiction.

13. On the question of characterization, Professor Remiro Brotóns did come back to the 2009 Constitution, but he was unable to address our point[33]. He accepted that Article 267 of the Constitution sets out "sovereign access to the sea as a permanent and inalienable objective" of Bolivia[34], but he appeared to characterize this as a matter of policy[35], and, curiously, he said that the 1904 Treaty was protected by Bolivia's Constitution through general provisions on the hierarchical status of treaties[36].

14. Well, that is entirely inconsistent with a plain reading of the Constitution and the Bolivian statements and other documentation that I took you to in opening that have followed on since the Constitution[37].

15. Professor Remiro Brotóns also said, by reference to the transitional provisions in the Constitution, that the treaties that were to be challenged before international tribunals were investment treaties alone[38]. I note that there is no document reference to support the point that was being made. But, in any event, the Supreme Resolution of the President of Bolivia appointing Bolivia's Honourable Agent in this case makes it crystal clear that this case was brought to vindicate the alleged "right" set out in Article 267 of Bolivia's Constitution[39].

16. The Court will also recall that Bolivia's 2013 offering memorandum for bonds — now on the screen again and at tab 37 of your judges' folder — makes clear that: (i) this case has been brought in fulfilment of the constitutional mandate in Article 267, that is the first sentence; (ii) that the 1904 Peace Treaty is viewed by Bolivia as the impediment to the exercise of its alleged

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[33]Cf. CR 2015/18, pp. 50-52, paras. 18-24 (Wordsworth); see Political Constitution of the Plurinational State of Bolivia, 7 Feb. 2009; POCh, Ann. 62, pp. 926 and 929, Art. 267 and Ninth Transitional Provision.

[34]CR 2015/19, p. 45, para. 18 (Remiro Brotóns).

[35]*Ibid.*, p. 45, para. 18 (Remiro Brotóns).

[36]*Ibid.*, pp. 45-46, para. 22 (Remiro Brotóns).

[37]CR 2015/18, pp. 50-52, paras. 18-24 (Wordsworth); see also Constitutional Tribunal of Bolivia, Plurinational Constitutional Declaration No. 0003/2013, made in Sucre on 25 Apr. 2013; POCh, Ann. 72, pp. 1025-1027, Sec. III. 11, considering Bolivian Law on Normative Application — Statement of Reasons, 6 Feb. 2013; POCh, Ann. 71, p. 1003, Art. 6.

[38]CR 2015/19, p. 45, para. 21 (Remiro Brotóns).

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

constitutional right to sovereign access to the sea; and (iii) that, consistent with this and the President Morales 2011 speech that I took you to on Monday[40], the current claim has been brought[41]. Bolivia elected to ignore this memorandum in its first round, although it neatly confirms that the "matter" before you is indeed the same "matter" settled and governed by the 1904 Peace Treaty.

III. The position prior to 1948

17. I move on to Bolivia's new emphasis on the documents prior to 1948, which evidently reflects the concern that, if Chile is right to say that the relevant matter was, as of 1948, settled in and governed by the 1904 Peace Treaty, that makes good our jurisdictional objection.

18. On Bolivia's case what was settled and governed by the 1904 Peace Treaty, on the one hand, and whether there is a *pactum de contrahendo* under which Chile is obliged to transfer to Bolivia a part of Chile's coastal territory, on the other hand, are different matters existing in parallel. Bolivia relies on 11 documents in the pre-1948 period to say that this alleged *pactum* existed prior to signature of the Pact of Bogotá. But it is clear at a glance that none of them comes close to establishing a *pactum de contrahendo* the effect of which might be to undermine Chile's central proposition at this jurisdictional phase which is that, as of 1948, the relevant legal landscape was governed by the 1904 Peace Treaty**.**

19. The first document that you were referred to, now up on the screen, was a Chilean memorandum of 9 September 1919[42]. Chile says that it "is willing to make all efforts for Bolivia to acquire an access to the sea of its own" by ceding a part of Arica, and that "independently of" the 1904 Treaty, "Chile accepts to engage into new negotiations to fulfil the longing of the friendly country, subordinated to the victory of Chile in the plebiscite" as established by the Treaty of Ancón[43]. This is a statement of a willingness to make all efforts, not a *pactum de contrahendo*.

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[40]Speech delivered by President Evo Morales on Bolivia's Day of the Sea, 23 Mar. 2011, available at http://www.diremar.gob.bo/node/265, tab 32 of Chile's judges' folder of 4 May 2015, pp. 5 and 6.

[41]See CR 2015/18, pp. 51-52, paras. 21-22 (Wordsworth); see also Bolivia, Offering Memorandum for government bonds, 22 Aug. 2013, available at: https://www.bourse.lu/instrument/listdocuments?cdVal=201919&cdTypeVal=OBL, tab 35 of Chile's judges' folder of 4 May 2015, p. 33.

[42]Chilean Memorandum of 9 September 1919, MB, Ann. 19.

[43]Chilean Memorandum of 9 September 1919, MB, Ann. 19, paras. IV and V.

20. [Slide on] You were then taken to a short extract yesterday from the Minutes of 10 January 1920, concerning Chile's being "willing to make all efforts", "independently [of] what has been established under" the 1904 Treaty to open negotiations "aimed at fulfilling the aspiration of its friend and neighbour"[44]. It is sufficient to take you to the opening and closing sections of the document, that show what was really happening and this is at tab 39 of our new and enviably slimline judges' folder. In the first paragraph, you see that the Ministers had "agreed to open these meetings in order to exchange general ideas on how to put into practice these lofty goals"[45], that is goals concerning strengthening ties between the two States. Then you see in the penultimate paragraph, over the page at tab 39, the following: "the present declarations do not contain provisions that create rights, or obligations for the States whose representatives make them"[46].

21. So, the suggestion that this document might establish a *pactum de contrahendo* is at best, one might say, a little far-fetched. It was said by Bolivia yesterday that it was "remarkable" that Chile had "completely ignored the 1920 Act"[47]. But what is remarkable is that in relying on this document, Bolivia failed to draw the Court's attention to this rather important statement of its legal value.

22. [Slide on] The next document relied on was a letter of 6 February 1923[48], tab 40 of the folder, in which Chile's Foreign Minister acknowledged receipt of Bolivia's proposal for "revision" of the 1904 Treaty, "for the purpose of opening a new international situation"[49]. Chile responded that it would not revise the 1904 Peace Treaty, but referring to Chile's statements before the League of Nations, indicated that Chile maintained "the purpose of listening" to Bolivia's proposals to conclude a new pact "which responds to the situation of Bolivia, without modifying the Treaty of Peace" or "interrupting the . . . continuity of the Chilean territory"[50]. So, the reference to this listening exercise evidently adds nothing whatsoever.

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[44]"Acta Protocolizada": Act of 10 January 1920, MB, Ann. 101, p. 394

[45]"Acta Protocolizada": Act of 10 January 1920, MB, Ann. 101, p. 393.

[46]"Acta Protocolizada": Act of 10 January 1920, MB, Ann. 101, p. 402.

[47]CR 2015/19, p. 56, para. 19 (Akhavan).

[48]Chilean Minister for Foreign Affairs' Note of 6 February 1923, MB, Ann. 48, referred to in CR 2015/19, p. 31, para. 14 (Chemillier-Gendreau).

[49]Chilean Minister for Foreign Affairs' Note of 6 February 1923, MB, Ann. 48, p. 209.

[50]Chilean Minister for Foreign Affairs' Note of 6 February 1923, MB, Ann. 48, p. 210.

23. That leads one to the League of Nations documents, to which Bolivia interestingly did not refer yesterday. And there one finds statements of Chilean willingness to negotiate, but not on the subject of sovereign access[51].

24. There were a series of exchanges between the States in 1923, but Bolivia did not take you to all of them. [Slide on] On 12 February 1923, the Bolivian Foreign Minister recalled that Chile would not agree to recognize "the revision" of the 1904 Peace Treaty and the Bolivian Minister added that, "my country's maritime claim cannot be situated outside the legal background of the Treaty of 1904"[52]. Well, quite so.

25. [Slide on] That leads me to the next document on which Bolivia relied on Wednesday[53]. It is a letter of 22 February 1923 from Chile's Foreign Minister to Bolivia, expressing optimism that Bolivian "aspirations" could be met "if they restrict themselves to ask [for] a free access to the sea and they do not assume the form of the maritime vindication that Your Excellency's note suggests"[54]. The Court will have seen that the word "sovereign" is noticeably absent from that communication.

26. [Slide on] The next document, tab 43, is a memorandum of 23 June 1926[55]. It was submitted on behalf of Bolivia on Wednesday that: "Le Chili dans un mémorandum du 23 juin 1926 propose alors le transfert à la Bolivie d'une partie du territoire d'Arica."[56] The sentence on the screen, now highlighted, is the evidence for that proposition, but the Court will also wish to consider the next sentence: [Phased slide] "None of these formulas deserved to be accepted."[57]

27. The next document Bolivia relied on was the proposal made by the United States Secretary of State Kellogg to Peru and Chile in 1926 in the context of seeking to find a solution to

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[51]See, e.g., Statement by the Delegate of Chile at the 22nd Plenary Meeting of the League of Nations, 28 Sep. 1921, MB, Ann. 160.

[52]Note from Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Luis Izquierdo, Minister for Foreign Affairs of Chile, 12 Feb. 1923; POCh, Ann. 40, p. 597.

[53]CR 2015/19, p. 31, para. 14 (Chemillier-Gendreau).

[54]Chilean Minister for Foreign Affairs' Note of 22 Feb. 1923; MB, Vol. II. Part I, Ann. 50, p. 215.

[55]Chilean Memorandum of 23 June 1926; MB, Vol. II, Part I, Ann. 20.

[56]CR 2015/19, p. 31, para. 15 (Chemillier-Gendreau).

[57]Chilean Memorandum of 23 June 1926; MB, Vol. II, Part I, Ann. 20, p. 95.

the dispute between those two States over Tacna and Arica[58]. The proposal was that they sell Tacna and Arica to Bolivia. Two points. A proposal by the United States Secretary of State could not create rights for Bolivia nor obligations for Chile. In addition, the Kellogg proposal is evidently inconsistent with there being any prior *pactum de contrahendo*. [Slide on] That same point flows from Chile's response to the Kellogg proposal (tab 44).

(a) Chile recalled that, in the 1904 Peace Treaty, Bolivia "renounced having a seacoast, demanding as more suitable for its interests, compensation of a financial nature and means of communication"[59]. It noted that Bolivia wished to be involved in the negotiations concerning Tacna and Arica and it added: "Neither in justice nor in equity can justification be found for this demand which it formulates today as a right."[60]

(b) In language incapable of creating legal obligations, Chile said that it had "not rejected the idea of granting a strip of territory and a port to the Bolivian nation" and went on to describe the question of whether it would do so as "pending"[61]. Bolivia seeks to make much of that word, but on no reading of this document was there any pending question about whether Bolivia had a right to sovereign access in territory that has never belonged to it. The pending question was whether Chile would decide to grant such a right, in a departure from the status quo. Chile indicated that it agreed "to consider, in principle, the proposal"[62]. The wording hasn't made it up on to your slide, but let me just read it from the Memorial, Annex 22, page 109: "In this sense the Chilean Government agrees to consider, in principle, the proposal, thereby giving a new and eloquent demonstration of its aims of peace and cordiality." Hardly a *pactum de contrahendo*.

28. [Slide on] As to the 1929 Protocol to the Treaty of Lima, at tab 45, Chile and Peru there agreed that neither of them would "without a prior agreement between them, cede to any third

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[58]CR 2015/19, p. 31, para. 15 (Chemillier-Gendreau), referring to Secretary of State Frank B. Kellogg's Memorandum of 30 Nov. 1926; MB, Vol. II, Part I, Ann. 21.

[59]Chilean Memorandum of 4 December 1926; MB, Vol. II, Part I, Ann. 22, p. 107.

[60]*Ibid.*

[61]*Ibid.*

[62]*Ibid.*, p. 109.

Power the whole or a part of" Tacna or Arica[63]. Bolivia now says that, if they agreed this, then there must have been a pending question between Bolivia and Chile "ainsi que la nécessité de la régler en dehors des termes du traité de 1904"[64]. That is just assertion and, if it were right, it would mean that there was also a pending question with Peru as the Protocol applies to both Tacna and Arica. In any event, there is no hint here of a *pactum de contrahendo* between Bolivia and Chile, and moreover the Protocol shows that, going forward, Chile did not and could not confer an unconditional right on Bolivia to sovereign access to the sea through Arica, because it could not give effect to such a right without the consent of Peru. [Slide off]

29. The last episode prior to 1948 on which Bolivia relies is the exchanges leading up to the 1950 Exchange of Notes, and you were invited by Professor Chemillier-Gendreau to refer to Annexes 58-68 of Bolivia's Memorial[65]. The first thing to note is that only the first two of those annexes are dated prior to 1948, and the second point is that Bolivia cannot credibly say that these constituted an agreement, let alone one concerning an obligation of result. Nor could it be said that they unsettled anything at all.

30. Mr. President, Members of the Court, there was no *pactum de contrahendo* in 1948 and Bolivia's new claim to the contrary is one that you can readily and properly reject at this jurisdictional phase.

31. At the same time, the mere fact that there were exchanges about negotiations could not of itself unsettle the existing legal position, as established in the 1904 Treaty. To the contrary, as I said in opening, they merely identify that there was an established legal position, i.e., that established by the 1904 Peace Treaty, that Bolivia was seeking to shift. The matter of whether Bolivia had a right to sovereign access to the Pacific Ocean was, as of 1948, one settled in, and governed by, the 1904 Peace Treaty.

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[63]Supplementary Protocol to the Lima Treaty, signed on 3 June 1929; MB, Vol. II, Part. I, Ann. 107, Art. 1, p. 423.

[64]CR 2015/19, p. 32, para. 17 (Chemillier-Gendreau).

[65]*Ibid.*, para. 18 (Chemillier-Gendreau).

IV. The position as from 1948

32. As to the documents that Bolivia relies on in the period post-1948, these provide an important response to the point that Bolivia was making yesterday on characterization: that, as introduced by Bolivia's Agent, the matter before the Court relates to a *pactum de contrahendo* and not the 1904 Peace Treaty[66]. If that were the case then, of course, one would expect the 1950 and 1975 exchanges, of which we heard so much yesterday, to have at least some plausible resemblance to such a *pactum*. The trouble for Bolivia is that they do not.

33. The Court may have picked up yesterday that Bolivia is rather coy about what these documents — on which it places such reliance — in fact say.

34. In its Note of 1 June 1950, Bolivia proposed, this is tab 46, that [slide on]: "the Governments of Bolivia and Chile [should] formally enter into direct negotiations to satisfy Bolivia's fundamental need to obtain its own sovereign access to the Pacific Ocean"[67].

35. The key document for Bolivia is then Chile's response of 20 June 1950, to which Professor Chemillier-Gendreau and others referred yesterday[68]. Yet, this was not included in the judges' folder or shown on your screens. Chile did not accept Bolivia's proposal, but stated instead that it was —this is tab 47 [slide on]:

> "willing to formally enter into direct negotiations aimed at finding a formula that will make it possible to give to Bolivia a sovereign access to the Pacific Ocean of its own, and for Chile to receive compensation of a non-territorial character that effectively takes into account its interests"[69].

36. Now, supposing for jurisdictional purposes that this exchange somehow establishes an international agreement, it is not even plausibly the *pactum de contrahendo* that is said by Bolivia, for the purposes of characterization, to be the relevant matter.

37. Two further points on this exchange: first, notwithstanding the reference in the Note of 20 June 1950 to "safeguarding the legal situation established by the Treaty of Peace of 1904"[70], the exchange still concerns in substance the same matter settled in and governed by that Treaty, the

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[66]CR 2015/19, p. 11, para. 6 (Rodríguez Veltzé).

[67]Ambassador of Bolivia's Note No. 529/21 of 1 June 1950; MB, Vol. II, Part I, Ann. 109A, p. 431.

[68]CR 2015/19, p. 32, para. 19 (Chemillier-Gendreau) and pp. 57-58, para. 22 (Akhavan).

[69]Minister for Foreign Affairs of Chile's Note No 9 of 20 June 1950; MB, Vol. II, Part I, Ann. 109B, p. 433.

[70]Minister for Foreign Affairs of Chile's Note No. 9 of 20 June 1950; MB, Ann. 109 B, p. 433.

matter of Bolivia's access to the sea; and, secondly, there is no hint here of any intent to bypass Article VI of the Pact or otherwise to establish the jurisdiction of the Court.

38. Precisely the same points apply with respect to the 1961 Trucco Memorandum[71], as well as the exchanges coming out of the 1975 Act of Charaña, about which we heard so much yesterday[72]. Again, the Court was referred to, but not actually shown, the documents on which Bolivia has placed such weight in its written and oral pleadings.

39. The principal document on which Bolivia relies is dated 19 December 1975, when Chile set out guidelines for a negotiation between the two States concerning the cession of territory as is now on the screen, and at tab 48. Time is too short perhaps to read it all for now but you have the basic point from paragraph *(c)*: "*(c)* As His Excellency President Banzer stated, the cession to Bolivia of a sovereign maritime coast linked to Bolivian territory through a territorial strip with the same type of sovereignty would be considered."[73]

40. Thus, the Court will see when it returns to this document that the same three points apply once more: there is no plausible suggestion of any *pactum de contrahendo* which can somehow now be portrayed as constituting the real matter at issue in this case; there is no hint of any intention to establish compulsory jurisdiction; and the matter at issue is that of Bolivian access to the sea, that is in substance the same matter settled in, and governed by, the 1904 Peace Treaty.

41. Now of course we accept the reference in paragraph *(b)* of this document to not "containing any innovation to the stipulations of the [1904 Treaty]"[74], but the role here of the Court is to look at the documents that Bolivia relies on objectively, and to assess whether these establish the existence of a substantively different matter that would no longer be caught by Article VI. They do not; but, in any event, the "without containing any innovation to" type wording could not assist Bolivia. The critical question for the purposes of Article VI remains whether Bolivia's claim, as now formulated, requires revision of the matter settled in, or governed by, the 1904 Peace Treaty. It does.

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[71]Memorandum from the Embassy of Chile in Bolivia to the Bolivian Ministry of Foreign Affairs, 10 July 1961; POCh, Ann. 48.

[72]CR 2015/19, p. 11, para. 4 (Rodríguez Veltzé); p. 19, para. 16 (Forteau); p. 32, para. 17 (Chemillier-Gendreau); p. 33, para. 21 (Chemillier-Gendreau); p. 56, para. 18 (Akhavan).

[73]Foreign Relations Minister of Chile's Note No. 686, 19 Dec. 1975; MB, Ann. 73, pp. 302-303.

[74]Foreign Relations Minister of Chile's Note No. 686, 19 Dec. 1975; MB, Ann. 73, p. 302.

42. Finally, under this heading, I want to turn briefly to the 1983 resolution of the OAS, which was referred to a number of times yesterday[75], alongside a statement by the Chilean representative to the OAS of 12 November 1986[76]. The 1983 resolution was, in relevant part — and this is at paragraph 2, of tab 49 [slide on]:

> "2. To urge Bolivia and Chile, for the sake of American brotherhood, to begin a process of rapprochement and strengthening of friendship of the Bolivian and Chilean peoples, directed toward normalizing their relations and overcoming the difficulties that separate them — including, especially, a formula for giving Bolivia a sovereign outlet to the Pacific Ocean . . ."[77]

43. And the same three points apply: not even plausibly a *pactum de contrahendo* that could constitute the relevant matter, no substantively different matter and no hint of an intention to establish jurisdiction.

44. Indeed, the Chilean representative stated at this meeting that "the boundaries between Chile and Bolivia were fixed once and for all by an international treaty that was freely signed by both countries in 1904"[78], and further, as you can see from tab 50, that [slide on]:

> "Any negotiations with Bolivia aimed at satisfying Bolivia's longing for sovereign access to the Pacific Ocean through Chilean territory is a matter for solution directly between Bolivia and Chile, and might possibly require the participation of Peru . . . [He said that] [a]ny negotiations of this type must also be the result of a process; a process that involves improving and normalizing the relations between our two countries . . ."[79]

45. When it comes to the all-important question of characterization of the real issue in the current claim, it is difficult to conceive of anything further away from the *pactum de contrahendo* that Bolivia asserts as being the relevant matter.

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[75]CR 2015/19, p. 13, fn. 6 (Rodríguez Veltzé); p. 19, para. 16 (Forteau); pp. 35-36, para. 29 (Chemillier-Gendreau).

[76]CR 2015/19, pp. 35-36, para. 29 (Chemillier-Gendreau).

[77]OAS resolution AG/Res. 686 (XIII-0/83), adopted on 18 Nov. 1983; MB, Ann. 195, pp. 723-724.

[78]Statement by Mr. Schweitzer, Minister for Foreign Affairs of Chile, at the Fourth Session of the General Committee of the General Assembly of the OAS, 18 Nov. 1983; POCh, Ann. 55, p. 781.

[79]*Ibid.*

46. There are many such statements made by Chile before the OAS, to which you were not alerted yesterday[80]; and, as reference was made to the Chilean intervention on 12 November 1986[81], I should note that the Chilean representative then stated in terms to the OAS — tab 51 [slide on]:

> "Here, I want to recall the Chilean opinion [in] this regard: there is no territorial dispute between Bolivia and Chile because our borders were determined through the [1904 Peace Treaty]~~, ...~~ whose intangibility we hold. From the aforementioned it can be followed that international organ[s] do not have any jurisdiction to consider any matter relating to an issue already settled through a bilateral treaty."[82]

47. So, as with the unopposed statement of Minister Trucco[83], the express position of Chile was that the existence of the 1904 Treaty excluded any submission to third-party jurisdiction, while, for the purposes of characterization of the real issue before you, there is once again a critical absence of the *pactum de contrahendo* which Bolivia now says that this case is all about.

V. Substance, not form

48. I move to my final point, which is that it is indeed substance, not form, that counts in this jurisdictional context.

49. There was no come back on my analogy on Monday to the approach of international courts and tribunals to jurisdiction *ratione temporis*[84], but I should identify that the point that it is substance here that matters is one that stems from the careful wording of Article VI.

50. The question of whether a matter is settled or not leads inevitably to the identification of the relevant matter and to the question of whether a given claim under Article XXXI of the Pact cuts across the status of that matter as one that is settled. Thus, what is important is the desired

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[80]See, e.g., statement by the Chilean Representative at the Sixth Plenary Session of the General Assembly of the OAS, 24 Oct. 1979; MB, Ann. 202, p. 738; statement by the Foreign Minister of Chile at the Second Session of the General Commission of the General Assembly of the OAS, 6 June 1990; MB, Ann. 214, pp. 778-779; statement by the Under-Secretary of Foreign Affairs of Chile at the Second Session of the General Commission of the General Assembly of the OAS, 7 June 1994; MB, Ann. 218, p. 789; statement by the Foreign Minister of Chile at the Fourth Plenary Session of the General Assembly of the OAS, 4 June 1996; MB, Ann. 220, p. 795; statement by the Foreign Minister of Chile at the Fourth Plenary Session of the General Assembly of the OAS, 3 June 1997; MB, Ann. 221, p. 798; and statement by the Foreign Minister of Chile at the Fourth Plenary Session of the General Assembly of the OAS, 6 June 2000; MB, Ann. 223, p. 803.

[81]CR 2015/19, p. 36, para. 29 (Chemillier-Gendreau).

[82]Statement by the Chilean Representative at the Third Session of the General Assembly of the OAS, 12 Nov. 1986; MB, Ann. 208, p. 758.

[83]CR 2015/18, pp. 60-61, paras. 55-56 (Wordsworth).

[84]*Ibid.*, p. 59, para. 51 *(c)* (Wordsworth).

legal outcome of the given claim, not the particular formulation of the mechanism by which that desired outcome is to be reached. For jurisdictional purposes, it can make no practical difference, and there is no reason for any principled legal distinction, between (i) a claim for the revision of a matter settled by arrangement and (ii) a claim for judicially prescribed negotiations that lead inevitably to the same result.

51. Bolivia recognizes this, and has therefore sought to establish the existence of an entirely fictive *pactum de contrahendo* that post-dates the signature of the Pact in an attempt to shore up the argument that there is a new, post-1948 matter that is not settled by the 1904 Peace Treaty. But, there are two points here:

(a) For the purposes of the current exercise of characterization of the relevant matter, the Court is empowered by Article VI to test whether Bolivia can point to, at least plausibly, the asserted *pactum de contrahendo.* It cannot, and it follows that this non-existent *pactum* cannot redefine the matter that is now before you.

(b) Secondly, even if it were to be assumed in Bolivia's favour that the existence of this *pactum de contrahendo* is anything more than wishful thinking, that would not alter the position that the revision of the settlement established by the 1904 Peace Treaty remains as the central and inevitable outcome of the pleaded claim such that the claim cannot somehow be characterized as containing a new or different matter to that settled in, and governed by, the 1904 Treaty, that is the matter of whether Bolivia has a right of sovereign access to the sea.

52. Mr. President, Members of the Court, I thank you for your attention, and ask you to hand the floor to Professor Dupuy.

Le PRESIDENT : Merci. Je donne la parole à M. le professeur Dupuy.

M. DUPUY :

1. Monsieur le président, Mesdames et Messieurs les juges, lors du premier tour de ses plaidoiries, la Bolivie a tenté de vous persuader que vous n'aviez pas besoin, dès le début de cette affaire, de vérifier que vous aviez compétence pour examiner sa requête ; comme si elle avait oublié combien la Cour elle-même a inlassablement rappelé, tout au long du développement de sa

jurisprudence, combien elle ne pouvait exercer sa fonction judiciaire qu'à la condition d'en avoir reçu mandat par le consentement explicite des Parties[85].

2. A vrai dire, à la sortie de l'audience d'hier matin, il devenait presque un peu difficile de savoir exactement quelle était l'argumentation de la Bolivie, tant un certain nombre de contradictions et de confusions, aussi bien matérielles que temporelles, étaient apparues entre ses divers conseils. Devrions-nous considérer qu'existait *ab initio*, c'est-à-dire, sans doute, comme incitait à le penser hier ma collègue et amie le professeur Chemillier-Gendreau, dès l'attaque du port d'Antofagasta, le 14 février 1879, un droit, c'est-à-dire un titre territorial de la Bolivie à un littoral maritime[86] ?

3. Ou bien serions-nous plus simplement, mais de façon bien différente, en présence d'une obligation de négocier à raison de l'existence d'un nouvel accord intervenu entre les Parties, distinct du traité de 1904 dont il nous a été assez dit que la Bolivie ne demandait pas l'annulation ? Selon une terminologie jusque-là inusitée par nos contradicteurs, un *pactum de contrahendo*, pour parler comme mon collègue, le professeur Akhavan, un pacte dont on ne sait pourtant ni quand ni comment il aurait jamais été conclu[87]?

4. A moins qu'il s'agisse non pas d'un pacte, par définition conventionnel, mais plutôt d'un engagement unilatéral du Chili, constitué à raison de la sédimentation d'un certain nombre de déclarations, voire d'échanges diplomatiques entre les deux Etats ? Mais alors, de cet engagement, on ne sait toujours pas davantage à partir de quel moment ses différents éléments constitutifs sont réputés avoir atteint la phase de cristallisation nécessaire à la formation d'une *obligation juridique*, au-delà de simples *pourparlers diplomatiques* ? Doit-on se situer avant ou après 1904 ? Antérieurement ou postérieurement à 1948 ? Quand, au juste, aurait eu lieu cette métamorphose insolite, soudaine ou progressive, ce passage aléatoire des tâtonnements incertains de la diplomatie à la rigueur intransigeante du droit ? Aucune réponse n'est donnée à cet égard par le demandeur dans cette affaire.

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[85] Affaire relative à l'*Incident aérien du 27 juillet 1955 (Israël c. Bulgarie), arrêt, C.I.J. Recueil 1959*, p. 142 ; *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 852, par. 51.

[86] CR 2015/19, p. 29, par. 10 (Chemillier-Gendreau).

[87] *Ibid.*, p. 51, par. 4 (Akhavan).

5. Pourtant, la réponse à ces interrogations n'est nullement insignifiante, Mesdames et Messieurs les juges ! Il y va, d'ores et déjà, de *votre* compétence, toujours fondée sur le seul consentement des parties, pour connaître d'une requête dont la Bolivie a voulu souligner à suffisance que l'objet serait distinct de celui identifié par le Chili. Il est, par conséquent, indispensable de revenir aux données, fondamentalement simples, du problème posé par la requête comme à celles de l'objection qu'elle suscite de la part du Chili quant à votre propre compétence (I). On rappellera ensuite que l'appréciation de celle-ci, en application de l'article VI du pacte de Bogotá, ne saurait être jointe au fond compte tenu du cadre juridique sur la base duquel vous avez été saisis (II).

I. Les données fondamentales du problème

6. Le problème simple qui se pose à la Cour à ce stade préliminaire est de savoir si la question soumise par la requête de la Bolivie était ou non *déjà réglée* par le traité de paix de 1904, en vigueur lorsque le pacte de Bogotá a été signé, en 1948.

7. Et pour y donner réponse, il est nécessaire pour la Cour de se livrer à la caractérisation de la demande bolivienne. Cette ***question***, nos distingués contradicteurs l'ont suffisamment répété hier matin, concerne le problème de savoir si la Bolivie dispose d'un droit d'accès à l'océan Pacifique dont le Chili aurait l'obligation de négocier les modalités avec elle.

8. Or, il se trouve que cette «question» de l'accès de la Bolivie à la mer, le terme de «question» étant ici à prendre au sens de l'article VI du pacte de Bogotá, a reçu une réponse, agréée d'un commun accord par les deux pays. Ce sont, en effet, les termes du traité de 1904 qui l'apportent, sans équivoque possible. La frontière existant entre les deux pays ne permet pas d'accès direct, ou «pleinement souverain», du territoire bolivien à l'océan. Et les deux Parties, prenant en compte le caractère enclavé du territoire bolivien, ont établi un droit de transit commercial au bénéfice de la Bolivie. La situation n'a pas changé depuis lors.

9. Alors, pour tenter de la contourner, la Bolivie s'est livrée devant vous, mercredi dernier, avec une créativité à laquelle on doit rendre hommage, à une tentative, nouvelle quant à elle, de dédoublement des obligations s'imposant au Chili. Nous étions, jusqu'ici, habitués par ses écritures à voir invoqué le traité de 1895. Las ! On nous dit à présent que ce traité n'est désormais

tout au plus qu'un indice, un simple fait déclaré révélateur, dans la tentative menée par la Bolivie pour constituer une sorte de *continuum* historique dont les origines restent mystérieuses mais dont les effets sont déclarés déterminants. C'est lui, semble-t-il, ce *continuum*, sur lequel s'appuierait un autre consentement du Chili que celui établi en 1904 : non plus un traité jamais entré en vigueur, ni en 1895 ni après, mais, désormais, un *pactum de contrahendo*[88].

10. Or, nous l'avons entendu hier, ce *pactum* devrait être constitué, selon la Bolivie, par l'amalgame de déclarations unilatérales et d'échanges de notes. Quoi qu'il en soit, la Cour n'a pas besoin de se livrer ici à la dissection délicate de cette chimère composite en l'examinant au fond et *à fond*, si je puis me permettre ici de jouer sur les mots.

11. A supposer même que certains de ses éléments (ce qu'ils ne font pas) aient pu constituer la matière d'un engagement unilatéral ou contractuel conclu par le Chili, la Cour se souviendra combien le professeur Chemiller-Gendreau a insisté dans sa plaidoirie d'hier sur l'échange de notes de *1950*, sur le mémorandum Trucco de *1961*, ou, plus encore, sur les prises de position diplomatiques intervenues entre les deux pays entre *1975* et *1977*[89], rejointe à cet égard par le professeur Akhavan[90]…

12. Or, Monsieur le président, si l'on cherche vraiment à trouver un point commun entre ces faits hétéroclites, on n'en trouvera qu'un seul. C'est que ces faits, quelle que soit leur qualification, sont tous *postérieurs à 1948*, date de signature du pacte de Bogotá. Il en résulte, en application du seul instrument sur la base duquel vous êtes saisis, et parce que, manifestement, la question mise en cause par la requête de la Bolivie est bien *la même* que celle réglée par le traité de paix, traité en vigueur en 1948, que la Cour internationale de Justice n'a pas compétence pour en connaître, et ce, par détermination de l'article VI du pacte.

13. Il est, je pense, inutile à ce stade de revenir sur le contenu et les implications de cette disposition. Je vous renvoie à cet égard aux propos du professeur Moníca Pinto qui n'ont d'ailleurs pas reçu de démenti par mon ami le professeur Remiro Brotóns hier matin. Je ne reviendrai pas

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[88] CR 2015/19, p. 52, par. 8 (Akhavan).

[89] *Ibid.*, p. 32, par. 19 et suiv. (Chemillier-Gendreau).

[90] *Ibid.*, p. 58, par. 23 et suiv. (Akhavan).

davantage sur l'artificialité de la thèse bolivienne, déjà évoquée devant vous par Daniel Bethlehem, cet après-midi.

14. Oh, bien entendu, sans être prophète, il est vraisemblable que nos contradicteurs et néanmoins amis vous diront demain que les précédents constituant cet assemblage à prétention conventionnelle s'inscrivent dans la longue durée ; et que certains d'entre eux remontent à une époque qui est antérieure à 1948. Ils vous diront cela, sans pour autant être à même de vous prouver que la «masse critique» de cet improbable engagement avait *déjà* été atteinte *avant* que le pacte adopté à Bogotá n'ait été signé. C'est, d'ailleurs, devant le constat de cette improbabilité, au sens propre du terme, que la Bolivie tente d'établir ce *continuum* historique dont on ne sait quand il a débuté ni quand il a pris consistance.

15. Mais alors, Monsieur le président, Mesdames et Messieurs les juges, ici survient une question ! Si la Bolivie était tellement certaine que le traité de paix de 1904, tout en restant en vigueur, s'était, en quelque sorte, vu doubler, comme dans les rues de Marseille, de Naples ou de Téhéran, par un autre engagement prenant le pas sur lui, dont mes collègues de l'autre côté de la barre vous disaient pourtant hier qu'il était *parallèle*[91], *pourquoi, mais pourquoi donc la Bolivie a-t-elle cru bon de ne pas ratifier le pacte de Bogotá avant 2011* ?

16. Et pourquoi, l'ayant enfin ratifié, a-t-elle maintenu cette réserve vraiment jusqu'à la veille du dépôt de sa requête ? Deux semaines à peine ! Pourquoi, s'agissant précisément, rappelons-le, d'une réserve destinée à faire obstacle à l'application de l'article VI du pacte de Bogotá ? Une réserve subordonnant l'application de celui-ci à l'appréciation par son propre auteur de la question de savoir si l'arrangement en cause «touche aux intérêts vitaux d'un Etat»[92] ! Une réserve dont le contenu avait provoqué le commentaire dubitatif du secrétaire général de l'OEA.

17. Pourquoi avoir maintenu une telle réserve sinon parce que la Bolivie savait fort bien que l'article VI est bien toujours l'obstacle incontournable se dressant en l'occurrence, et compte tenu de l'existence et du contenu du traité de 1904, à l'encontre de votre compétence ? Alors, faute de

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[91] CR 2015/19, p. 51, par. 4 (Akhavan).

[92] «La délégation de la Bolivie formule une réserve en ce qui concerne l'article VI car elle estime que les procédures pacifiques peuvent également s'appliquer aux différends issus de questions résolues par arrangement entre les parties, lorsque pareil arrangement touche aux intérêts vitaux d'un Etat», onglet n° 3 du dossier de plaidoiries du premier tour du Chili, p. 24, 54 et 55.

mieux, et parce que les contraintes de sa nouvelle Constitution comme les déclarations de son président rendaient indispensable une initiative, politique autant que juridique, il a fallu que la Bolivie fabrique un ersatz de convention pour contourner celle, pourtant bien réelle, qui lui barrait le chemin de la Cour.

18. Et si la Bolivie a tant tardé à retirer sa réserve, c'est bien parce qu'elle voulait jusqu'au bout se préserver des termes implacables de l'article VI. Et si elle s'est finalement résolue à la retirer, ce n'est nullement «pour dissiper tout doute sur l'applicabilité ou non du pacte à ses relations avec le Chili», ainsi que le disait aimablement mon ami Remiro Brotóns[93], mais parce qu'elle savait bien que cette réserve serait de toute façon dépourvue d'effet à l'égard du seul Etat qui compte en l'occurrence, à savoir le Chili ; celui-ci avait, en effet, par une déclaration dépourvue de toute ambiguïté, indiqué à deux reprises dont la dernière au moment de la ratification du pacte par la Bolivie, en 2011, qu'il faisait *objection* à une telle réserve, ainsi que lui en fait droit la convention de Vienne sur le droit des traités. Encerclée par le pacte, la Bolivie s'est alors résolue à tenter une sortie, en essayant de refouler les termes du traité de paix de 1904 pour mieux le faire oublier.

19. Peut-on alors considérer que la Cour pourrait attendre, pour se prononcer sur sa compétence, que les deux Parties en viennent à considérer le fond du différend ? Et bien non ! Selon la République du Chili, la réponse à cette question est manifestement négative, Mesdames et Messieurs de la Cour, et ceci en raison du cadre juridique à l'intérieur duquel la Cour a été saisie.

II. Le fondement invoqué de la compétence de la Cour impose que l'objection présentée à son encontre par le Chili soit examinée à titre préliminaire

20. Contrairement à ce qui s'était présenté à vous lors de l'objection à la compétence de la Cour présentée par la Colombie dans l'affaire qui l'opposait au Nicaragua, objection que vous avez examinée dans votre arrêt souvent cité de 2007, il n'y a pas ici dédoublement de la base de juridiction de la Cour, le pacte, d'un côté, le Statut de la Cour, d'autre part. Ici, il n'y a qu'un fondement sur lequel le demandeur appuie sa demande. Il se réduit à l'invocation du pacte. Ce sont par conséquent ses dispositions qu'il convient d'appliquer. Il n'y a aussi, au-delà de la

[93] CR 2015/19, p. 44, par. 17 (Remiro Brotóns).

chimère fabriquée par la Bolivie, qu'un seul traité applicable et un traité dont les dispositions, contrairement à celles du traité de 1928 entre le Nicaragua et la Bolivie, sont dépourvues de toute équivoque aussi bien pour ce qui se réfère à leur contenu qu'à leur validité au moment de la signature du pacte, en 1948.

21. Monsieur le président, vous nous avez engagés à éviter d'inutiles répétitions lors de notre second tour, et je ne vais pas redire ici les raisons pour lesquelles nous ne nous trouvons dans aucun des deux cas de figure identifiés par la Cour en 2007 comme faisant exception au droit qu'a l'Etat auteur d'une objection à ce que celle-ci soit véritablement examinée par la Cour à titre préliminaire[94].

22. Le seul test pour vérifier la compétence de la Cour est celui de savoir si le traité apportant les réponses que nous savons aux questions soulevées par la requête bolivienne était ou non en vigueur en 1948. Et la Bolivie elle-même reconnaît que c'était bien le cas tout en essayant de faire prévaloir sur ce traité réel un *pactum* improbable.

23. Or, j'y insiste, vérifier le test de compétence précité correspond à la satisfaction de l'objection chilienne. Et ceci n'équivaut en rien à entrer dans la substance d'une revendication bolivienne fondée sur l'allégation d'existence d'un droit dont elle se prévaut sans même savoir nous dire quand il serait né ! Alors même que la date de son apparition est pourtant capitale pour vérifier si oui ou non vous avez compétence en cette affaire !

24. La Cour ne rencontrera par conséquent nul obstacle ici à consacrer un *autre* droit, purement procédural, quant à lui : celui qu'a l'auteur d'une *objection* préliminaire d'obtenir, *à titre préalable*, un arrêt relatif à cette *objection*. Rappelons que la Cour est d'autant plus incitée à se prononcer *in limine litis* que dans le cadre du pacte de Bogota, l'article XXXIII de celui-ci déclare qu'au cas où les parties ne se mettraient pas d'accord sur la compétence de la Cour au sujet du litige, elle-même décidera «au préalable» de cette question.

25. Une ultime raison, cependant, non pas accessoire mais fondamentale, paraît devoir conduire à l'examen et à la consécration, *à titre préliminaire*, de l'*objection* déposée par la

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[94] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 852, par. 51 ; CR 2015/19, p. 44, par. 17 (Remiro Brotóns) ; CR 2015/18, p. 63, par. 6 (Dupuy).

République du Chili, au-delà même des dispositions de cette *lex specialis* que constitue le pacte de Bogotá.

26. Et cette raison est tout simplement à trouver dans le caractère, toujours consensuel, de votre compétence.

27. N'était-ce pas, déjà, votre devancière, la Cour permanente de Justice internationale, qui reconnaissait dans l'affaire des *Concessions Mavromatis en Palestine* que sa compétence ne saurait subsister en dehors des limites dans lesquelles le consentement du défendeur a été donné[95] ? Ainsi que le notait un commentateur averti de cette jurisprudence, une telle considération vaut d'autant plus lorsque la Cour est confrontée à une objection formulée par ce défendeur ; et elle justifie à elle seule qu'il y soit répondu avant toutes choses, comme, du reste, ce défendeur y a droit[96] ainsi que vous l'avez encore rappelé en 2007[97].

J'en ai ainsi terminé, Monsieur le président, et je vous prie de bien vouloir céder la parole au professeur Harold Koh.

Le PRESIDENT : Merci, Monsieur le professeur. Eu égard au fait que l'audience a commencé tout à l'heure un peu après 16 heures 30, le Chili peut quelque peu déborder au-delà de 18 heures, mais je demande aux orateurs qui restent du côté du Chili de ne pas dépasser 18 heures 10. Je donne la parole à M. Koh.

Mr. KOH:

1. Mr. President, Members of the Court, on behalf of Chile, I am honoured to appear before you to underscore what is really at stake in this hearing.

2. The presentations thus far make clear that you may grant Chile's preliminary objection without determining the merits. Bolivia entered two binding treaties with Chile: the bilateral Peace Treaty of 1904[98] and the multilateral Pact of Bogotá of 1948[99]. On its face, the former

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[95] Affaire des *Concessions Mavrommatis en Palestine, arrêt n° 2, 1924, C.P.J.I. série A n° 2*, p. 16.

[96] G. Abi-Saab, *Les Exceptions préliminaires dans la procédure de la Cour internationale*, 1967, p. 35.

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

[98] Treaty of Peace and Amity between Bolivia and Chile, signed at Santiago on 20 Oct. 1904 (the 1904 Peace Treaty), tab 1 of judges' folder.

settled and governed Bolivia's claimed right of sovereign access to the Pacific. Forty-four years later, the latter, Article VI, expressly excluded from this Court's jurisdiction any matter "settled" or "governed" by a treaty in force in 1948, thereby divesting this Court of jurisdiction over Bolivia's Application[100].

3. But what risks would this Court incur, if instead it were to grant jurisdiction or join jurisdiction to the merits? Bolivia styles its claim as about Chile's alleged *obligation to negotiate* sovereign access to the sea. Bolivia's novel claim has broad implications for the sanctity of treaties and the ability of nations to engage freely in diplomatic discussions without prejudice to what already has been settled.

4. In Article VI, all High Contracting Parties to the Pact of Bogotá agreed that this Court should not intrude upon the sanctity of existing treaties by taking jurisdiction over matters previously settled or governed by treaty. Yet claiming an independent "obligation to negotiate", Bolivia now asks this Court to *order* Chile to renegotiate to change Bolivia's non-sovereign access through Chilean territory into sovereign access. To grant Bolivia's request would disrupt stable borders agreed upon in a bilateral treaty concluded more than 110 years ago.

5. Yesterday, Bolivia supported its supposed obligation to negotiate by citing various diplomatic exchanges before and after 1948. What Bolivia missed is that when the High Contracting Parties concluded the Pact of Bogotá, they sought not to end such exchanges, but to direct them to *diplomatic*, and not judicial, fora. As Professor Pinto reviewed, in 1948, the parties to the Pact chose to look forward, not backwards[101]. They never foreclosed future *diplomatic* discussions regarding matters of mutual interest already settled or governed by treaty[102]. Although the parties permitted certain matters to come to the Court, they consciously refused to allow any single State unilaterally to reopen a matter already settled by arrangement or governed by a treaty in force. Thus, Bolivia's claim of a historically continuous right of sovereign access to the Pacific that preceded and survived the 1904 Treaty belongs in diplomatic negotiating rooms. Not before a

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[99]American Treaty on Pacific Settlement, signed at Bogotá on 30 Apr. 1948 (entry into force 6 May 1949) (the Pact of Bogotá), tab 3 of judges' folder.

[100]Pact of Bogotá, tab 3 of judges' folder, pp. 4, 32 and 33, Art. VI.

[101]CR 2015/18, pp. 22-23, paras. 8-9 (Pinto).

[102]*Ibid.*, p. 27, para. 22 (Pinto).

Court that has no jurisdiction to consider such long-settled matters on the unilateral application of one State.

6. If Bolivia had wanted to secure a legal obligation by Chile to negotiate in the future on sovereign access, it could have included in the 1904 Treaty an explicit treaty clause obliging both Parties to negotiate in good faith in the future on that matter. Instead, Bolivia asks this Court to exercise its jurisdiction to imply a *judicially mandated* obligation to negotiate to a particular fixed result. In such lopsided negotiations, the two nations are not free to engage in diplomatic discussions without prejudice. What Bolivia pointedly demands is not a good-faith obligation of process, but a predetermined obligation of result.

7. Under Bolivia's theory, every negotiation creates two parallel tracks. Every time a nation concludes a treaty that settles one matter, it can incur a shadow set of obligations to negotiate with regard to a second matter that was *not* resolved to the opposing party's satisfaction. Once a nation begins any diplomatic discussions on this second track, it creates a new basis — a *pactum de contrahendo* — for claiming this Court's jurisdiction. Yesterday, Mr. Akhavan claimed this theory "does not lead to a precedent of general application in international law"[103]. But two dire consequences would follow.

8. First, Article VI of the Pact of Bogotá would be washed away. That article protects sovereign boundaries from unilateral challenge before the Court. But under Bolivia's theory, no matter subject to negotiations would ever be settled. Almost any boundary treaty, such as the 1904 Treaty of Peace that forms the basis of the two countries' daily relationship, could be judicially reopened simply by virtue of the Parties sitting down at the diplomatic table. As Sir Daniel reviewed, the 1904 Treaty addressed not just a comprehensive territorial settlement, but a series of other forward-looking arrangements and commitments designed to strengthen political and commercial ties[104]. If Bolivia could have this Court review the territorial settlement aspect of the 1904 Treaty, why could it not force judicial review of other elements of that Treaty as well?

9. Second, the Pact of Bogotá was designed to bring closure not just to territorial issues, but to a long list of other historical controversies. The fact that two States may negotiate on a treaty

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[103]CR 2015/19, p. 52, para. 6 (Akhavan).

[104]CR 2015/18, pp. 37-38, paras. 19-26 (Bethlehem).

matter that was settled before that date does not create jurisdiction for this Court to reopen that settled matter. Otherwise, Latin American States could not freely negotiate about any matter already settled or governed before 1948 without the risk of creating the very jurisdiction they had already excluded. Fear of litigation would create a perverse, freezing effect on States' willingness to negotiate on such matters. Bolivia's theory would chill diplomatic dialogue, and continually thrust this Court into the midst of delicate diplomatic discussions that fit poorly with its judicial function.

10. Under Bolivia's novel theory, by clever pleading, applicants could manufacture jurisdiction in this Court regarding previously settled matters. And this Court can expect to hear many more preliminary objection sessions like the one yesterday, replete with snippets of speeches, ministerial statements, and diplomatic exchanges as reasons to avoid the jurisdictional bar of Article VI. Notwithstanding Mr. Akhavan's effort to underplay, Bolivia's theory would doubtless encourage unilateral attempts to re-litigate the continent's history and borders. The careful limits established by the Pact of Bogotá would become increasingly meaningless.

11. Mr. President, Members of the Court, the stakes here are larger than the interests of just these two Parties. The two treaties relevant to jurisdiction are part of a larger treaty network that binds Bolivia and Chile[105]. The Pact of Bogotá succeeded in barring existing territorial settlements and other settlement matters from being reopened at the sole initiative of one State. But as Sir Daniel recounted, during the nineteenth and twentieth centuries, at least 12 separate treaties Bolivia settled disputed boundaries not just with Chile, but also with all four of its other neighbours[106]. May Bolivia now come before this Court to seek an order directing renegotiation of all of those other borders as well? And even if Bolivia did not, could those other regional partners also come to the Court seeking an order directing renegotiation of their borders?

12. This Court has announced that [slide on]

> "the clear purpose of [Article VI] was to preclude the possibility of using [these procedures], and in particular judicial remedies, in order to reopen such matters *as*

[105]CR 2015/18, p. 55, para. 33 (Wordsworth). See also Chile's preliminary objection, fn. 88.

[106]CR 2015/18, p. 35, fn. 69 (Bethlehem).

> *were settled between the parties to the Pact, because they had been the object of an international judicial decision or a treaty*"[107].

How many such settled matters might there be? Should they all now be subject to judicial re-examination? What about other pre-1948 boundaries that involve other Latin American countries who are not before the Court today? And if the matter of whether Bolivia has a right to sovereign access, which was plainly settled by the 1904 Treaty, could be reopened by this Court, why not also any of the many other matters that all had thought resolved?

13. Mr. President, Members of the Court: the stability of borders within Latin America is a regional achievement, achieved at high cost. Respect for treaties, borders, the rule of law, stability, require that Chile and its Latin American neighbours, including Bolivia, live up to their treaty commitments. Article VI of the Pact of Bogotá embodies that respect.

14. At bottom, Bolivia's case turns on unravelling and destabilizing established legal structures designed to preserve regional borders and preserve friendly relations. Those structures are fundamental not just to the peaceful bilateral relationship of these countries, but to their regional co-operation.

15. To allow applicants to avoid Article VI by jurisdictional sleight-of-hand would encourage other countries in the region to attempt unilaterally to reopen settled matters whose adjudication the Pact foreclosed. It would undermine a regional legal framework designed to promote stability and peaceful co-operation. It would chill useful discussions of difficult issues in diplomatic fora, where these two countries have periodically held talks. It would permit litigants to enlist this Court in delicate diplomatic matters.

16. In closing, Mr. President, Members of the Court: Bolivia invites this Court to unsettle what has long been settled, and to manufacture jurisdiction to govern judicially what a binding treaty has long governed. Accepting Bolivia's invitation would undercut the sanctity of binding treaties, and the ability of nations to engage freely in diplomatic discussions. It would undermine respect going forward for binding treaties and international law as a basis for regional stability, peace and co-operation in Latin America. To preserve that respect, this Court should grant Chile's Preliminary Objection, by confirming — based on the materials before it — that Bolivia's

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

Application raises a matter "settled" and "governed" by binding treaty at the time that the Pact of Bogotá was concluded.

17. I thank you, Mr. President, Members of the Court, and ask you to invite the Honourable Agent to the podium for his closing remarks. Thank you.

Le PRESIDENT : Merci, Monsieur Koh. Je donne maintenant la parole à Son Excellence Monsieur Felipe Bulnes, l'agent de la République du Chili.

Mr. BULNES:

CHILE'S CONCLUSION BY THE AGENT AND FINAL SUBMISSIONS

1. Mr. President, Members of the Court, I conclude by recalling that in our 1904 Peace Treaty Bolivia and Chile:

(a) re-established peaceful relations 20 years after the end of the War of the Pacific;

(b) delimited in full our boundary, in such a way that Bolivia had no right to coastal territory; and

(c) agreed that Bolivia would in perpetuity have unrestricted access to the Pacific Ocean, over Chilean territory and its Pacific ports. Ever since, Bolivia has made, and it continues to make, extensive use of this perpetual and full right of free transit.

2. For the better part of a century Bolivia has aspired to change the settlement reached in 1904 and gain sovereign access to the sea.

3. Bolivia has always and still now describes this aspiration as one for "historical vindication", for territory lost in a war that ended in 1884[108]. In Article VI of the Pact, Latin American countries agreed to look forward, and to exclude unilateral claims to the Court for historical vindication.

4. You have seen that when Bolivia signed the Pact in 1948, and again when it ratified it in 2011, that it entered a reservation[109]. It knew that a claim designed to change the settlement reached in the 1904 Peace Treaty would be *outside* the Court's jurisdiction.

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[108]Speech delivered by President Evo Morales on Bolivia's Day of the Sea, 23 Mar. 2011; judges' folder, tab 32, pp. 5 and 6. See also statement by H.E. Mr. Choquehuanca, Minister for Foreign Affairs of Bolivia, Fourth Session of the General Assembly of the OAS, 5 June 2012; judges' folder, tab 34, pp. 13 and 14.

[109]Chamber of Deputies of Bolivia, Legislature 2011-2012, 38th Session, 24 Mar. 2011; judges' folder, tab 33, pp. 31 and 32.

5. Until Bolivia unilaterally commenced this case, this jurisdictional exclusion was common ground between Bolivia and Chile, and it was fundamental to Chile's decision to ratify and remain party to the Pact[110].

6. Most importantly, Bolivia's request for relief asks the Court to order Chile to agree to change the settlement reached in the 1904 Peace Treaty. It asks the Court to order Chile to cede its territory to Bolivia, to *change* Bolivia's access to the sea from *non-sovereign*, to *sovereign*. That is a necessary result of the *pactum de contrahendo* that Bolivia's Agent and counsel emphasized[111].

7. Article VI, and I finish, prevents Bolivia abusing the Pact in this way, and all of the parties to the Pact have entrusted the Court with preventing States from advancing artificial claims of this kind that are crafted to try to attract jurisdiction that is — in substance — lacking.

8. On those foundations, I have the honour formally to read Chile's submission, which is that:

> "The Republic of Chile respectfully requests the Court to adjudge and declare that the claim brought by Bolivia against Chile is not within the jurisdiction of the Court."

9. Mr. President, Members of the Court, I sincerely thank the Court for its careful attention to this sensitive matter. I equally thank the Registrar and his staff for the smooth conduct of these proceedings and the Court's interpreters, transcribers and translators for their outstanding work.

10. Mr. President, that concludes Chile's case.

Le PRESIDENT : Merci, Monsieur l'agent. La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom du Chili. La Bolivie présentera son second tour de plaidoiries le vendredi 8, demain, à 15 h. Elle disposera à cet effet d'un maximum de 1 h 35.

L'audience est levée.

L'audience est levée à 18 h 10.

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[110]Chilean National Congress Chamber Debate, Background of Decree No. 526 — American Treaty on Pacific Settlement (1967); POCh, Ann. 49, Vol. 3, pp. 738 and 739; and Chamber of Deputies of Chile, 42nd Session, 12 May 1965; judges' folder, tab 31, pp. 11-14.

[111]See, e.g., CR 2015/19, p. 11, para. 6 (Rodríguez Veltzé).