

Non corrigé
Uncorrected

CR 2015/18

International Court
of Justice

THE HAGUE

Cour internationale
de Justice

LA HAYE

YEAR 2015

Public sitting

held on Monday 4 May 2015, at 3 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 lundi 4 mai 2015, à 15 heures, 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
 Cañado 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
Caçado Trindade
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian, juges
M. Daudet
Mme Arbour, juges *ad hoc*

M. Couvreur, greffier

The Government of Bolivia is represented by:

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as Agent;

H.E. Mr. David Choquehuanca Céspedes, Minister for Foreign Affairs of the Plurinational State of Bolivia,

as National Authority;

Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre-La Défense, member of the Institut de droit international,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma de Madrid, member of the Institut de droit international,

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H.E. Mr. Juan Carlos Alurralde, Vice-Minister for Foreign Affairs of the Plurinational State of Bolivia,

Mr. Emerson Calderon, Secretary General of the Strategic Maritime Vindication Office (DIREMAR), Professor of Public International Law, Universidad Mayor de San Andrés, La Paz,

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H.E. Ms Nardy Suxo, Permanent Representative of Bolivia to the United Nations Office in Geneva,

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Ms Mariana Durney, Legal Officer, Ministry of Foreign Affairs,

Ms María Alicia Ríos, Ministry of Foreign Affairs,

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M. Coalter G. Lathrop, Sovereign Geographic, membre du barreau de Caroline du Nord,

comme conseiller technique.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit aujourd'hui pour entendre les Parties en leurs plaidoiries sur l'exception préliminaire présentée par le Chili dans l'affaire relative à l'*Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili)*. Le juge Crawford ne siègera pas en l'affaire, en application de l'article 24, paragraphe 1, du Statut.

Je relève par ailleurs que, la Cour ne comptant sur son siège aucun juge de la nationalité des Parties, chacune d'elles s'est prévaluée de la faculté que lui confère le paragraphe 2 de l'article 31 du Statut de désigner un juge *ad hoc*. La Bolivie a désigné M. Yves Daudet, et le Chili, Mme Louise Arbour.

L'article 20 du Statut dispose que «[t]out membre de la Cour doit, avant d'entrer en fonctions, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». En vertu du paragraphe 6 de l'article 31 du Statut, cette disposition s'applique également aux juges *ad hoc*. Bien que M. Daudet ait siégé comme juge *ad hoc* en l'affaire du *Différend frontalier (Burkina Faso/Niger)* dans laquelle il a fait une déclaration solennelle, il lui faut, conformément au paragraphe 3 de l'article 8 du Règlement de la Cour, en faire une nouvelle en la présente affaire. Avant de les inviter à faire leur déclaration solennelle, je dirai d'abord quelques mots de la carrière et des qualifications de M. Daudet et de Mme Arbour.

De nationalité française, M. Daudet est docteur en droit et agrégé de droit public et de science politique. Il a occupé divers postes d'enseignement et de recherche en France métropolitaine, en Martinique, à l'île Maurice, au Maroc et en Côte d'Ivoire. Il a été membre de la délégation française au groupe d'experts, puis à la conférence des Nations Unies sur le transfert international de technologie. M. Daudet est secrétaire général de l'Académie de droit international de La Haye et professeur émérite de l'Université de Paris I (Panthéon-Sorbonne), dont il a été premier vice-président. Il est par ailleurs membre du comité de rédaction de *l'Annuaire français de droit international*, et membre de la société française pour le droit international et de la branche française de l'Association de droit international/International Law Association. Il a publié de nombreux ouvrages et articles dans différents domaines du droit international.

De nationalité canadienne, Mme Arbour est titulaire d'une maîtrise en droit de l'Université de Montréal et a été membre du barreau du Québec et à celui de l'Ontario. Elle a exercé de hautes fonctions judiciaires dans son pays d'origine en tant que juge à la Cour suprême du Canada. Elle a également occupé plusieurs postes universitaires à la faculté de droit Osgoode Hall de l'Université York, au Canada. De 1996 à 1999, Mme Arbour a été procureur des Tribunaux pénaux internationaux pour l'ex-Yougoslavie et pour le Rwanda. De 2004 à 2008, elle a été Haut-Commissaire des Nations Unies aux droits de l'homme. Elle est l'auteur de nombreuses publications dans le domaine du droit pénal international et a reçu nombre de distinctions pour son action dans celui des droits de l'homme.

J'invite maintenant M. Daudet et Mme Arbour à prendre l'engagement solennel prescrit par l'article 20 du Statut et je demande à toutes les personnes présentes à l'audience de bien vouloir se lever. Monsieur Daudet.

M. DAUDET :

«Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

Le PRESIDENT : Je vous remercie, Monsieur Daudet. Madame Arbour.

Mme ARBOUR :

«Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

Le PRESIDENT : Je vous remercie, Madame Arbour. Veuillez vous asseoir. La Cour prend acte des déclarations solennelles faites par M. Daudet et Mme Arbour.

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Je rappellerai à présent les principales étapes de la procédure en l'espèce.

Le 24 avril 2013, l'Etat plurinational de Bolivie a déposé au Greffe de la Cour une requête introductive d'instance contre la République du Chili au sujet d'un «différend concernant

l'obligation du Chili de négocier de bonne foi et de manière effective avec la Bolivie en vue de parvenir à un accord assurant à celle-ci un accès pleinement souverain à l'océan Pacifique». Dans sa requête, la Bolivie entend fonder la compétence de la Cour sur l'article 31 du traité américain de règlement pacifique, signé le 30 avril 1948 et dénommé officiellement, aux termes de son article 60, «pacte de Bogotá».

Par ordonnance du 18 juin 2013, la Cour a fixé au 17 avril 2014 la date d'expiration du délai pour le dépôt du mémoire de la Bolivie et au 18 février 2015 la date d'expiration du délai pour le dépôt du contre-mémoire du Chili. La Bolivie a déposé son mémoire dans le délai ainsi prescrit.

Le 15 juillet 2014, dans le délai prescrit au paragraphe 1 de l'article 79 du Règlement, le Chili a soulevé une exception préliminaire d'incompétence de la Cour. En conséquence, par ordonnance du 15 juillet 2014, le président, constatant qu'en vertu des dispositions du paragraphe 5 de l'article 79 du Règlement la procédure sur le fond était suspendue, et tenant dûment compte de l'instruction de procédure V, a fixé au 14 novembre 2014 la date d'expiration du délai dans lequel la Bolivie pourrait présenter un exposé écrit contenant ses observations et conclusions sur l'exception préliminaire soulevée par le Chili. La Bolivie a déposé un tel exposé dans le délai ainsi fixé, et l'affaire s'est ainsi trouvée en état pour ce qui est de l'exception préliminaire.

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Conformément au paragraphe 2 de l'article 53 de son Règlement, la Cour, après s'être renseignée auprès des Parties, a décidé de rendre accessibles au public, à l'ouverture de la procédure orale, des exemplaires des pièces de procédure et documents annexés. En outre, conformément à la pratique de la Cour, l'ensemble de ces documents sera placé dès aujourd'hui sur le site Internet de la Cour.

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Je constate la présence à l'audience des agents, conseils et avocats des deux Parties. Je salue aussi la présence dans cette salle de S. Exc. M. Choquehuanca, ministre des affaires étrangères de la Bolivie et de S. Exc. M. Muñoz, ministre des affaires étrangères du Chili. Conformément aux

dispositions relatives à l'organisation de la procédure arrêtées par la Cour, les audiences comprendront un premier et un second tours de plaidoiries. Le premier tour de plaidoiries débute aujourd'hui et se terminera le mercredi 6 mai. Chaque Partie disposera d'une séance de trois heures. Le second tour de plaidoiries s'ouvrira le jeudi 7 mai et s'achèvera le vendredi 8. Chaque Partie disposera d'une séance d'une heure et demie.

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Le Chili, qui sera entendu en premier, pourra aujourd'hui, si besoin est, déborder un peu au-delà de 18 heures, compte tenu du temps consacré à ma déclaration liminaire et aux déclarations solennelles des juges *ad hoc*. Je donne à présent la parole à S. Exc. M. Felipe Bulnes Serrano, agent du Chili. Monsieur l'ambassadeur, vous avez la parole.

Mr. BULNES:

I. INTRODUCTION

1. Mr. President, Members of the Court, it is my honour to appear before you as the Agent of Chile. Chile is a vibrant democracy, respectful of the rule of law and fully committed to the promotion of human rights and to policies designed to improve social inclusion and eradicate poverty. In its interactions with other States, Chile aspires not only to a relationship of peace, but to one of integration and co-operation, and this is the case especially with its neighbours. Indeed Chile has been central to almost every Latin American integration initiative.

2. Respect for treaties is fundamental to Chile's foreign policy, since they constitute the foundation of stability and peace between nations. Chile requests the same level of respect for treaties from its partners, as a basic commitment of international law.

3. Chile's Preliminary Objection in this case has been made necessary by Bolivia's attempt to circumvent the Treaty of Peace and Amity that was agreed between our two countries in 1904, and to avoid the limits on the Court's jurisdiction under the Pact of Bogotá. In the 1904 Peace Treaty, Bolivia and Chile agreed on the allocation of sovereignty over territory between them, and on the character of Bolivia's access to the Pacific Ocean. They agreed that Bolivia would have "in

perpetuity the fullest and most unrestricted right of commercial transit”¹, through Chilean territory and its Pacific ports. Bolivia now asks the Court to order Chile to negotiate and to agree with Bolivia to grant it coastal territory over which Chile is the undisputed sovereign, in order to change the character of Bolivia’s access to the Pacific from non-sovereign to sovereign.

4. Yet, Article VI of the Pact of Bogotá excludes from the Court’s jurisdiction any matter already settled by arrangement when the Pact was concluded in 1948, or governed by a treaty in force in that year. Whether Bolivia has a right to sovereign access to the Pacific is a matter that was settled in, and governed by, the 1904 Peace Treaty. That matter is therefore outside the Court’s jurisdiction under the Pact. The whole of Bolivia’s case concerns that same matter, and the Court should at this preliminary stage rule that it has no jurisdiction.

5. These points will be developed in the speeches that will follow mine, but against the background of this brief summary of our case, Chile wishes to emphasize that the principles before you in this case are of interest not only to Chile, but to the entire international community. Bolivia is challenging the stability of borders and territorial sovereignty solemnly agreed in a peace treaty concluded 111 years ago. That Peace Treaty is in force today and it still underpins the daily relations between Chile and Bolivia.

II. BOLIVIA’S CLAIM IN CONTEXT

6. Mr. President, Members of the Court, allow me to underline the true character of Bolivia’s claim. Bolivia’s claim before you is no more than a repackaging of its long-standing aspiration to revise the territorial settlement contained in the 1904 Peace Treaty. What Bolivia seeks from the Court is a declaration that Chile is under an obligation to negotiate and to agree with Bolivia to grant it sovereign access to the Pacific². There is no conceivable basis on which this request can be reconciled with the allocation of sovereignty and the character of Bolivia’s access to the Pacific Ocean agreed in the 1904 Peace Treaty. Bolivia’s case is therefore excluded by Article VI of the Pact of Bogotá.

¹Treaty of Peace and Amity between Bolivia and Chile, signed at Santiago on 20 Oct. 1904 (the *1904 Peace Treaty*), tab 1 of judges’ folder, pp. 5, 12 and 19, Art. VI.

²Application of Bolivia (AB), submissions, para. 32 (a) and (c); AB, submissions, para. 500 (a) and (c); see also, para. 28 (a) and (c).

7. Bolivia's effort to reopen the peace settlement reached in 1904 goes back to 1920. That was the first occasion on which Bolivia explicitly sought revision of the 1904 Peace Treaty — at that stage, from the League of Nations³. The League of Nations rejected that request as falling outside its competence⁴.

8. Bolivia then attempted, on at least four separate occasions, to secure support for a general power to avoid or revise treaties, its focus on the 1904 Peace Treaty being clear. So, in 1928, Bolivia made two reservations at the time it signed the Havana Convention on the Law of Treaties that sought to expand the circumstances in which a treaty would cease to apply or would expire⁵. Then in 1945, during a meeting of the Second Commission of the San Francisco Conference, the Bolivian delegate spoke in favour of a power of revision of treaties⁶. In 1950, Bolivia also tried to create a wide power to revise treaties in a declaration that it made at the time it ratified the Charter of the Organization of American States (OAS)⁷. In 1968, during the Vienna Conference on the Law of Treaties, Bolivia again set out its case for the modification of treaties⁸.

9. Bolivia directed its efforts not only at the 1904 Peace Treaty, but also at the jurisdictional exclusion contained in Article VI of the Pact of Bogotá. The reservation that Bolivia made on signature of the Pact in 1948 is highly material to this case, and is now on your screens. It provided that:

³Letter from the Delegates of Bolivia to the League of Nations to James Eric Drummond, Secretary-General of the League of Nations, 1 Nov. 1920, Ann. 37 to the Preliminary Objection of Chile (POCh), Vol. 2, pp. 578 and 579.

⁴League of Nations, Report of the Commission of Jurists on the Complaints of Peru and Bolivia, 21 Sep. 1921, Ann. 39 to POCh, Vol. 2, pp. 591 and 593.

⁵Havana Convention on the Law of Treaties, signed at La Havana on 20 Feb. 1928, Arts. 14 and 15 and Bolivia's reservations made upon signature, Organization of American States (OAS), *Law and Treaty Series*, No. 34, doc. 10 of Chile's collection of readily available documents (RADCh), pp. 92-101.

⁶Statement by Mr. Andrade, Ambassador of Bolivia to the United States and Acting Chairman of the Bolivian Delegation, at the Fourth Meeting of the Second Commission of the General Assembly of the United Nations Conference on International Organization (San Francisco Conference), 22 June 1945, UN doc. No 1151/II/17; doc. 17 of RADCh, pp. 165-166: "We believe that in drawing up the Charter, we should make it possible to review any case of injustice whether deriving from a treaty or not."

⁷Bolivia's Declaration made upon ratification of the Charter of the OAS, signed at Bogotá on 30 April 1948, OAS, *Law and Treaty Series*, Nos. 1-C and 61; RADCh, doc. 18, p. 193.

⁸Statement by Mr. Kempff Mercado, Ambassador of Bolivia, at the Sixty-Third Meeting of the First Session of the United Nations Conference on the Law of Treaties, 10 May 1968; RADCh, doc. 19, p. 202, paras. 45-46:

"Bolivia considered it an essential condition for the continuity of treaties that the possibility of peaceful modification should not be excluded; that rule must apply both to treaties establishing boundaries and to peace treaties which were manifestly unjust, and which belonged to a period when war was considered legal. Consequently his delegation totally disagreed with the provisions of paragraph 2 (a) of article 59 [the provision concerning fundamental changes of circumstances], which were not based on valid legal grounds."

“The Delegation of Bolivia makes a reservation with regard to Article VI, inasmuch as it considers that pacific procedures may also be applied to controversies arising from matters settled by arrangement between the Parties, when the said arrangement affects the vital interests of a State.”⁹

10. Bolivia failed to ratify the Pact for a further 63 years, until 2011¹⁰. When it did so, it restated exactly the same reservation¹¹. This reservation was an attempt to bring within the Court’s jurisdiction Bolivian efforts to modify the settlement reached in the 1904 Peace Treaty. Chile therefore immediately objected to it, preventing the entry into force of the Pact as between our two countries¹².

11. So as to bring the Pact into force between Bolivia and Chile, Bolivia withdrew its reservation to Article VI on 10 April 2013¹³ and, two weeks later, submitted to the Court its Application in this case. Article VI is in full force between Bolivia and Chile, as it is between all of the High Contracting Parties of the Pact. The device Bolivia chose to attempt to avoid the obvious jurisdictional exclusion of its case was to package it as one concerning an obligation to negotiate.

12. This historical sequence demonstrates an enduring policy on Bolivia’s part to challenge the settlement contained in the 1904 Peace Treaty, and an enduring appreciation on Bolivia’s part that Article VI of the Pact prevented it from doing so before the Court. Bolivia entered its reservation to the Pact precisely because it understood that Article VI excluded the Court’s jurisdiction over any attempt to change what was settled in, and governed by, the 1904 Peace Treaty.

⁹American 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, pp. 24, 54 and 55.

¹⁰See Organization of American States, Signatories and Ratifications, A-42: American Treaty on Pacific Settlement, POCh, Ann. 77, Vol. 3, p. 1101; and letter from Luis Toro Utillano, Principal Legal Officer of the Department of International Law of the OAS, to States signatory to the American Treaty on Pacific Settlement, OEA/2.2/36/11, 9 June 2011, enclosing Bolivia’s Instrument of Ratification, POCh, Ann. 63, Vol. 3, pp. 934 and 935.

¹¹See Organization of American States, Signatories and Ratifications, A-42: American Treaty on Pacific Settlement, POCh, Ann. 77, Vol. 3, p. 1101; and letter from Luis Toro Utillano, Principal Legal Officer of the Department of International Law of the OAS, to States signatory to the American Treaty on Pacific Settlement, OEA/2.2/36/11, 9 June 2011, enclosing Bolivia’s Instrument of Ratification; POCh, Ann. 63, Vol. 3, pp. 934 and 935.

¹²Objection by Chile to the reservation made by Bolivia at the time it ratified the American Treaty on Pacific Settlement, 10 June 2011; POCh, Ann. 64, Vol. 3, pp. 940 and 941.

¹³Bolivian Instrument of Withdrawal of Reservation to the Pact of Bogotá, 10 Apr. 2013; Memorial of Bolivia (MB), Ann. 115, Vol. III, Part IV.

**III. BOLIVIA SEEKS A JUDICIALLY COMPELLED TRANSFER
OF CHILEAN SOVEREIGN TERRITORY**

13. Mr. President, Members of the Court, I wish to emphasize that with Article VI in force, the device Bolivia adopted to seek to avoid the obvious jurisdictional exclusion of its claim was to plead an obligation to negotiate. That is just the latest manifestation of Bolivia's long-standing aspiration to revise the territorial settlement agreed in the 1904 Peace Treaty. Bolivia seeks a declaration from the Court that Chile is under an obligation not only to negotiate, but as a result of negotiations "to grant Bolivia a fully sovereign access to the Pacific Ocean"¹⁴. This would impose upon Chile an obligation to cede to Bolivia a portion of territory over which Chile is the undisputed sovereign. That Bolivia seeks to use the Court to advance such a request is completely unacceptable to Chile.

14. Although Bolivia dresses up its case as one concerning an obligation to negotiate that it says has nothing to do with the 1904 Peace Treaty, its true nature cannot be hidden. According to Bolivia, only how much territory and where it lies along the Chilean coast would remain to be negotiated. In its pleadings, Bolivia describes the outcome of the "negotiation" that it asks the Court to order as "predetermined"¹⁵. That predetermined result that Bolivia asks you to order would clearly require a change to the allocation of sovereignty, and to the character of Bolivia's access to the Pacific Ocean, agreed in the 1904 Peace Treaty.

**IV. BOLIVIA SEEKS TO UNSETTLE A MATTER SETTLED IN AND GOVERNED
BY THE 1904 PEACE TREATY**

15. Mr. President, Members of the Court, Bolivia is asking the Court to ignore the purpose of Article VI of the Pact of Bogotá. Bolivia is asking the Court to close its eyes to the fact that its case goes to the heart of the 1904 Peace Treaty. The truth of the matter is: that the 1904 Peace Treaty pre-dates the Pact of Bogotá of 1948; that the 1904 Peace Treaty was in force in 1948 and remains in force today; and that the 1904 Peace Treaty clearly settled and governed Bolivia's access to the Pacific Ocean, establishing that Bolivia's rights of access are not sovereign.

16. Bolivia barely refers to the 1904 Peace Treaty in the almost 200 pages of its Memorial. Mr. President, a peace treaty does not disappear just because a State decides not to mention it.

¹⁴AB, submissions, para. 32 (c); MB, submissions, para. 500 (c); see also para. 28 (c).

¹⁵MB, para. 404.

Bolivia reviews at length its relationship with Chile from the early nineteenth century to the present day, but devotes only two paragraphs to the content of the Peace Treaty that has been the foundation of their relationship for 111 years¹⁶. This settled territorial dispensation cannot be brought within the Court's jurisdiction by pleading an obligation to negotiate, and referring to exchanges that preceded and followed the Peace Treaty, but ignoring the Peace Treaty itself.

17. The Court has no jurisdiction over matters settled by arrangement or governed by treaty in 1948, and whether Bolivia has a right of sovereign access to the Pacific is the archetype of such matters. If that matter is within the Court's jurisdiction, then the list of historical issues in Latin America that could be reopened before you is long indeed. The High Contracting Parties to the Pact of Bogotá did not and do not consent to that, and Bolivia's reservation shows that it took the same view until two weeks before it seised the Court. Article VI of the Pact of Bogotá leaves any matter settled or governed by the 1904 Peace Treaty, including any subsequent negotiations concerning that same matter, within the exclusive jurisdiction of all of the States concerned.

18. Mr. President, Members of the Court, before you, Bolivia insists that its case does not concern the 1904 Peace Treaty. In contrast, Bolivia has been clear elsewhere that what it seeks is a renegotiation of that Treaty. Before the Organization of American States in 2012, less than twelve months before commencing this case, the Honourable Foreign Minister of Bolivia announced, and I quote, that "Bolivia requests the Government of the Republic of Chile to renegotiate the 1904 Treaty"¹⁷. This, he said, was in order to comply "with the Bolivian right to a sovereign outlet on the Pacific Ocean"¹⁸. Bolivia could not have been more clear, and it could not be more clear now, that what it seeks from the Court is an order compelling Chile to agree to change what was settled in the 1904 Peace Treaty.

19. Further evidence of how Bolivia's case should be characterized is found in Bolivia's 2009 Constitution. It purports to declare Bolivia's, I quote, "unwaivable and imprescriptible right

¹⁶MB, paras. 10 and 92.

¹⁷Statement by H.E. Mr. Choquehuanca, Minister for Foreign Affairs of Bolivia, at the Fourth Session of the General Assembly of the Organization of the American States, 5 June 2012, tab 34 of judges' folder, pp. 17-18.

¹⁸*Ibid.*

over the territory giving access to the Pacific Ocean and its maritime space”¹⁹. It also provided that by the end of 2013 the Executive Government had to “denounce” or “renegotiate” treaties contrary to the Constitution²⁰. Bolivia’s Congress then passed a law stating that the Constitutional obligation to denounce such treaties could be fulfilled by the “challenge of such treaties before international tribunals”²¹. That law was passed in February 2013, and two months later Bolivia seised the Court, precisely to challenge the settlement reached in the 1904 Peace Treaty. That is exactly what the parties to the Pact of Bogotá intended to prevent by including Article VI.

V. CONCLUSION

20. Mr. President, Members of the Court, if pleading an obligation to negotiate is found to be enough to avoid Article VI of the Pact, then the careful limits established by the Pact for dispute settlement in Latin America will be destroyed. The Pact established a framework for the peaceful settlement of disputes, but subject to the important limit that the High Contracting Parties expressly did not consent to the Court having jurisdiction over any matters already settled by arrangement or governed by treaties in 1948. The parties to the Pact entrusted the Court with the role of guardian of this limit, and Chile respectfully requests the Court to protect the Pact from Bolivia’s attempt to circumvent that limit. Chile did not, and does not, consent to the Court having jurisdiction in this case. Chile thus requests the Court to find that Bolivia’s claim is not within its jurisdiction, and to do so without entertaining any further pleadings on the merits.

21. I conclude by indicating the scheme of Chile’s presentations to come, which will develop the points that I have outlined.

(a) Next, Professor Pinto will address the purpose and interpretation of Article VI of the Pact of Bogotá.

(b) Sir Daniel Bethlehem will then address the 1904 Peace Treaty.

(c) On those foundations, Mr. Wordsworth will apply Article VI of the Pact of Bogotá to Bolivia’s claim.

¹⁹Political Constitution of the Plurinational State of Bolivia, 7 February 2009; POCh, Ann. 62, Vol. 3, p. 926, Art. 267.

²⁰*Ibid.*, p. 929, Ninth Transitional Provision.

²¹Bolivian Law on Normative Application — Statement of Reasons, 6 Feb. 2013; POCh, Ann. 71, Vol. 3, p. 1003.

(d) To conclude Chile's first round submissions, Professor Dupuy will confirm that our jurisdictional objection has a preliminary character and should be upheld by the Court at this stage.

22. Mr. President, Members of the Court, I thank you for your attention and I invite you to call upon Professor Pinto.

Le PRESIDENT : Merci, Monsieur l'agent. Je donne la parole à Mme le professeur Pinto.

Mme PINTO :

L'ARTICLE VI DU PACTE DE BOGOTÁ

I. Introduction

1. Monsieur le président, Mesdames et Messieurs les juges, j'ai l'honneur de plaider au nom du Chili sur le sens et le but de l'article VI du pacte de Bogotá. Après quelques remarques préliminaires sur la relation entre les articles VI et XXXI du pacte, je vous exposerai mes arguments en trois parties :

- a) tout d'abord, je parlerai de l'importance que revêt l'article VI du pacte de Bogotá pour l'Amérique ;
- b) ensuite, j'évoquerai l'article VI tel qu'il a déjà été interprété par la Cour ; et
- c) j'aborderai enfin l'attitude bolivienne vis-à-vis de l'article VI du pacte.

2. Tel qu'il ressort des pièces écrites de cette procédure, l'article XXXI du pacte de Bogotá est l'unique base de compétence invoquée par la Bolivie dans la présente affaire²². Comme vous pouvez le voir sur vos écrans, cette disposition donne à la Cour une compétence très étendue s'agissant des différends portant sur :

- «a) l'interprétation d'un traité ;
- b) toute question de droit international ;
- c) l'existence de tout fait qui, s'il était établi, constituerait la violation d'un engagement international ;

²² Requête de la Bolivie (RB), par. 5 ; mémoire de la Bolivie (MB), par. 22 et 23.

d) la nature ou l'étendue de la réparation qui découle de la rupture d'un engagement international.»²³

3. Comme l'a établi votre Cour dans son jugement sur la compétence et la recevabilité dans l'affaire relative à des *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)*, dont un extrait apparaît sur vos écrans :

«[L]engagement figurant à l'article XXXI vaut *ratione materiae* pour les différends énumérés par ce texte. Il concerne *ratione personae* les Etats américains parties au pacte. Il demeure valide *ratione temporis* tant que cet instrument reste lui-même en vigueur entre ces Etats.»²⁴

4. Même s'il est évident que la portée du consentement des parties à soumettre des différends à la Cour est définie par l'article XXXI, cet article doit être lu en parallèle avec d'autres dispositions du pacte, l'article VI étant la disposition déterminante pour l'exception préliminaire chilienne. Cet article prévoit, comme vous pouvez le voir sur vos écrans, que :

«Ces procédures ne pourront non plus s'appliquer ni aux questions déjà réglées au moyen d'une entente entre les parties, ou d'une décision arbitrale ou d'une décision d'un tribunal international, ni à celles régies par des accords ou traités en vigueur à la date de la signature du présent pacte.»²⁵

5. L'article VI constitue donc une limite à la compétence *ratione materiae* de la Cour. Les questions auxquelles s'applique l'article VI sont exclues de la compétence matérielle de la Cour, compétence que l'article XXXI définit autrement de manière large. Dans l'affaire du *Différend territorial et maritime (Nicaragua c. Colombie)*, votre Cour a considéré dans l'extrait qui s'affiche sur vos écrans que :

«si la Cour devait conclure que les questions qui lui ont été soumises par le Nicaragua au titre de l'article XXXI du pacte de Bogotá ont déjà été réglées par l'une des voies exposées à l'article VI dudit pacte, elle n'aurait pas la compétence requise aux termes du pacte pour statuer sur l'affaire»²⁶.

²³ Traité américain de règlement pacifique, signé à Bogotá le 30 avril 1948 (entré en vigueur le 6 mai 1949) (le pacte de Bogotá), onglet n° 3 du dossier de plaidoiries, p. 12, 40 et 41, art. XXXXI.

²⁴ *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 84, par. 34.

²⁵ Pacte de Bogotá, onglet n° 3 du dossier de plaidoiries, p. 4, 32 et 33, art. VI.

²⁶ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 853, par. 57.

II. L'importance de l'article VI du pacte de Bogotá pour l'Amérique latine

6. Monsieur le président, Mesdames et Messieurs les juges, permettez-moi à présent de parler de l'importance de l'article VI du pacte de Bogotá pour les Etats américains et notamment pour l'Amérique latine car le cas que nous traitons aujourd'hui s'y déroule. Les républiques d'Amérique en général et celles d'Amérique latine en particulier ont fourni des efforts considérables et soutenus en vue de promouvoir une approche cohérente aux règlements pacifiques des différends. Le pacte de Bogotá constitue une étape importante d'un processus qui commence au cours de la réunion des nouveaux Etats d'Amérique latine au Congrès de Panama en 1826, à l'invitation de Simón Bolívar. Dans le pacte de Bogotá, ces Etats ont réaffirmé leur engagement de longue date pour le règlement pacifique des controverses, en prévoyant un règlement judiciaire obligatoire par le biais d'un traité ouvert à tous les Etats de la région. Ils ont cependant refusé que les règlements — en particulier les règlements territoriaux — soient rouverts à l'initiative d'un seul Etat. Les républiques d'Amérique latine — soit les parties au pacte de Bogotá — ont refusé de mettre en péril la stabilité de leurs frontières, souvent chèrement payée.

7. Il est évident que «la juridiction n'existe que dans les termes où elle a été acceptée»²⁷. Dans l'affaire de *l'Usine de Chorzów*, la Cour permanente a établi que «[c]'est toujours l'existence d'une volonté des Parties de conférer juridiction à la Cour, qui fait l'objet de l'examen de la question de savoir s'il y a compétence ou non»²⁸. Si l'on avait demandé aux Etats d'Amérique, au moment de la signature du pacte de Bogotá, s'ils avaient la volonté d'utiliser les procédures du pacte pour permettre la saisine unilatérale de la Cour pour des réclamations relatives à des questions territoriales déjà réglées par des traités existants, ils auraient répondu par un non *catégorique*. Voilà pourquoi la compétence obligatoire de la Cour prévue par le pacte n'aurait pas été acceptée sans les restrictions imposées par l'article VI.

8. Il est à noter que l'article VI n'avait pas un caractère nouveau. Animés par le souci d'aller toujours de l'avant, les Etats d'Amérique avaient déjà exclu des arrangements régionaux pour le règlement des différends les questions déjà réglées. C'est notamment le cas du traité pour le

²⁷ *Phosphates du Maroc, arrêt, 1938, C.P.J.I. série A/B n° 74, p. 23.*

²⁸ *Usine de Chorzów, compétence, arrêt n° 8, 1927, C.P.J.I. série A n° 9, p. 32 (le soulignement est de nous).*

règlement pacifique des conflits entre les Etats américains de 1923²⁹. Ce traité est le premier texte mentionné à l'article LVIII du pacte de Bogotá comme étant remplacé par le pacte³⁰. Les Etats d'Amérique latine avaient également exclu les questions réglées du champ d'application des dispositions relatives à la résolution des conflits contenues dans le traité anti guerre de 1933. Ce traité prévoyait une procédure de conciliation tout en permettant à chacun des Etats parties d'émettre une réserve excluant les «[q]uestions ou points résolus par des traités antérieurs»³¹. Le Chili a précisément émis une telle réserve³². Il apparaît donc clairement, au vu de cette pratique, que les républiques d'Amérique étaient désireuses d'un accord de portée large en matière de règlement judiciaire des différends comme substitut à la guerre. Il est tout aussi clair qu'elles étaient déterminées à exclure de la compétence de tout nouveau mécanisme de règlement des différends les questions déjà réglées.

9. A la signature du pacte de Bogotá en 1948, la nécessité d'empêcher la réouverture unilatérale de questions était encore plus pertinente qu'elle ne l'était en 1923 et en 1933, surtout en ce qui concernait la souveraineté territoriale. Au moment de l'adoption du pacte, de nombreuses frontières d'Amérique latine venaient tout juste d'être définies. En 1942, six ans à peine avant le pacte de Bogotá, l'Equateur et le Pérou signaient à Rio de Janeiro leur protocole de paix, d'amitié et de délimitation³³. Ils y réglaient, avec le Chili et d'autres Etats comme facilitateurs, ce qu'ils appelaient «le différend frontalier qui les avait longtemps séparés»³⁴. C'est ensuite le Pérou qui,

²⁹ Cet accord prévoyait l'établissement de commissions d'enquête. L'article I^{er} de ce traité prévoyait cependant que cette procédure ne serait pas appliquée pour les «questions déjà tranchées par des traités d'une autre espèce», traité pour le règlement pacifique des conflits entre les Etats américains signé à Santiago (Chili), le 3 mai 1923 (entré en vigueur le 8 octobre 1924), document n° 7 de la collection chilienne de documents facilement accessibles, p. 62, 71 et 72, art. I^{er}.

³⁰ Le pacte de Bogotá remplaçait (s'agissant des Etats ayant ratifié le pacte) neuf arrangements régionaux régulant le règlement pacifique des différends en Amérique latine, pacte de Bogotá, onglet n° 3 du dossier de plaidoiries, p. 22 et 50-53, art. LVIII.

³¹ Traité antiguerre (non-agression et conciliation) signé à Rio de Janeiro le 10 octobre 1933 (entré en vigueur le 13 novembre 1935), document n°13 de la collection chilienne de documents facilement accessibles, p. 123, 133 et 134, art. V a).

³² *Ibid.*, p. 129, 139 et 140.

³³ Protocole de paix, d'amitié et de délimitation entre le Pérou et l'Equateur, signé à Rio de Janeiro le 29 janvier 1942, document n° 16 de la collection chilienne de documents facilement accessibles, p. 154-159.

³⁴ *Ibid.*, préambule, p. 154 et 157.

en 1948, a proposé l'article VI du pacte de Bogotá lors de la neuvième conférence internationale des Etats américains³⁵.

10. Cette proposition du Pérou a été soutenue par le Chili lors de cette conférence³⁶. Le pacte maintenait les réalisations du passé, et il les amplifiait. Il prévoyait non seulement une procédure d'enquête et de conciliation mais il établissait aussi, pour la première fois, un système contraignant de règlement judiciaire des différends pour l'ensemble de l'Amérique. La proposition péruvienne concernant l'article VI intervenait donc dans le cadre de l'introduction du système de règlement judiciaire obligatoire des différends et en tant que limite à celui-ci³⁷, c'est-à-dire que cet article constitue une exclusion encore plus large que celles qui l'ont précédées. C'est ainsi donc que les articles XXXI et VI du pacte lus conjointement permettent aux Etats parties de saisir la Cour de controverses liées à des questions qui n'ont pas déjà été réglées par un arrangement ni régies par un traité en vigueur le 30 avril 1948. Le rôle de la Cour témoigne d'ailleurs de l'importance que revêt cette délégation de compétence judiciaire pour la région, ainsi que de ses limites.

11. Je voudrais insister, Monsieur le président, Mesdames et Messieurs les juges, sur le fait que 1948 représentait le point de départ d'un nouveau système interaméricain, établi pour la première fois à travers une organisation régionale en conformité avec l'article 52 de la Charte des Nations Unies. Ce nouveau système impliquait son propre «système judiciaire» autonome — et j'emploie ici les mots de votre Cour — pour le règlement pacifique des différends³⁸. Il était donc essentiel pour l'Organisation des Etats américains et pour les instruments qui l'établissaient de favoriser la coopération entre les Etats sans risquer de mettre en péril la stabilité déjà obtenue.

12. La restriction imposée par l'article VI à la compétence de la Cour est importante de manière générale pour le Chili, mais elle l'est d'autant plus dans le cadre de sa relation avec la Bolivie. Le Chili n'aurait pas signé ni ratifié le pacte si celui-ci n'avait pas empêché la Bolivie de saisir la Cour unilatéralement de ses aspirations à un accès souverain à la mer. La préoccupation

³⁵ Travaux préparatoires du pacte de Bogotá, onglet n° 2 du dossier de plaidoiries, p. 19 et 20.

³⁶ *Ibid.*, p. 37 et 38.

³⁷ *Ibid.*, p. 1-2, 5-8, 15-22 et 25-26.

³⁸ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 832, par. 53.

exprimée par le Congrès national du Chili à l'égard de la réserve émise par la Bolivie sur l'article VI était, comme vous le voyez sur vos écrans, d'éviter que la Bolivie ne puisse saisir la Cour unilatéralement en vue de «raviver son désir d'un accès à l'océan Pacifique, affaiblissant ainsi l'effet du Traité de 1904»³⁹.

III. Le pacte de Bogotá tel qu'interprété par la Cour

13. J'arrive, Mesdames et Messieurs les juges, à votre propre interprétation de l'article VI du pacte, et notamment à votre décision de 2007 relative aux exceptions préliminaires en l'affaire du *Différend territorial et maritime* entre le Nicaragua et la Colombie. Deux aspects de cette décision sont particulièrement pertinents dans la présente affaire.

14. Tout d'abord, vous avez reconnu dans cette décision que l'article VI du pacte de Bogotá «visait clairement» à «empêcher que de telles procédures, et en particulier les voies de recours de nature judiciaire, puissent être utilisées afin de rouvrir des questions déjà réglées»⁴⁰. Je voudrais insister sur la cohérence de cette approche avec les travaux préparatoires du pacte de Bogotá⁴¹, que je vais aborder d'ici peu, et avec la volonté et la pratique des Etats d'Amérique latine, que je viens de décrire.

15. Le second aspect de l'affaire *Nicaragua c. Colombie* sur lequel je voudrais insister est la définition par la Cour du moment auquel une question doit avoir été réglée par une entente ou régie par un traité en vigueur pour être exclue de la compétence *ratione materiae* de la Cour. En l'espèce, la position de la Cour était que la question de savoir si le traité de 1928 avait pris fin en 1969 était, comme vous le voyez à l'écran, «sans pertinence quant à sa compétence, étant donné que le point déterminant, aux termes de l'article VI du pacte de Bogotá, est celui de savoir si le traité de 1928 était en vigueur à la date de la signature dudit pacte, c'est-à-dire en 1948»⁴². La

³⁹ *Débat de la Chambre du Congrès national du Chili, contexte du décret n° 526 – traité américain de règlement pacifique* (1967), exception préliminaire du Chili (EPCh), vol. 3, p. 738 et 739 (annexe 49).

⁴⁰ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 858, par. 77 (le soulignement est de nous).

⁴¹ Travaux préparatoires du Pacte de Bogotá, onglet n° 2 du dossier de plaidoiries, p. 37 et 38.

⁴² *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 859, par. 82.

Cour évoquait 1948 comme la «date à retenir aux fins de déterminer si les dispositions de l'article VI de ce pacte ... trouvent à s'appliquer»⁴³.

16. La Cour a clairement indiqué que la question de savoir si une question donnée est «régulée» par entente ou «régie» par un traité aux fins de l'article VI doit être déterminée par rapport à la date de 1948. Si c'est le cas, cette question est exclue de la compétence matérielle de la Cour aux termes du pacte, même si l'entente ou le traité a été modifié après 1948.

17. Dans l'affaire *Nicaragua c. Colombie*, la Cour a établi que «dans les circonstances propres à la présente espèce, aucune distinction quant aux effets juridiques n'est à faire, aux fins de l'application de l'article VI du pacte, entre une question «régulée» et une question «régie» par le traité de 1928»⁴⁴. La Bolivie considère de la même façon qu'aucune distinction n'est à faire dans la présente affaire entre les deux branches de l'article VI⁴⁵. En réalité, chacune de ces branches joue ici un rôle différent, et ce, conformément à leur signification ordinaire et à leur présence comme alternatives dans l'article VI. Chacune d'elles est suffisante par elle-même pour exclure la demande de la Bolivie.

18. Une question est «régulée» par entente si elle est *résolue* par cette entente. Le traité de paix de 1904, qui constitue l'aboutissement d'un processus entamé longtemps auparavant, *réglait* la question de savoir si la Bolivie avait ou non droit à un accès souverain à l'océan Pacifique. Cette question avait donné lieu à un différend entre les deux Etats qu'ils avaient tenté en vain de résoudre par traité en 1895 et qu'ils avaient finalement réglé par traité en 1904, comme l'expliquera M. Daniel Bethlehem.

19. Une question est «régie» par un traité si le traité en question régleme *la relation existant entre les parties* concernant cette question. Le traité de paix de 1904 *régit* également la question de savoir si la Bolivie a ou non droit à un accès souverain à l'océan Pacifique, et établit qu'elle n'y a pas droit. Il détermine au lieu de cela un droit perpétuel d'accès non souverain, lequel a été réalisé au moyen de nombreux instruments ultérieurs.

⁴³ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II), p. 859, par. 81.*

⁴⁴ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II), p. 848, par. 39.*

⁴⁵ Exposé écrit de la Bolivie (EEB) sur l'exception préliminaire du Chili, par. 48 et 49.

20. Qu'une question soit réglée par une entente ou régie par un traité en vigueur en 1948, la conséquence juridictionnelle — l'«effet juridique»⁴⁶ pour employer les mots de votre Cour dans l'affaire *Nicaragua c. Colombie* — en sera identique. Cette question est exclue de la compétence *ratione materiae* de la Cour.

21. Au cours de l'examen de l'article VI lors du troisième comité de la conférence qui a conclu le pacte de Bogotá, le représentant cubain s'interrogea sur l'opportunité d'exclure des questions si celles-ci avaient déjà été réglées⁴⁷. Le représentant du Pérou répondit dans ces termes : «le risque est que la question pourrait être réouverte, ou que l'on pourrait tenter de réouvrir»⁴⁸. Au cours de cette discussion, les Parties ont reconnu que les Etats continueraient à vouloir traiter des questions réglées ou faisant l'objet de traités en vigueur en 1948. Ils ont explicitement envisagé le risque que certains Etats pourraient tenter de rouvrir des questions qui, en 1948, avaient été réglées par entente ou étaient déjà régies par un traité. Ces tentatives ne manqueraient pas de donner lieu à des échanges divers entre les Etats concernés et à d'éventuels désaccords quant à leur signification légale. Or, il convenait d'éviter de telles situations. En conséquence, si ces événements subséquents concernaient une question réglée par entente ou régie par un traité en vigueur en 1948, ils constitueraient précisément ce que l'article VI visait à exclure de la compétence de la Cour.

22. Le pacte a été conclu pour le futur, pour la période consécutive à 1948. C'est pour cette raison que les parties ne cherchaient pas à entraver les efforts diplomatiques futurs en faveur de la paix et de l'harmonie de la région quant aux questions déjà réglées ou autrement régies par des traités en vigueur en 1948. Ce qu'elles ont exclu, c'est la possibilité de demander de manière unilatérale la résolution par un tiers de ces questions.

23. Soyons clairs, l'article VI concerne la compétence et non les sources de droit applicables à un différend. L'intention des parties au pacte était de créer, par le biais de l'article VI, l'exclusion juridictionnelle en 1948. Les sources de droit pertinentes pour une question, et donc applicables au bien-fondé d'un différend résultant de cette question, peuvent très bien avoir changé depuis 1948. L'existence de nouveaux instruments relatifs à cette même question ne peut

⁴⁶ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 848, par. 39.

⁴⁷ Travaux préparatoires du pacte de Bogotá, onglet n° 2 du dossier de plaidoiries, p. 37 et 38.

⁴⁸ *Ibid.*

cependant remettre en cause l'exclusion de cette question de la compétence *ratione materiae* de la Cour, telle qu'elle a été définie en 1948 par l'article VI du pacte.

24. La Cour a déjà adopté, à juste raison, cette interprétation de l'article VI dans l'affaire *Nicaragua c. Colombie*. L'agent a parlé du rôle de la Cour comme gardienne des limites du consentement qui lui a été conféré par les parties au pacte et, dans la présente affaire, la Cour a devant elle une décision historique à faire relativement à ces limites. Pour ce faire et pour maintenir la viabilité du pacte comme source continue de consentement à l'égard de la compétence de la Cour pour les Etats d'Amérique, votre Cour n'a qu'à prendre une décision conforme aux paragraphes 81 et 82 de sa décision relative à l'affaire *Nicaragua c. Colombie*.

IV. La Bolivie et le Pacte de Bogotá

25. Monsieur le président, Mesdames et Messieurs les juges, je voudrais maintenant parler de l'attitude de la Bolivie à l'égard du pacte de Bogotá. Comme l'a expliqué l'agent, cette affaire a été introduite par la Bolivie pour tenter de concrétiser ses aspirations de longue date à changer le résultat du traité de paix de 1904. Si les aspirations de la Bolivie datent de plus d'un siècle, ce n'est qu'en 2013 qu'elle a saisi la Cour. Et si la Bolivie a attendu si longtemps, c'est parce que, jusqu'en avril 2013, elle reconnaissait que le résultat qu'elle espère obtenir aujourd'hui devant la Cour ne relevait pas de la compétence de la Cour.

26. En effet, jusqu'en avril 2013, l'interprétation bolivienne de l'article VI du pacte était la même que celle du Chili. Ceci apparaît clairement à l'examen de la réserve de la Bolivie à l'égard du pacte, émise au moment de la signature en 1948, confirmée à sa ratification en 2011⁴⁹ et retirée en avril 2013⁵⁰, juste avant l'introduction de sa requête auprès de la Cour.

27. La réserve bolivienne apparaît maintenant sur vos écrans. La traduction française, pour rester fidèle au texte original en espagnol, s'énonce comme suit :

«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

⁴⁹ Voir l'Organisation des États américains, signataires et ratifications, A-42 : traité américain de règlement pacifique, EPCh, vol. 3, p. 1101 (annexe 77) ; et la lettre de Luis Toro Utrillano, juriste principal du département de droit international de l'Organisation des États américains, aux États signataires du traité américain de règlement pacifique, OEA/2.2/36/11, 9 juin 2011, comprenant l'instrument de ratification bolivien, EPCh, vol. 3, p. 934 et 935 (annexe 63).

⁵⁰ Instrument bolivien de retrait de la réserve au pacte de Bogotá, 10 avril 2013, MB, vol. III, partie IV (annexe 115).

arrangement touche aux intérêts vitaux d'un Etat.»⁵¹ Je me réfère aux «*controversias emergentes de asuntos resueltos por arreglo de las Partes, cuando dicho arreglo afecta intereses vitales de un Estado*».

La Bolivie savait donc que le traité de paix de 1904 réglait la question de savoir si elle avait droit à un accès souverain à l'océan Pacifique — une question qu'elle considère comme affectant ses «intérêts vitaux» — et elle savait que cette question était exclue de la compétence de la Cour en vertu de l'article VI du pacte. C'est pourquoi elle a émis cette réserve et tenté ainsi de faire entrer cette question dans la compétence de la Cour.

28. Le Chili a eu pleinement conscience de la réserve bolivienne. Dans ses observations sur l'exception préliminaire du Chili, la Bolivie a cité, sans toutefois le fournir à la Cour, le rapport d'une session du Congrès chilien daté du 12 mai 1965⁵². Ce rapport contenait un message du président du Chili adressé au Congrès de son pays concernant l'éventuelle ratification du pacte de Bogotá. Selon ce rapport, les débats sur cette question avaient, en 1954, été «suspendus du fait que le Gouvernement souhaite analyser plus attentivement la portée de la réserve émise par la Bolivie à sa signature dudit pacte»⁵³. Une fois cette analyse effectuée, le président a expliqué au Congrès, en 1965, que la réserve de la Bolivie ne constituait pas un danger pour le Chili car, si la Bolivie maintenait cette réserve au moment de sa ratification, le Chili pourrait la rejeter à ce moment-là⁵⁴. Comme l'a expliqué l'agent, c'est précisément ce qui s'est passé en 2011.

29. Une fois convaincu qu'il ne serait pas affecté par la réserve bolivienne, le Chili a voulu renforcer le pacte en le ratifiant. Le président du Chili a donc demandé au Congrès d'approuver la ratification du pacte, parce que le Chili s'inquiétait d'autres propositions qui visaient à le remplacer et qui ne contenaient pas de restrictions équivalentes à celles de l'article VI du pacte⁵⁵. C'est dire à quel point était fondamentale la restriction de compétence énoncée dans l'article VI dans la décision du Chili de ratifier le pacte.

⁵¹ Pacte de Bogotá, onglet n° 3 du dossier de plaidoiries, p. 24, 54 et 55. La traduction française publiée dans le *Recueil des traités des Nations Unies*, dont une retranscription exacte figure dans la diapositive^o12, est incorrecte. Elle traduit «*controversias emergentes de asuntos resueltos*» par «différends relatifs à des questions résolues» au lieu de «différends issus de questions résolues».

⁵² EEB sur l'exception préliminaire du Chili, note de bas de page n° 41.

⁵³ Chambre des députés du Chili, 42^e session, 12 mai 1965, onglet n° 31 du dossier de plaidoiries, p. 11 et 12.

⁵⁴ *Ibid.*, p. 13 et 14.

⁵⁵ Chambre des députés du Chili, 42^e session, 12 mai 1965, onglet n° 31 du dossier de plaidoiries, p. 11-14.

30. Lorsque le Chili a finalement ratifié le pacte en 1974, il a émis une réserve en réponse à celle de la Bolivie⁵⁶. Les archives parlementaires du Chili de 1965 montrent que la réserve du Chili était considérée comme souhaitable parce que, comme vous pouvez le voir sur vos écrans, la Bolivie espérait, en formulant sa réserve sur l'article VI, et je me réfère à ce passage pour la deuxième fois aujourd'hui, «raviver son désir d'un accès à l'océan Pacifique, affaiblissant ainsi l'effet du traité de 1904»⁵⁷. L'article VI a toujours été d'une importance fondamentale pour le Chili, précisément eu égard aux aspirations de la Bolivie à un accès souverain à l'océan Pacifique. Monsieur le président, il est important de réaliser que le Chili n'a ratifié le pacte que parce qu'il était convaincu que les réclamations de la Bolivie quant à son droit à un accès souverain à l'océan Pacifique étaient et seraient toujours exclues par l'article VI.

31. La réserve de la Bolivie démontre non seulement que, jusqu'en 2013, la Bolivie reconnaissait que ses aspirations au territoire chilien étaient exclues de la compétence de la Cour, mais elle renforce également l'interprétation correcte, et partagée jusque très récemment, de l'ampleur du mot «question» dans l'article VI du pacte. Et l'ampleur de ce terme est significative pour la bonne application de l'article VI dans cette affaire. Dans son exposé, la Bolivie soutient que le mot «question» dans l'article VI signifie «un différend sur un problème donné»⁵⁸. Ce n'est toutefois pas ce que pensait la Bolivie entre 1948 et 2013 ! Dans sa réserve, restée en place tout ce temps, la Bolivie cherchait à exclure du champ d'application de l'article VI et donc à inclure dans la compétence de la Cour les «controverses *issues de questions réglées*» par un arrangement qui affecte ses intérêts vitaux⁵⁹. La position de la Bolivie n'était pas que l'article VI excluait les différends déjà réglés, mais bien qu'il excluait toute controverse ou différend issu d'une question réglée («las controversias emergentes de asuntos resueltos»).

32. Cette interprétation plus large du mot «question» est indubitablement correcte. Dans ses observations, la Bolivie fait référence non seulement au mot anglais «matters» mais aussi aux

⁵⁶ Acte de dépôt de l'instrument contenant la ratification par le Gouvernement chilien du traité américain de règlement pacifique, 15 avril 1974, EPCh, vol. 3, p. 748-749 (annexe 51) ; et chambre des députés du Chili, 42^e session, 12 mai 1965, ongles n° 31 du dossier de plaidoiries, p. 13 et 14.

⁵⁷ Débat de la chambre du Congrès national du Chili, contexte du décret n° 526 : traité américain de règlement pacifique (1967), EPCh, vol. 3, p. 738 et 739 (annexe 49).

⁵⁸ EEB sur l'exception préliminaire du Chili, par. 47.

⁵⁹ Pacte de Bogotá, ongles n° 3 du dossier de plaidoiries, p. 24, 54 et 55 (les italiques sont de nous).

versions espagnole, française et portugaise du pacte⁶⁰, chacune faisant également foi⁶¹. Il s'agit du mot «asuntos» en espagnol, «questions» en français, «matters» en anglais, et «assuntos» en portugais. Tous ces termes ont une portée large et signifient «sujet» ou «question». Ils n'ont pas le sens étroit que la Bolivie tente aujourd'hui de leur attribuer. Si les parties contractantes avaient voulu limiter les exclusions de l'article VI aux différends, elles auraient utilisé ce terme en français, «controversias» en espagnol, «disputes» en anglais et «controvérsias» en portugais. C'est du reste ce qu'elles ont fait ailleurs dans le pacte lorsqu'elles entendaient évoquer les différends, notamment dans l'article XXXI⁶².

33. Les travaux préparatoires du pacte confirment également que l'intention des parties était d'exclure des sujets, et pas uniquement des différends donnés, des procédures du pacte. À la conférence au cours de laquelle le pacte de Bogotá a été négocié, le représentant de l'Equateur demanda au représentant péruvien s'il serait possible de tempérer la formulation catégorique de l'article VI. La préoccupation du délégué équatorien était que «de *nouveaux différends* pouvaient surgir de *questions déjà réglées*»⁶³. L'Equateur souhaitait que la compétence s'étende à de tels différends. Ceci provoqua aussitôt la réaction critique du représentant du Pérou ; il répondit que, si la formulation de l'article VI était modifiée de façon à ce que de nouveaux différends issus de questions réglées puissent être unilatéralement adressés selon les procédures obligatoires du pacte, les Etats ne «poursuivraient [plus] un but de paix» mais inviteraient les litiges ; et ainsi, ébranleraient les fondements de la paix⁶⁴. Le caractère absolu de l'exclusion fut discuté et maintenu dans la version finale.

34. Permettre à de nouveaux différends, issus de questions déjà réglées, d'être unilatéralement adressés à la Cour aurait été en contradiction avec l'objectif même de l'article VI. Un Etat aurait alors pu échapper à la restriction juridictionnelle de l'article VI en présentant simplement une réclamation comme un différend nouveau, alors qu'il concernait une question déjà

⁶⁰ EEB sur l'exception préliminaire du Chili, par. 47.

⁶¹ Pacte de Bogotá, onglet n° 3 du dossier de plaidoiries, p. 24, 52 et 53.

⁶² *Ibid.*, p. 12, 13, 40 et 41, art. XXXI.

⁶³ Travaux préparatoires du pacte de Bogotá, onglet n° 2 du dossier de plaidoiries, p. 34 et 36 (les italiques sont de nous).

⁶⁴ Travaux préparatoires du pacte de Bogotá, onglet n° 2 du dossier de plaidoiries, p. 35 et 38.

réglée. Ainsi donc, la question devant être posée relativement à l'article VI n'est pas de savoir si un *différend donné* adressé à la Cour a déjà été réglé par entente ou régi par un traité en vigueur en 1948, mais bien si la réclamation adressée à la Cour concerne une question précédemment réglée par entente ou régie par un traité en vigueur en 1948. Et, comme le développera M. Wordsworth, il appartient bien évidemment à la Cour, et non à l'Etat demandeur, de définir la question qui lui est adressée.

35. Si la question a été «réglée» par entente ou «régie» par un traité en vigueur en 1948, cette question n'entre pas dans la compétence *ratione materiae* conférée à la Cour aux termes du pacte. Permettez-moi d'insister sur le fait que l'article VI est une disposition qui se réfère à la compétence *ratione materiae* de la Cour et non aux sources de droit applicables au bien-fondé du différend. Si une question est réglée ou régie par un traité en 1948, la Cour n'a pas, aux termes du pacte, la compétence *ratione materiae* pour connaître de telle question ; et ceci comprend les différends issus, après 1948, de questions réglées avant 1948 ou régies par un traité en vigueur en 1948. Les parties contractantes ne se voient pas interdire de saisir unilatéralement la Cour pour un certain type de différends, mais plutôt de saisir unilatéralement la Cour de certaines questions qui seraient susceptibles de donner lieu à de nouveaux différends.

36. Monsieur le président, Mesdames et Messieurs les juges, le fait que la Bolivie n'a pas droit à un accès souverain à l'océan Pacifique est l'une des nombreuses questions réglées en Amérique latine qu'un Etat mécontent de ce règlement souhaiterait maintenant pouvoir rouvrir de façon unilatérale. Cette réalité politique vous est familière et l'est à plus forte raison aux gouvernements démocratiques et aux citoyens d'Amérique latine. La volonté des républiques d'Amérique, et surtout d'Amérique latine, lorsqu'elles ont convenu de l'article VI en 1948, était précisément de prévenir ce type de problème.

37. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie de votre bienveillante attention et je vous invite à appeler à la barre M. Daniel Bethlehem. Merci.

Le PRESIDENT : Merci. Je donne la parole à M. Daniel Bethlehem.

Sir Daniel BETHLEHEM:

THE 1904 TREATY OF PEACE AND AMITY

I. Introduction

1. Mr. President, Members of the Court, it is an honour for me to address you on behalf of Chile in these proceedings. Mr. President, with your permission, I will be on my feet for about 40 minutes.

The focus of my submission will be the 1904 Treaty of Peace and Amity between Bolivia and Chile, a treaty that was in force on the date of the conclusion of the Bogotá Pact and remains in force today. It is a treaty that settled the disputes and claims over sovereignty between the Parties and delimited the boundary between them. It also laid down a régime of co-operation between the two sides, including as regards Bolivia's access to the Pacific Ocean. By Article 6 of the 1904 Treaty, Bolivia was afforded "in perpetuity the fullest and most unrestricted right of commercial transit" through Chilean territory and its Pacific ports⁶⁵. This access to the ocean, in accordance with Article 6 of the 1904 Treaty, has been facilitated through a number of other treaties and arrangements, as well as in Chilean law and practice⁶⁶.

2. Mr. President, Members of the Court, I will return to the detail of the 1904 Treaty in just a moment and invite you to look at the text in tab 1 of your judges' folders. Before I do so, however, let me step back briefly to place my submissions in the wider context of Chile's case.

3. Chile's objection to jurisdiction in this case, as you have just heard, rests on Article 6 of the Pact of Bogotá. This excludes from the jurisdiction of the Court matters already settled by arrangement between the Parties or governed by treaties in force on the date of the conclusion of the Pact on 30 April 1948.

4. The question in these proceedings this week — the only question — is whether Bolivia's access to the Pacific Ocean is a matter that was, on 30 April 1948, governed by a treaty in force

⁶⁵Treaty of Peace and Amity between Bolivia and Chile, signed at Santiago on 20 October 1904 (the *1904 Peace Treaty*), tab 1 of judges' folder, pp. 5, 12 and 19, Article VI.

⁶⁶This element is addressed in paragraph 3.33 of the Preliminary Objection of Chile (POCh).

between Chile and Bolivia or settled by arrangement between them. If it was, you are bound to find for Chile in these proceedings.

5. The 1904 Treaty of Peace and Amity has been the foundation of Bolivia's access to the Pacific Ocean for the past 111 years. It remains the cornerstone of this access today. The character of Bolivia's access to the Pacific Ocean was, on 30 April 1948, without any shadow of a doubt and beyond any credible contention, settled and governed by the 1904 Treaty.

6. Mr. Wordsworth, whose submissions will follow mine, will develop this point and will draw the threads of Chile's arguments together. My submissions are on the 1904 Treaty; its terms and its scope.

7. In its response to Chile's Preliminary Objection, Bolivia states that neither in its Application nor in its Memorial "is there any trace of a dispute concerning the revision or nullification of the 1904 Treaty"⁶⁷. Bolivia, indeed, failed to address, or even to refer to, other than in passing, the 1904 Treaty in its Application and Memorial. That silence, however, is a device; it is a device to sidestep the Treaty; an attempt to wish the Treaty away. The plain reality is that what Bolivia seeks from the Court is fundamentally at odds with the 1904 Treaty.

8. Let me turn to the detail of the 1904 Treaty.

II. A definitive peace agreement

9. The 1904 Treaty was "a definitive treaty of peace" between Bolivia and Chile following the War of the Pacific of 1879 to 1884. The phrase "a definitive treaty of peace" comes from the opening language of the Truce Pact between Bolivia and Chile of 1884 that brought the Pacific War to an end⁶⁸. Twenty years later, the 1904 Treaty, referencing the Truce Pact and terminating it, re-established relations of peace and friendship between Bolivia and Chile.

10. The 1904 Treaty was a treaty of peace *and* of amity. It did more than simply declare the re-establishment of peace and friendship. It established what was intended by the parties to be enduring arrangements for their future peaceful relations. It settled the territorial limits of the two States vis-à-vis each other by delimiting the boundary. It acted to strengthen the political and

⁶⁷Written Statement of Bolivia on the Preliminary Objection of Chile (WSB), para. 24.

⁶⁸Truce Pact between Bolivia and Chile, signed at Valparaíso on 4 Apr. 1884 (the *1884 Truce Pact*), POCh, Vol. 1, Ann. 2, pp. 78 and 79, Preamble.

commercial relations between the two States through a number of concrete initiatives. It recognized in favour of Bolivia, in perpetuity, the fullest and most unrestricted right of commercial transit through Chilean territory and ports. It accorded Bolivia the right to establish customs agencies in designated Chilean ports and established a customs régime between the two States. It provided for a mechanism for settling disputes concerning the interpretation or execution of the Treaty.

11. The 1904 Treaty was 20 years in the making. It closed a chapter of enmity in Bolivia-Chile relations and looked to the future. It was a compact between two States, it was *a treaty of exchanges*, that not only re-established peace between them but addressed key elements of their sovereign relationship going forward.

12. Mr. President, Members of the Court, the 1904 Treaty was not unusual, either in form or in substance. The nineteenth century saw a number of wars across the South American continent, over disputed boundaries. The Pacific War of 1879 to 1884 with Chile was not the only war in which Bolivia was engaged. Bolivia had disputed boundaries with all of its neighbours. Quite apart from its boundary disputes with Chile, Bolivia's boundary disputes with Argentina, with Brazil, with Paraguay, with Peru, were collectively the subject of at least 12 separate treaties⁶⁹.

13. These treaties were amongst many others across the continent. They are instruments of their time, but they have an enduring importance. As you have just heard from Professor Pinto, maintaining the integrity and stability of these treaties was a driving imperative behind Article 6 of the Bogotá Pact. Sovereignty and boundaries and territorial arrangements governed by pre-1948

⁶⁹As regards *Bolivia/Argentina*, see the Boundaries Treaty between Argentina and Bolivia, signed at Buenos Aires on 10 May 1889, RADCh, doc. 3, pp.24-29; the Final Treaty on Boundaries between Argentina and Bolivia, signed at La Paz on 9 July 1925; RADCh, doc. 9, pp.86-89; and the Supplementary Protocol to the Argentine-Bolivian Boundaries Treaty of 9 July 1925, signed at Buenos Aires on 10 Feb. 1941, RADCh, doc. 15, pp. 150-152. As regards *Bolivia/Brazil*, see the Treaty of Friendship, Boundaries, Navigation, Commerce, and Extradition between Brazil and Bolivia, signed at La Paz de Ayacucho on 27 Mar. 1867, RADCh, doc. 2, pp. 8-22; the Boundaries Treaty between Brazil and Bolivia, signed at Petrópolis on 17 Nov. 1903, RADCh, doc. 5, pp. 40-50; and the Treaty on Boundaries and Railway Communications between Brazil and Bolivia, signed at Rio de Janeiro on 25 Dec. 1928, RADCh, doc. 11, pp. 104-111. As regards *Bolivia/Paraguay*, see the Treaty of Peace, Friendship and Boundaries between Bolivia and Paraguay, signed at Buenos Aires on 21 July 1938, RADCh, doc. 14, pp. 142-148. As regards *Bolivia/Peru*, see the Preliminary Treaty of Peace and Amity between Peru and Bolivia, signed at Puno on 7 June 1842, RADCh, doc. 1, pp. 2-5; the Treaty on Demarcation of Frontiers between Peru and Bolivia, signed at La Paz on 23 Sep. 1902, RADCh, doc. 4, pp. 32-37; the Treaty on Rectification of Borders between Peru and Bolivia, signed at La Paz on 17 Sep. 1909, RADCh, doc. 6, pp. 52-55; the Protocol for the Demarcation of the Border between Peru and Bolivia, signed at La Paz on 2 June 1925, RADCh, doc. 8, pp. 80-84; and the Ratifying Protocol for the Demarcation of the Second Section of the Bolivian-Peruvian Border, signed at La Paz on 15 Jan. 1932, RADCh, doc. 12, pp. 114-117.

treaties or settled by pre-1948 arrangements were not to become the subject of a unilateral attempt to unpick the continent's history through litigation before the Court.

III. The 1904 Treaty

14. Mr. President, Members of the Court, let me take you to the detail of the 1904 Treaty and may I invite you to turn to tab 1 in your judges' folder. The Spanish text of the Treaty is at page 1 of tab 1, with an English translation following at page 8 and a French translation at page 15. The 1904 Treaty is a treaty of 12 articles⁷⁰. Article 1 is brief, stating simply that the relations of peace and friendship between Bolivia and Chile are re-established. This is not just a *chapeau* for what follows, however, but language that connotes the "definitive treaty of peace" that the parties had in contemplation at the time of the 1884 Truce Pact⁷¹.

15. There follow ten substantive articles that address two distinct issues. The first issue, addressed in Article 2, which, as you will see, covers almost three pages of dense text, is a *comprehensive territorial settlement* between the two States. I will return to the details of this settlement shortly. In essence, however, Article 2 both affirmed Chilean sovereignty, absolutely and in perpetuity, over coastal territory that had been Bolivian before the 1879 Pacific War and delimited the boundary between Chile and Bolivia. Under this settlement, Bolivia did not have sovereign access to the Pacific Ocean. The 1904 Treaty was and remains dispositive about the sovereign, territorial settlement between the parties. There was no ambiguity. There was no space for doubt. Nothing was left unresolved.

16. The second issue, addressed in Articles 3 through to 11, is a settlement of amity, of forward-looking arrangements and commitments, having as their object the strengthening of political and commercial relations between the two States and affording to Bolivia certain extensive rights and benefits. I will take you through these arrangements and commitments in just a moment. Amongst these, however, is Article 6 by which Chile recognized in favour of Bolivia "in perpetuity the fullest and most unrestricted right of commercial transit through its territory and its Pacific ports"⁷².

⁷⁰1904 Peace Treaty, tab 1 of judges' folder.

⁷¹1884 Truce Pact, POCh, Vol. 1, Ann. 2, pp.78 and 79, Preamble.

⁷²1904 Peace Treaty, tab 1 of judges' folder, pp. 5, 12 and 19, Art. VI.

17. Mr. President, Members of the Court, two considerations of importance flow from Article 6 of the 1904 Treaty. The first consideration is that the 1904 Treaty provided to Bolivia a *treaty-based right*, in perpetuity, of access to the Pacific Ocean through Chilean territory and ports. The second consideration is that this treaty-based right of access affirms what follows from Article 2 of the 1904 Treaty, namely, that the Treaty did not leave unresolved any Bolivian claim to sovereign access to the Pacific Ocean. The 1904 Treaty, both in the detail of its territorial settlement and in the terms of its treaty-based right of access to the Pacific Ocean, definitively settled the issue of Bolivia's access to the Pacific Ocean.

18. Following these substantive provisions, Article 12 of the 1904 Treaty established a mechanism for settling disputes. As amended by a 1907 Protocol⁷³, Article 12 provides that all questions which may arise with reference to the interpretation or execution of the Treaty shall be submitted to arbitration before the Permanent Court of Arbitration.

19. Mr. President, Members of the Court, I skipped over the detail of the forward-looking arrangements and commitments in Articles 3 to 11 of the Treaty. I would like, if I may, to take you to these briefly by reference to the Treaty — I don't propose to spend a great deal of time but just invite you to turn the pages with me.

20. Article 3 provides that, with the object of strengthening the political and commercial relations between Chile and Bolivia, the Parties agree to unite the Chilean port of Arica with the plateau of La Paz by a railroad to be constructed at Chile's expense, with ownership of the Bolivian section of the railroad to be transferred to Bolivia 15 years after completion of its construction. It also provides that Chile would guarantee bonds issued by Bolivia to finance the building of other railroads.

21. Article 4 requires Chile to pay to Bolivia the sum of £300,000, a sum that, in today's money, would be very considerably greater.

22. Article 5 addresses the cancellation of various sums of money and credits owed by Bolivia.

⁷³Protocol that designates an Arbitrator between Bolivia and Chile, signed at Santiago on 16 April 1907, Ann. 32 to POCh, Vol. 2, pp. 542 and 543.

23. We then have Article 6, to which I have referred already, in which Chile recognizes in favour of Bolivia in perpetuity the fullest and most unrestricted right of commercial transit through its territory and its Pacific ports.

24. By Article 7, Bolivia is granted the right to establish customs agencies in designated Chilean ports and provides that goods in transit shall go directly from the pier to the railroad station for transportation to the Bolivian customs houses in closed and sealed wagons.

25. Article 8 provides for most-favoured-nation status in respect of commercial interchange between the Parties.

26. Finally, Articles 9, 10 and 11 address customs formalities in respect of certain goods and products and in respect of the ports of Arica and Antofagasta.

27. Mr. President, Members of the Court, the 1904 Treaty was a compact in two parts. In its first part, it settled comprehensively the territorial sovereignty of the Parties vis-à-vis one another and delimited the boundary between them. In its second part, it established treaty-based arrangements and commitments governing core aspects of the Parties' relations going forward. Amongst these arrangements and commitments was the unrestricted, in perpetuity, treaty-based right of access by Bolivia to the Pacific Ocean through sovereign Chilean territory and ports.

28. All of this is evident on the face of the Treaty. It does not require fancy interpretative footwork. It is plain for all to see. The Treaty was dispositive on the nature of Bolivia's right of access to the Pacific Ocean. The Treaty was in force and governing of these issues on 30 April 1948.

Le PRESIDENT : Monsieur Bethlehem, le moment est sans doute approprié pour faire une petite pause dans votre présentation de manière à permettre à la Cour de se retirer pour une durée de 15 minutes, puis nous reprendrons l'audience et je vous donnerai la parole pour la suite et la fin de votre plaidoirie. L'audience est suspendue.

L'audience est suspendue de 16 h 25 à 16 h 45.

Le PRESIDENT : Veuillez vous asseoir. Monsieur Bethlehem, vous pouvez poursuivre. Nous vous écoutons.

Sir Daniel BETHLEHEM: Merci.

IV. Sovereignty and delimitation

29. Mr. President, Members of the Court, just before the Court rose for the short break, I had sketched out the broad scheme of the 1904 Treaty. Let me return to the detail of the territorial settlement in the 1904 Treaty in a little bit more detail.

30. Article 2 of the 1904 Treaty, which embodies the comprehensive territorial settlement between Chile and Bolivia, has five components. First, it addresses Chilean sovereignty over what had, until the Pacific War of 1879, been the Bolivian Littoral Department. Second, it delimited the boundary between Chile and Bolivia from south to north in the area of the Chilean provinces of Antofagasta and Tarapacá. Third, it agreed and delimited the frontier line between Chile and Bolivia in the area of Tacna and Arica. Fourth, it provided for the demarcation of the entire boundary. Fifth, it recognized the legally-acquired private rights of nationals and foreigners in the territories that remain under the sovereignty of either country.

31. For present purposes, the issues of demarcation and the recognition of private rights are not material. The first three components are material, however, and are illustrated by the slide now up on the screen⁷⁴. This slide shows the comprehensive nature of the territorial settlement between Chile and Bolivia pursuant to Article 2 of the 1904 Treaty. In particular, it shows the territories that had, until the Pacific War, been the Bolivian Littoral Department; territories addressed in Article 2 of the Truce Pact of 1884. By Article 2 of the 1904 Treaty, it was provided that these territories are “recognized as belonging absolutely and in perpetuity to Chile”⁷⁵. And you see this language from Article 2 of the 1904 Treaty up on the screen.

32. The slide also shows the boundary between Chile and Bolivia in the area of the Chilean provinces of Antofagasta and Tarapacá, as well as the agreed frontier line between Chile and Bolivia in the area of Tacna and Arica; in other words, the entirety of the boundary between Chile and Bolivia.

33. Let me take you through each of these elements in a little more detail.

⁷⁴Tab 15 of judges' folder.

⁷⁵1904 Peace Treaty, tab 1 of judges' folder, pp.1, 8 and 15.

34. Chilean sovereignty over what had been the Bolivian Littoral Department prior to the Pacific War of 1879 is addressed in the opening paragraph of Article 2 of the Treaty. Once again, you see this language on the second slide up on the screen⁷⁶. It highlights again the opening language of Article 2 of the 1904 Treaty, which provides that “the territories occupied by Chile by virtue of article 2 of the Truce Pact of April 4, 1884, are recognized as belonging absolutely and in perpetuity to Chile”⁷⁷.

35. The delimitation of the boundary between Chile and Bolivia in the area of the Chilean provinces of Antofagasta and Tarapacá is addressed in the next part of Article 2 which, in 12 dense paragraphs, delimits the boundary by reference to 77 geographic locations. The detail of the delimitation is not material for present purposes. The boundary so delimited is shown on the slide on the screen⁷⁸.

36. The next part of Article 2 reflects the agreement of the parties on the delimitation of the frontier line between Chile and Bolivia in the area of Tacna and Arica by reference to 20 geographic locations. This is addressed in four detailed paragraphs. These paragraphs are introduced by a distinct *chapeau*, now shown on the slide on the screen⁷⁹. The *chapeau* reads as follows: “To the North of this last point [in other words, point 77] Bolivia and Chile agree to establish between them the following frontier line.”⁸⁰ The frontier line so delimited ran from the northern point of the boundary in the area of Chile’s Tarapacá Province to the north-eastern corner of the province of Tacna.

37. Mr. President, Members of the Court, putting the various parts of Article 2 together, it is self-evident that the 1904 Treaty affected a comprehensive territorial settlement between Chile and Bolivia that left Bolivia with no right to any territory on the coastal side of the agreed boundary.

38. Mr. President, Members of the Court, Bolivia says virtually nothing about the 1904 Treaty in its Application and Memorial. In so far as it does say anything, it advances the submission that “[t]he 1904 Treaty addressed the cession of Bolivia’s Department of Littoral but

⁷⁶Tab 16 of judges’ folder.

⁷⁷1904 Peace Treaty, tab 1 of judges’ folder, pp.1, 8 and 15, Art. II.

⁷⁸Tab 17 of judges’ folder.

⁷⁹Tab 18 of judges’ folder.

⁸⁰1904 Peace Treaty, Tab 1 of judges’ folder, pp.3, 10 and 17, Art. II.

not Bolivia's sovereign access to the sea on *occupied coastal territories* further to the north⁸¹. This reference to "occupied coastal territories further to the north" is a reference to the territories of Tacna and Arica, territories that, by the Treaty of Peace of Ancón of 1883 between Chile and *Peru*, were in the possession of Chile and subject to Chilean jurisdiction pending a subsequent plebiscite of the population on the issue of sovereignty⁸². Sovereignty over Tacna and Arica was ultimately settled by the Treaty of Lima between Chile and Peru of 1929, in which it was agreed that Peru would be sovereign over Tacna and Chile sovereign over Arica⁸³.

39. Mr. President, Members of the Court, Bolivia's claim that the 1904 Treaty did not exclude the possibility of Bolivian sovereign access to the sea through Tacna and Arica has no foundation whatever. The terms of the 1904 Treaty leave no room for doubt that, as regards Chile and Bolivia, the issue of sovereign access to the Pacific Ocean had been comprehensively settled. Bolivia's access to the Pacific Ocean was addressed in the negotiations leading up to the 1904 Treaty. While it was evident that the status of Tacna and Arica was unresolved as between Chile and *Peru*, the 1904 Treaty reflected an agreement between Chile and *Bolivia* that Bolivia would have no rights in whatever part of Tacna and Arica might come under definitive Chilean sovereignty by subsequent agreement with Peru. It is simply not credible for Bolivia now to claim that, in the 1904 Treaty, the parties somehow left open scope for a residual Bolivian claim against Chile of sovereign access to the Pacific Ocean. Any such claim runs counter to the plain language and scheme of the 1904 Treaty.

40. Mr. President, Members of the Court, the relevant consideration for present purposes is that, by the 1904 Treaty, Bolivia and Chile settled that Bolivia had no sovereign rights over *any* territory on the coastal side of the *entirety* of the boundary delimited by Article 2 of the 1904 Treaty and thus no right opposable to Chile in *any* territory in Tacna or Arica nor anywhere further south.

⁸¹MB, para. 93, emphasis added; and see, for example, WSB, para. 74.

⁸²Treaty of Peace of Ancón between Chile and Peru, signed at Lima on 20 Oct. 1883 (the *Treaty of Ancón*), POCh, Vol. 1, Ann. 1, pp. 72 and 73, Art. 3.

⁸³Treaty between Chile and Peru for the Settlement of the Dispute Regarding Tacna and Arica, signed at Lima on 3 June 1929 (entry into force 28 July 1929) (the *Treaty of Lima*), POCh, Vol. 1, Ann. 11, pp. 173 and 178, Art. 2.

41. Mr. President, Members of the Court, it is also clear that, at the point at which the 1904 Treaty was concluded, Bolivia was itself of the view that all of its issues had been fully addressed and resolved by the Treaty, including the issue of sovereign access to the Pacific Ocean. This appreciation of the scope of the 1904 Treaty is illustrated by the statement of the Chairman of the Bolivian National Congress in 1905 on presenting the 1904 Peace Treaty to the Bolivian National Congress for its approval. He said as follows:

“The most important act of Congress, which concerns its responsibility before the country and history, is the approval of the Treaty of peace, commerce, transfer of territory, and setting of boundaries concluded with the Republic of Chile, which puts an end to the truce we have been in since the War of the Pacific. These were laborious, lengthy and difficult negotiations that resulted in the said arrangement, *which encompasses all of our issues. Bolivia has accepted the weight of the facts, with the firm purpose of committing to arbitration, faithfully complying with its obligations, and maintaining cordial relations with said Republic.*”

And the Chairman of the Bolivian National Congress then continued:

Having recovered, as a consequence of this Treaty, its autonomy in trade and customs matters, it [Bolivia] strongly wishes to strengthen its relationships with friendly countries, and invites investors and capitalists from all over the world to explore the richness of its soil.”⁸⁴

42. After this statement by the Chairman of the Bolivian National Congress, the President of Bolivia took the floor before Congress and said as follows:

“As it is well said by the authoritative and respected word of the Chairman of the Honorable Congress, the most important act of the current legislature . . . is the approval of the Treaty of Peace and Amity concluded with the Republic of Chile.

. . . it should be noted that in entering into a peace agreement with Chile, we have been guided by . . . *the desire of working without obstacles, with full independence, within our clear and finally determined borders;* to prepare the country for a future free of suspicions and fears, and abundant in prosperity for all, to re-establish cordial relations with the Chilean people, proud in war and noble at peace, aimed at joining in concert with the friendly countries, with which we have to carve out the common work of progress and civilization in the Americas.

Fortunately [he continues], given the conditions of the treaty of peace that fully guarantees our sovereignty in customs matters, the benefits to Bolivia will not be long-awaited.”⁸⁵

43. Mr. President, Members of the Court, what Bolivia’s President, Bolivia’s National Congress Chairman and Bolivia’s National Congress accepted in February 1905, when solemnly

⁸⁴Bolivia, 13th Closing Session of the Honourable National Congress, 2 Feb. 1905, La Paz, 1905; Ann. 30 to POCh, Vol. 2, pp. 530 and 531; emphasis added.

⁸⁵*Ibid.*, pp. 534 and 535.

approving the 1904 Treaty, their successors now seek to deny before this Court. *Now*, Bolivia describes itself as “a State *temporarily* deprived of access to the sea as a result of war”⁸⁶. *Now*, Bolivia argues that the 1904 Peace Treaty “did not cancel previous Chilean declarations and commitments concerning Bolivia’s sovereign access to the sea”⁸⁷. The historic reality, however, is very different. *Then*, Bolivia described the Treaty as encompassing all of its issues. *Then*, Bolivia described the Treaty as one through which Bolivia recovered its autonomy in trade and customs matters. *Then*, Bolivia commended the Treaty as one that allowed it to move forward to obtain the benefits of prosperity within clear and finally determined borders.

44. Mr. President, Members of the Court, Bolivia *now* proposes three sources for its claimed right of sovereign access said to have arisen before the 1904 Treaty. It relies on treaties of 1866, 1874 and 1895⁸⁸. Let me address briefly the 1866 and 1874 Treaties. I will come back to the 1895 Treaty shortly.

45. The Treaties of 1866⁸⁹ and 1874⁹⁰ were boundary treaties between Bolivia and Chile. They were plainly superseded by the comprehensive boundary settlement in the 1904 Treaty. They had no surviving legal effect following the 1904 Treaty. There is nothing more that needs to be said about them.

46. Bolivia also claims, although without evidence, “that the 1904 Treaty was understood to be without prejudice to the agreed intent of Chile and Bolivia to negotiate a sovereign access to the sea”⁹¹. One searches in vain, however, for any indication in the 1904 Treaty that its comprehensive territorial settlement was somehow intended to be without prejudice to some residual Bolivian right to territory on the Chilean side of the boundary. There is no basis on which any such right can be implied. The Treaty is “clear on the face of the text”⁹². Nor is there any basis whatever for

⁸⁶MB, para.396; emphasis . See also para.20 in which Bolivia says that “it has been landlocked for more than a century while *retaining* a right of sovereign access to the sea that it has not been allowed to exercise”; emphasis added.

⁸⁷AB, para. 14.

⁸⁸See AB, paras. 9-14.

⁸⁹Treaty of Territorial Limits Between Chile and Bolivia, signed at Santiago on 10 Aug. 1866; MB, Vol. I, Ann. 95.

⁹⁰Treaty of Limits Between Bolivia and Chile, signed at Sucre on 6 Aug. 1874; MB, Vol. I, Ann. 96.

⁹¹MB, para. 353.

⁹²*Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (I)*, p. 861, para. 88.

Bolivia's assertion that it does not seek a "modification of the 1904 Treaty"⁹³. It would be impossible for Bolivia to gain sovereign access to the Pacific Ocean through Chilean territory without modification of the settlement reached in the 1904 Treaty.

V. The 1896 Exchange of Notes and Article VI of the Pact of Bogotá

47. Mr. President, Members of the Court, I turn finally to the issue of the 1895 treaties. In its Application and Memorial, Bolivia rooted its claim to sovereign access to the Pacific Ocean in the 1895 Treaty on Transfer of Territory between Bolivia and Chile⁹⁴. Everything in Bolivia's case ultimately flows from this, including the weight that Bolivia seeks to attach to post-1948 conduct.

48. What Bolivia failed to mention, however, was that neither the Transfer Treaty nor any of the other treaties concluded by Chile and Bolivia in 1895 ever entered into force. This is an omission of considerable audacity on Bolivia's part.

49. In its Application, Bolivia described the 1895 Transfer Treaty as "particularly important"⁹⁵. In its Memorial, referring to the 1895 treaties, Bolivia claimed that "it *retained* a right of sovereign access to the sea"⁹⁶. Bolivia's Memorial is replete with numerous other references to what it describes as "the 1895 settlement"⁹⁷.

50. Mr. President, Members of the Court, this is smoke and mirrors. The 1895 Transfer Treaty never entered into force.

51. The reason why the 1895 treaties never entered into force is that, by an Exchange of Notes in April 1896, Chile and Bolivia agreed that, if the Congress of either State did not approve the protocols of December 1895⁹⁸ and 30 April 1896⁹⁹ to the May 1895 treaties, this would "imply a disagreement upon a fundamental basis of the May agreements which would make them wholly

⁹³MB, para. 467.

⁹⁴Treaty on Transfer of Territory between Bolivia and Chile, signed at Santiago on 18 May 1895 (the *1895 Transfer Treaty*); POCh, Vol. 1, Ann. 3, pp. 92-103.

⁹⁵AB, para. 13.

⁹⁶MB, para. 36; emphasis added.

⁹⁷MB, para. 98 and see also para. 410. See also MB, para. 115. See also the sections of MB starting at Chap. I, p. 26, and Chap. II, p.41, and more specifically paras. 9, 73, 76, 167, 228, 311, 340, 341, 343, 355, 368, 411, 416 and 428. See also AB, paras. 13-14.

⁹⁸Protocol of 9 Dec. 1895 on the scope of the obligations agreed upon in the treaties of 18 May between Bolivia and Chile, signed at Sucre on 9 Dec. 1895 (the *December 1895 Protocol*); POCh, Vol. 1, Ann. 4, pp. 106-108.

⁹⁹Explanatory Protocol of the Protocol of 9 Dec. 1895 between Bolivia and Chile, signed at Santiago on 30 April 1896 (the *1896 Protocol*); POCh, Vol. 1, Ann. 8, pp. 122-129.

without effect”¹⁰⁰. The language from this April 1896 Exchanges of Notes is up on the screen¹⁰¹. Bilateral congressional approval of these two protocols was thus a precondition of the consent of the two States to the entry into force of the 1895 treaties.

52. Rather than consenting to these protocols, the Bolivian Congress purported to enter a reservation to one of them¹⁰². In the face of that reservation, the Chilean Congress declined to approve the two relevant protocols. Since bilateral congressional consent to these two protocols was never given, the 1895 treaties, including the Transfer Treaty, never entered into force and remain “wholly without effect”.

53. Mr. President, Members of the Court, these observations on the 1895 treaties are not merits points. They are jurisdictional points. The position I have just described was the position in 1948. Quite apart from the lack of legal effect of the 1895 Transfer Treaty, it is also the case that the 1895 Transfer Treaty and the 1896 Exchange of Notes are themselves caught by the application of Article 6 of the Bogotá Pact and are thus outside the jurisdiction of the Court.

VI. Summary of Chile’s case on the 1904 Treaty

54. Mr. President, Members of the Court, I come to my concluding remarks. Bolivia rooted its claim to sovereign access to the Pacific Ocean in an 1895 treaty that never entered into force. It all but failed to mention the 1904 Treaty. Such that it did refer to the 1904 Treaty, it suggested that the territorial settlement of that Treaty left some residual space for Bolivia to assert a claim of a right of sovereign access, although this residual space is utterly invisible to the naked eye. It failed to address the comprehensive nature of the territorial settlement in Article 2 of the 1904 Treaty. It failed to address the implications that follow from Article 6 of the 1904 Treaty. Mr. President, Members of the Court, these are omissions of grave and fatal proportions by Bolivia.

55. On the other side of the equation, an examination of the 1904 Treaty leaves no doubt about the compact that was agreed by the Parties 111 years ago. The Treaty rested on the twin

¹⁰⁰Note from Adolfo Guerrero, Minister for Foreign Affairs of Chile, to Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 521, 29 April 1896; POCh, Vol. 1, Ann. 6, pp.114-115; and Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister for Foreign Affairs of Chile, No 118, 30 April 1896; POCh, Vol. 1, Ann. 7, pp. 118-119.

¹⁰¹Tab 19 of judges’ folder.

¹⁰²Bolivia’s Reservation to the 1896 Explanatory Protocol of the Protocol of 9 Dec. 1895 between Bolivia and Chile, 7 Nov. 1896; POCh, Vol. 1, Ann. 9, pp. 132-135.

pillars of a comprehensive territorial settlement and commitments of amity addressing the political and commercial relations of the Parties going forward, including a treaty-based right, in perpetuity, granting Bolivia access to the Pacific Ocean through sovereign Chilean territory and ports. This right of access in perpetuity is the fullest and most unrestricted treaty-based right. But it is not a sovereign right.

56. Mr. President, Members of the Court, the 1904 Treaty was in force on the date of the conclusion of the Bogotá Pact. It governed and settled the matter then, just as it does now.

57. Mr. President, Members of the Court, this concludes my submissions this afternoon. Mr. Wordsworth will develop Chile's submissions on the application of Article VI of the Bogotá Pact to the circumstances of this case. Mr. President, if it is convenient, I would ask you to invite Mr. Wordsworth to the podium.

Le PRESIDENT : Merci. Je donne la parole à M. Wordsworth pour sa plaidoirie.

Mr. WORDSWORTH:

ARTICLE VI OF THE PACT OF BOGOTÁ APPLIED TO BOLIVIA'S CLAIM

I. Introduction

1. Mr. President, Members of the Court, it is a privilege to appear before you, and to have been asked by the Republic of Chile to build on the submissions that you have just heard, and to develop our position on why Bolivia's claim is outside your jurisdiction.

2. You can see from the outline that is just before tab 20 of your judges' folder, that there are three key areas for me to address in considering how Article VI of the Pact of Bogotá, which is now on your screens once more, applies to this case: that is (a) identification of the relevant "matter" for the purposes of Article VI, and (b) assessing whether that matter is "settled" and/or (c) "governed" within the terms of this provision¹⁰³.

¹⁰³American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948 (entry into force 6 May 1949) (the *Pact of Bogotá*), tab 3 of judges' folder, pp. 4, 32 and 33. Article VI provides: "The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty."

3. In brief, Bolivia's claim is for an order that Chile must negotiate with Bolivia "in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean"¹⁰⁴. The ultimate object of the claim is, unarguably, the grant of sovereign access to the sea.

4. It is necessary to cut through the obfuscation, but the short point is that the real issue in the current case is whether Bolivia has a right to sovereign access to the Pacific Ocean. The alleged obligation to negotiate is merely a means — indeed a notably artificial means — articulated by Bolivia to seek to implement that alleged right. When one comes to the details of its claim, it is plain that, for Bolivia, negotiation is *not* the usual process of good faith exchanges, but rather a judicially prescribed procedure leading only to one predetermined outcome: that is, the grant to Bolivia of Chilean territory in order to obtain sovereign access to the sea.

5. It follows that, with Article VI firmly in mind as it must be, the case before you concerns the "matter" of whether Bolivia has a right of sovereign access to the Pacific Ocean.

6. And, that "matter" is one "settled by arrangement between the parties", notably by the 1904 Peace Treaty that Bolivia has sought to glide over, both in its Application and in its Memorial. The Treaty established unequivocally that Bolivia does not have any right of sovereign access to the Pacific Ocean, and quite deliberately not, as Mr. Bethlehem has just shown. The only way for Bolivia to be granted the sovereign access to the Pacific that it claims in this case would be precisely through revision of the settlement reached in 1904 concerning territorial sovereignty and the character of Bolivia's access to the sea.

7. Further, the relevant "matter" is one "governed by" the 1904 Peace Treaty, which was in force in 1948, and remains in force today; and it is likewise governed by a number of later ancillary agreements that gave and still give further precision to the nature of Bolivia's access to the sea¹⁰⁵.

¹⁰⁴MB, para. 500 (c).

¹⁰⁵See for example Convention on Transit between Bolivia and Chile, signed at Santiago on 16 Aug. 1937; POCh, Ann. 44, pp. 616-624; see also Convention on Trade between Chile and Bolivia, signed at Santiago on 6 Aug. 1912; POCh, Ann. 34, pp. 560-567.

8. In short, whether formulated as a direct claim for revision of the settlement reached in the 1904 Peace Treaty or as an obligation to negotiate and to agree on the same result, the matter that Bolivia has put before you is one excluded from the Court's jurisdiction by virtue of Article VI.

II. The relevant “matter” for the purposes of Article VI

9. I turn, then, to the details, starting with identification of the real issue in the case, which is the necessary antecedent to the question of whether the case concerns a matter excluded from jurisdiction by virtue of Article VI.

10. I pick up now from paragraph 3 of my outline, and also you can see it on the screen, the obvious starting-point in this task of identification is the principal relief claimed by Bolivia — that is negotiation “to grant Bolivia a fully sovereign access to the Pacific Ocean”¹⁰⁶. And, so far as concerns identifying the real issue in the case and the real object of the claim, the important point is that the formulation of the alleged obligation to negotiate is an obligation to achieve one stated result. This establishes what Bolivia is truly seeking, which is evidently not an open negotiation. The claim to an obligation to negotiate is merely a legal construct to secure for Bolivia the grant of fully sovereign access to the Pacific Ocean, that is, to obtain the transfer to Bolivia of a stretch of Chilean sovereign territory.

11. And I say “legal construct” precisely because sovereign access is the essential and inevitable outcome of the relief sought. Negotiation only constitutes an *apparent* stepping-stone at best: for, on the claim as formulated by Bolivia, whatever happens next in the negotiations, Bolivia is to get its sovereign access, and the negotiation is relegated to matters of detail, or to “the precise terms of Bolivia's sovereign access”, which is the way it is expressed in Bolivia's Memorial¹⁰⁷. The result that Bolivia seeks of sovereign access to the sea is described by Bolivia as having been “predetermined”¹⁰⁸, and to similar effect Bolivia says in its Memorial that the obligation to negotiate — and you can now see this on the screens as well as in my outline — “will terminate

¹⁰⁶MB, para. 500 (c).

¹⁰⁷*Ibid.*, para. 498.

¹⁰⁸*Ibid.*, para. 404.

only when an agreement is concluded materializing in concrete terms the sovereign access to the sea”¹⁰⁹.

12. So, whatever happens in the negotiation, there is to be a reallocation of sovereignty over territory, with the effect that the character of Bolivia’s access to the sea changes from non-sovereign access, as per the current position agreed in 1904, to sovereign access.

13. The object of the claim is thus correctly identified as the grant of sovereign access to the Pacific Ocean, and the real issue in this case is whether Bolivia has a right to that access. And, this is confirmed by the fact that Bolivia’s claim is predicated on the alleged existence of a long-standing right to sovereign access: it is said in the Memorial that Bolivia “is in a unique and unprecedented position” expressly through it “retaining a right of sovereign access to the sea that it has not been allowed to exercise”¹¹⁰.

14. And, although there is in fact little need for you to look beyond Bolivia’s current pleadings when it comes to the task of isolating the real issue before you, it must be emphasized that the current claim is not to be approached as if it were in a vacuum.

15. The jurisprudence that establishes this proposition will be very well known to you, although I note that Bolivia appears to wish to constrain the Court in its task of determining the “real issue” in this case. At paragraphs 13 and 20 of its Written Statement, Bolivia says that: “In considering the nature of [Chile’s] objection, the Court must first identify the subject-matter of the dispute with reference to the terms of the application and the applicant’s submissions”, and then that “Bolivia’s Application must therefore be read and interpreted in its own terms”¹¹¹.

16. Now, that does not capture the relevant principles from the *Fisheries Jurisdiction* case to which Bolivia refers. As the Court first observed in the *Nuclear Tests* cases, and you can see that at paragraph 4 of my outline, “it is the Court’s duty to isolate the real issue in the case and to identify the object of the claim”¹¹², and likewise that it “is entitled to interpret the submissions [plural] of the parties [plural], and in fact is bound to do so”¹¹³. And, as the Court then explained in

¹⁰⁹MB, para. 287; see also paras. 289 and 290.

¹¹⁰MB, para. 20.

¹¹¹WSB, paras. 13 and 20.

¹¹²See *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 262, para. 29.

¹¹³See *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 466, para. 30.

Fisheries Jurisdiction, in identifying the “real dispute” the Court “will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence”¹¹⁴.

17. It follows that, in considering the real issue before it, the Court’s attention is correctly drawn to the context of the current claim, including, as the Honourable Agent explained earlier today, that it constitutes the latest in a long line of initiatives taken by Bolivia with a view to satisfying its aspiration of departing from the 1904 Peace Treaty and obtaining sovereign access to the Pacific Ocean.

18. And if I can ask you to turn to paragraph 5 of my outline, you will see, there, our position that the true nature of the current claim is further confirmed by a number of recent Bolivian documents, including Bolivia’s 2009 Constitution. Article 267, as you can see on the screen, contains a declaration of Bolivia’s “unwaivable and imprescriptible right over the territory giving access to the Pacific Ocean and its maritime space”, and this provision must be read together with the transitional provisions, which impose — and you can see this in the second sentence on the screen and in tab 23 of our judges’ folder — a duty on the Government to “denounce and, if necessary, renegotiate those treaties that are contrary to the Constitution”, which must inevitably include the asserted Article 267 “right over the territory giving access to the Pacific Ocean and its maritime space”¹¹⁵.

19. What happened next is instructive. Bolivia did not then denounce the 1904 Peace Treaty, which would undoubtedly be caught by these provisions of the Constitution. Instead, in the course of early 2013, both the Bolivian Senate and its Constitutional Tribunal confirmed that this duty could be fulfilled by challenging treaties before international tribunals¹¹⁶. You can see this from the documents that we have included at tabs 24 and 25 of the judges’ folder. And indeed, in the next tab (tab 26), you can see that on 3 April 2013, the Supreme Resolution of the President of

¹¹⁴*Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p 449, para. 31, referring to *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 262-263.

¹¹⁵Political Constitution of the Plurinational State of Bolivia, 7 Feb. 2009, POCh, Ann 62, pp. 926 and 929, Art. 267 and Ninth Transitional Provision.

¹¹⁶Constitutional Tribunal of Bolivia, Plurinational Constitutional Declaration No 0003/2013, made in Sucre on 25 April 2013, POCh, Ann. 73, pp. 1025-1027, section III.11, tab 25 of judges’ folder, pp. 1 and 3, considering Bolivian Law on Normative Application – Statement of Reasons, 6 Feb. 2013, POCh, Ann. 71, p. 1003, Art. 6, tab 24 of judges’ folder, pp. 1-5.

Bolivia appointing Bolivia's Honourable Agent to my right, made clear that this very case was brought to vindicate the "right" set out in Article 267 of Bolivia's Constitution¹¹⁷. As you can see from the highlighted passage, the appointment takes as its starting-point Article 267 to Bolivia's Constitution; and you can see the communication to the Registrar is on the opposite page.

20. Bolivia now seeks to muddy the waters in its Written Statement of November 2014. It appears to contest Chile's reading of the 2009 Constitution, but without explaining why, and we can only look forward to it developing that point — in the face of its own official statements and documents¹¹⁸. Bolivia also asserts that Chile's submissions are irrelevant because Bolivia's "claim" is said to pre-date the 2009 Constitution, and hence could not have been the result of a constitutional prescription¹¹⁹.

21. But that assertion merely seeks to bypass Chile's point. The 2009 Constitution imposes a duty to renounce or renegotiate or challenge by way of international proceedings treaties contrary to Bolivia's alleged right of sovereign access to the sea, i.e., the 1904 Peace Treaty. Bolivia itself — by a Supreme Resolution of the President no less — has in effect confirmed that this case was brought in fulfilment of that duty. In these circumstances, it is clear that this case concerns an Article 267 matter, i.e., Bolivia's alleged right of sovereign access to the sea. And, likewise, that it puts squarely in issue the 1904 Treaty.

22. This is also confirmed in official Bolivian documentation that post-dates the commencement of the current proceedings. In August 2013, Bolivia issued an Offering Memorandum for government bonds¹²⁰, and you can see the relevant extract coming up on the screen and the relevant extracts are also at tab 27 of your judges' folder — where you can see the first page of the bond and the relevant page placed next to it, on the slide.

Now, under the heading of Chile, Bolivia is describing its political relations with Chile and it is the second paragraph that is important for present purposes:

¹¹⁷Bolivian Supreme Resolution 09385, 3 April 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 April 2013, POCh, Ann. 72, p. 1007, tab 26 of judges' folder, p. 2.

¹¹⁸WSB, para. 54.

¹¹⁹WSB, para. 53.

¹²⁰Bolivia, Offering Memorandum for government bonds, 22 August 2013, available at <https://www.bourse.lu/instrument/listdocuments?cdVal=201919&cdTypeVal=OBL>, tab 35 of judges' folder, p. 33.

“The Bolivian Political Constitution declares our indispensable and irreversible right over the territories that give us access to the Pacific Ocean. [So that, of course, is a reference to Article 267.] We have not had direct access to the Pacific Ocean since the Treaty of Peace and Friendship of 1904 that we signed with Chile after the War of the Pacific. [So, the 1904 Treaty is portrayed there as being the impediment to sovereign access.] Since then, we have sought to reclaim lands from Chile in order to regain our access to the Pacific Ocean, which to date have been unsuccessful. In 2011, President Morales reaffirmed his intention to seek a peaceful solution to our maritime dispute with Chile through international courts, and on April 24, 2013 we instituted proceedings against Chile before the International Court of Justice.”¹²¹

23. So, this once again makes it as plain as can be that the current case has been brought — by way of fulfilment of a constitutional mandate — to unsettle a matter settled by the 1904 Peace Treaty and governed by it. I should say that a fuller extract of the bond Memorandum is at tab 35 of this judges’ folder.

24. And it inevitably follows from all the above that this case concerns the “matter” of whether Bolivia has a right to sovereign access to the sea. Bolivia’s alleged right to sovereign access to the Pacific Ocean constitutes the real issue in the current case, and likewise constitutes the relevant “matter” for the purposes of Article VI of the Pact.

25. The question, then, is whether this is a matter “already settled by arrangement”, or “governed by agreements or treaties in force on the date of the conclusion of” the Pact of Bogotá. Chile’s position is that the matter before you is caught by *both* limbs of Article VI of the Pact; but, as follows from a plain reading of Article VI, Chile need only satisfy you that the matter is one “settled by arrangement” in or “governed by” a pre-1948 Treaty.

III. The “matter” is one “settled by arrangement”/“governed by” the 1904 Peace Treaty and related instruments

26. Now dealing with these two limbs in order, I want to develop the argument in three stages.

(a) First, to address the issue of whether the matter of sovereign access to the Pacific Ocean was settled by the 1904 Peace Treaty.

(b) Secondly, and consistent with the Court’s approach in *Nicaragua v. Colombia*, to ask the question whether that matter remained settled as of the date of conclusion of the Pact of Bogotá, i.e., as of 1948.

¹²¹Bolivia, Offering Memorandum for government bonds, 22 August 2013, available at <https://www.bourse.lu/instrument/listdocuments?cdVal=201919&cdTypeVal=OBL>, tab 35 of judges’ folder, p. 33.

(c) And thirdly, to ask whether the matter was “governed by agreements or treaties in force on the date of the conclusion of” the Pact.

27. I will then come back to the way that Bolivia seeks to reframe the issue by reference to exchanges between the Parties subsequent to the conclusion of the Pact.

A. The position as at 1904: the matter of sovereign access to the Pacific Ocean was settled by the 1904 Peace Treaty

28. As to the first element of the argument, as noted at paragraph 7 of my outline, the 1904 Peace Treaty dealt in a definitive manner with the previously contested issues of territorial sovereignty and access to the sea. There is no manifestation of any intent in the Treaty language that the critical matter of Bolivia’s access to the sea be subject to reopening or that the Treaty be of limited scope or duration on this matter. To the contrary, as Mr. Bethlehem identified, the 1904 Treaty established a complete boundary and, in its Article VI, a régime for Bolivia’s access to the sea that was expressly to endure “in perpetuity”.

29. The 1904 Peace Treaty was precisely the kind of arrangement that the drafters of Article VI of the Pact will have had in mind; and, crucially for today’s purposes, the only way for Bolivia to be granted the sovereign access to the Pacific that it now claims before you would be through the unsettling of this arrangement reached in 1904. Certainly, with Article VI of the Pact firmly in mind, Bolivia has chosen not to formulate its claim as one seeking revision of the 1904 Peace Treaty in direct language; but its claim is not somehow any less excluded from the Court’s jurisdiction through being presented as a claim to revision via an alleged obligation to negotiate.

30. As the necessary flipside to its tactical decision not to challenge the 1904 Treaty in any express way in these proceedings, Bolivia contends in its Memorial that: “Sovereign access to the sea was not addressed in the 1904 Treaty.”¹²² But of course it was, as Mr. Bethlehem has just demonstrated. And the question has to be asked as to why Bolivia is taking such an untenable line; and the only answer can be that Bolivia recognizes that the matter before you does indeed concern

¹²²MB, para. 10.

its alleged right to sovereign access to the sea. Hence, to avoid the application of Article VI of the Pact, it has to argue that this was not a matter settled in or governed by the 1904 Peace Treaty.

31. Bolivia therefore argues that, in the 1895 Transfer Treaty, Chile explicitly bound itself to transfer territory to Bolivia to grant it a sovereign access, an obligation that is said to have been left untouched by the 1904 Peace Treaty. But there are insurmountable difficulties here for Bolivia — I have summarized them at paragraph 8 of my outline, which is just before tab 20 of your slightly industrial-looking judges' folder:

- (a) First, the issue of sovereign access was addressed and settled by the 1904 Treaty. It was at the forefront of the Parties' minds, and rejected in favour of a non-sovereign régime of access for Bolivia. The Parties' respective rights over territory were definitively established, and key provisions were agreed in relation to — explicitly and exclusively — Bolivia's non-sovereign access to the Pacific Ocean.
- (b) Secondly, the juridical fact that the matter of access to the sea was settled by the 1904 Treaty cannot somehow be undermined by reference to the 1895 Transfer Treaty. The 1895 Treaties never came into force and, to quote the Parties' April 1896 Exchange of Notes that Mr. Bethlehem has just taken you to, they are “wholly without effect”¹²³.
- (c) Thirdly, that 1896 Exchange of Notes settled the matter of whether the 1895 Transfer Treaty has any effect, and it follows that this is also a “matter” caught by Article VI of the Pact of Bogotá. The Court has no jurisdiction to hear any submission seeking to go behind the agreement in the 1896 Exchange of Notes, as Mr. Bethlehem just noted.

B. The position as at 1948: the matter of sovereign access to the Pacific Ocean remained settled by the 1904 Peace Treaty

32. I move, then, to the position as of 1948, when the Pact was concluded, which the Court has identified as “the date by reference to which [it] must decide on the applicability of the provisions of Article VI”¹²⁴.

¹²³Note from Adolfo Guerrero, Minister for Foreign Affairs of Chile, to Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No. 521, 29 April 1896; POCh, Ann. 6, pp. 114-115; and Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister for Foreign Affairs of Chile, No. 118, 30 Apr. 1896; POCh, Ann. 7, pp. 118-119.

¹²⁴*Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 859, para. 81.

33. And it is crystal clear that the matter of sovereign access to the sea remained settled. The 1904 Peace Treaty remained in full force and effect, and Bolivia does not suggest otherwise; its terms had not changed; it had not somehow ceased to regulate in definitive terms the apportionment of territory between the Parties, and the nature of Bolivia's access to the Pacific Ocean. Indeed, its validity and scope so far as concerns regulating the nature of access to the sea was confirmed, and detailed, in various acts and agreements in the decades prior to 1948, for example in the 1937 Convention on Transit between the two States, which is at Annex 44 of our Preliminary Objections¹²⁵.

34. And, in addition, Bolivia's long-standing reservation to the Pact of Bogotá confirmed its contemporaneous understanding that the matter of access to the sea was settled by the 1904 Peace Treaty. As Professor Pinto has explained, this reservation remained in place till April 2013, and purported in effect to modify Article VI such that, "pacific procedures may also be applied to controversies arising from matters settled by arrangement between the Parties, when the said arrangement affects the vital interests of a State"¹²⁶. And there can be little doubt that the 1904 Treaty, was one of the arrangements, if not the sole arrangement, that Bolivia had in mind.

35. Indeed this understanding is confirmed by the recent acts of Bolivia, listed out at paragraph 11 in my outline. On 23 March 2011, President Morales proposed the establishment of a specific governmental department "for Vindication of the Maritime Claim", to "constitute the authority within which the legal actions for the Bolivian maritime claim will be planned"¹²⁷.

36. On the following day, Bolivia's reservation to the Pact of Bogotá was considered in its Chamber of Deputies by reference to President Morales's speech. The President of the Chamber explained how the reservation was "in Bolivia's interests and . . . defines the lines of the claim that was yesterday expressed by the President of the State"¹²⁸. The extract as you can see is at tab 29 and on your screens and the full document is at tab 33, but there is no need to go to that right now.

¹²⁵Convention on Transit between Bolivia and Chile, signed at Santiago on 16 Aug. 1937; POCh, Ann. 44, pp. 616-617, Art. I.

¹²⁶Pact of Bogotá, tab 3 of judges' folder, pp. 24, 54 and 55.

¹²⁷Speech 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 judges' folder, pp. 5-6.

¹²⁸Chamber of Deputies of Bolivia, Legislature 2011-2012, 38th Session, 24 Mar. 2011, tab 33 of judges' folder, pp. 5-6.

You can see overleaf at tab 29 that the point was further developed by the then President of the Commission of Constitutional Affairs, Deputy Marca, who explained:

“This reservation is important because it allows States that may be affected by agreements between two States, and Bolivia in particular would have the right to revise pacts that have been concluded, using the abovementioned procedural means. An example is the issue we have with Chile; the Pact of 1904 as a result could be revised if the Pact of Bogotá is applied.”¹²⁹

37. So, with a reservation in place that in effect re-wrote Article VI, Bolivia considered that it could seek to revise the 1904 Peace Treaty through judicial means, but at the same time it evidently recognized that, without the reservation, Article VI of the Pact excluded jurisdiction with respect to any such attempt. Bolivia now seeks revision of the settlement reached in the 1904 Treaty, albeit through the guise of the alleged obligation to negotiate. And the difficulty for Bolivia is that it is confronted by Article VI *without* the benefit of the reservation that it had formerly considered so important.

38. In an attempt to navigate a way around the actual terms of Article VI, Bolivia says in its Written Statement that:

“It is telling . . . that between 1947 and 1950, not only during the drafting of the Pact but also subsequent to the signing of the Pact, Bolivia and Chile specifically agreed to hold negotiations on Bolivia’s sovereign access to the sea. [Bolivia continues] This confirms that neither Bolivia nor Chile were of the view that the 1904 Treaty had already ‘settled’ this matter or that Article VI of the Pact applied thereto.”¹³⁰

39. But, to the contrary. Even if the underlying premise of a specific agreement to negotiate were correct, the fact that Bolivia considered that negotiations were required in order to create the possibility of leading to any different legal situation merely emphasizes how this was indeed a settled matter. The correct position is precisely that, as of 1948, both Parties considered that the matter *was* settled by the 1904 Peace Treaty.

40. And it follows that the matter of Bolivia’s alleged right to sovereign access falls within the exclusion established by Article VI of the Pact. That conclusion is, of itself, sufficient to establish the lack of jurisdiction over Bolivia’s current claim.

¹²⁹Chamber of Deputies of Bolivia, Legislature 2011-2012, 38th Session, 24 Mar. 2011, tab 33 of judges’ folder, pp. 31-32.

¹³⁰WSB, para. 51.

C. The position as at 1948: the matter of sovereign access to the Pacific Ocean was “governed by agreements or treaties in force”, in particular, the 1904 Peace Treaty

41. But, as a further and separate issue, I move on to the second limb of Article VI, which is whether the relevant matter is one “governed by agreements or treaties in force on the date of the conclusion of the [Pact]”. The points are set out at paragraph 14 of my outline.

42. As already explained by Professor Pinto, this raises a question different to that of whether the matter is one “already settled by arrangement”. The question is no longer whether the matter has been “settled”, i.e., resolved by a given arrangement, but rather whether a given arrangement or treaty governs the matter, that is, regulates the relationship between the Parties concerning that matter.

43. But the same conclusion follows. To recall, the matter is whether Bolivia has a right to sovereign access to the sea. That matter was without doubt governed by the 1904 Peace Treaty in 1948, and the position remains the same today. For more than 110 years the 1904 Peace Treaty has defined and governed the régime of access to the sea, establishing that it is non-sovereign in nature.

44. And, as follows from the plain meaning of Article VI, this is a matter that the parties to the Pact of Bogotá chose to exclude from the scheme of compulsory jurisdiction that they otherwise wished to establish. And it likewise follows that the matter that Bolivia seeks to re-cast in the current proceedings is one that is excluded from the Court’s jurisdiction.

D. Bolivia’s inappropriate reliance on events post-1948

45. Mr. President, Members of the Court, the conclusion that the matter before you was, in 1948, governed by the 1904 Peace Treaty is again sufficient to establish the lack of jurisdiction over the current claim.

46. As Professor Pinto has explained, the intention of the parties to the Pact was to create a jurisdictional exclusion as at 1948. The sources of law relevant to a given matter, and so applicable to the merits of any dispute arising out of that matter, might vary post-1948 due to the conclusion of new instruments. But the fact of any such new instruments was not intended somehow to bypass the exclusion of a given matter from the Court’s jurisdiction *ratione materiae* as established by Article VI of the Pact by reference to the position as at 1948. The parties to the Pact agreed to

exclude matters settled or governed as of 1948, and what may or may not have happened next with respect to these settled or governed matters is not an issue with which this Court may be concerned.

47. But even if it were nonetheless appropriate to look forward to events post-1948, this would not assist Bolivia — notwithstanding the very considerable emphasis that Bolivia places on such post-1948 events in its Written Statement. It is argued there that the post-1948 exchanges and statements gave rise to an international agreement independent of, and subsequent to, the 1904 Treaty¹³¹. Thus Bolivia says that: “The 1904 Treaty could not settle or govern the agreement reached, for instance, in 1950 to negotiate a sovereign access of Bolivia to the Pacific Ocean.”¹³² And, related to this first point, Bolivia says that the separation between the obligation to negotiate and matters settled by the 1904 Treaty is, in fact, one that Chile’s representatives insisted on repeatedly¹³³.

48. There are three points in response — and I have summarized them at paragraph 18 of my outline.

49. First, and most obviously, Bolivia’s contentions presume in its favour that the correct date at which to ask the question of whether the relevant matter was “already settled by arrangement” or “governed by agreements or treaties in force on the date of the conclusion of the [Pact]” is not fixed at 1948, but was intended to be ambulatory. That is inconsistent with the plain wording of Article VI, and with the Court’s prior jurisprudence.

50. Secondly, even if it were somehow correct to look forwards from 1948, Bolivia is still asking the wrong question.

(a) The principal focus of the current enquiry must be whether the matter that is now before the Court, as correctly characterized by the Court, is one that was settled by, or is governed by, the 1904 Peace Treaty. It was; it is.

(b) Bolivia wishes to confuse the issue by relying in particular on exchanges in 1950 and 1975, but it cannot use those exchanges to gloss over the way in which it has in fact formulated its current claim. It claims an order that Chile agree on, and grant to Bolivia, sovereign access to the sea.

¹³¹WSB, paras. 68-69.

¹³²*Ibid.*, para. 68.

¹³³*Ibid.*, para. 64.

In light of the unalterable legal fact that the 1904 Peace Treaty settled the matter as to Bolivia's alleged right to sovereign access to the sea, it is for Bolivia somehow to establish that its current claim does *not* seek to "unsettle" this Treaty. And, it cannot do so. To adjudicate on Bolivia's current claim, this Court would, in substance, be adjudicating on the revision of the 1904 Treaty, and Article VI establishes that the Court has no jurisdiction in this respect.

51. Thirdly, the conclusion of an alleged agreement post-1948, and the reliance on that new agreement in a claim before this Court, does not mean that there is a different "matter" that falls outside Article VI of the Pact:

- (a) If it were somehow correct to look at the post-1948 events, which it is not, the Court would still need to analyse the case before it to establish the precise contours of the relevant "matter" for the purposes of Article VI and to see whether there is, as Bolivia now maintains, a different "matter". And, although Bolivia will no doubt be making a great deal of the post-1948 exchanges in its oral submissions later this week, we ask you to keep firmly in mind that, in substance, they all come back to the *same* matter that was settled by, that is governed by, the 1904 Treaty: that is, the matter of whether Bolivia has a right to sovereign access to the sea.
- (b) Chile's objection is not, as Bolivia would have it, that, in 1904, Chile and Bolivia purportedly settled something that had not even happened yet. Rather, Chile's objection is that events occurring after 1948 are outside the Court's jurisdiction if they concern the same matter that was settled by arrangement or governed by treaty in 1948.
- (c) And it is substance here that is important, and not what the relevant matter might look like after some artful repackaging. The cases where there is a *ratione temporis* limitation on jurisdiction offer an analogy. Where there is a consensual exclusion of disputes pre-dating a treaty's entry into force, what matters is substance not form, and the approach of international courts and tribunals has been to reject jurisdiction where a prior dispute is suddenly re-cast to appear as if it were newly-minted. The *Phosphates in Morocco* case is a good example¹³⁴.

52. And this leads me to Bolivia's related point, which is to say that the separation of the post-1948 negotiations from matters settled and governed by the 1904 Treaty is one that Chile's

¹³⁴*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, pp. 24-26.*

representatives insisted on repeatedly and, hence, Bolivia now says, they are correctly to be regarded as separate¹³⁵.

53. No doubt we will be hearing more on this from Bolivia as it seeks to glide over the legally relevant point, which is that the claim as formulated by Bolivia *inevitably* places the alleged obligation to negotiate and the long-agreed terms of the 1904 Peace Treaty on a collision course. Bolivia cannot say that it is now keeping these two elements separate, and that is regardless of its current and notably artificial interpretation of what may have been said or allegedly agreed in 1950 or 1975. Its claim, and the relief sought, is predicated precisely on an inevitable unsettling of the 1904 Peace Treaty that somehow permits Bolivia to have the historical and current benefits of the Treaty, but also to revise those matters settled in the Treaty to the extent that Bolivia wishes.

54. And, stepping back, the further point is that the 1950 and 1975 exchanges, even if taken as international agreements for the purposes of jurisdiction, do not convey the faintest hint of an intention to establish a basis for compulsory jurisdiction.

55. To the contrary, one might say, as can be seen from the related exchanges between the Parties. Bolivia relies on a communication of 10 July 1961 from the Chilean Ambassador in La Paz, Manuel Trucco, to Bolivia's Foreign Minister¹³⁶, and it is useful to look at this in a little more detail. It is at tab 30 of the judges' folder and now on your screens. Bolivia sets out the first sentence of the relevant passage, where Mr. Trucco stated: "Chile has always been willing, along with preserving the legal situation established in the Treaty of Peace of 1904, to examine in direct negotiations with Bolivia the possibility of satisfying the aspirations of the latter and the interests of Chile."¹³⁷ Notably, however, Bolivia omits the very next sentence, highlighted over the page and also at paragraph 21 of my outline, where it was stated in terms: "Chile will always reject resorting, on Bolivia's end, to organizations which are not competent to resolve an issue settled by the Treaty, which could only be amended by direct agreement of the parties."¹³⁸

¹³⁵WSB, para. 64.

¹³⁶MB, paras. 136-138.

¹³⁷Memorandum from the Embassy of Chile in Bolivia to the Bolivian Ministry of Foreign Affairs, 10 July 1961; POCh, Ann. 48, pp. 730-731. See also statement by Mr. Schweitzer, Minister for Foreign Affairs of Chile, at the Fourth Session of the General Committee of the General Assembly of the Organization of American States, 18 Nov. 1983; POCh, Ann. 55, pp. 778-785.

¹³⁸Memorandum from the Embassy of Chile in Bolivia to the Bolivian Ministry of Foreign Affairs, 10 July 1961; POCh, Ann. 48, pp. 730-731.

56. That statement was not greeted by a response from Bolivia to the effect that there was, to the contrary, an agreement to negotiate over which the International Court of Justice, no less, would have jurisdiction pursuant to the Pact of Bogotá. Indeed, there was no pushback by Bolivia of any kind. And this shows how the Parties were willing to, and did, discuss the issue of access to the sea, but in no sense considered that, in doing so, they were somehow establishing a basis for the jurisdiction of this Court, which they had already excluded through Article VI of the Pact.

IV. Conclusion

57. Mr. President, Members of the Court, I conclude.

58. Bolivia's claim in this case has been formulated with more than a careful eye to Article VI of the Pact, and with a relationship to the 1904 Peace Treaty which is quixotic in nature. The 1904 Peace Treaty, in so far as it is mentioned at all by Bolivia, is portrayed as of no relevance; and yet the claim positively requires that the settlement reached in this long-standing peace treaty be revised — through a judicially compelled cession to Bolivia of Chilean territory.

59. The correct application of Article VI in this case requires no more than an answer to the following question — at paragraph 23 of my outline: would adjudication of Bolivia's claim — a claim that puts squarely before you the matter of Bolivia's alleged right to sovereign access to the Pacific Ocean — would that claim involve adjudication of a matter that was in 1948 settled or governed by the 1904 Peace Treaty? Chile considers that the answer to this question is an unequivocal "yes". If you were to hear Bolivia's claim, you would be hearing a claim that is in substance for a revision of the settlement reached in that pre-1948 Treaty. And that is precisely the type of claim that Article VI excludes from jurisdiction.

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

Le PRESIDENT : Merci. Je donne la parole au professeur Dupuy.

M. DUPUY :

**CONCLUSIONS GÉNÉRALES : L'EXCEPTION À LA COMPÉTENCE DE LA COUR SOULEVÉE
PAR LE CHILI PRÉSENTE UN CARACTÈRE AUTHENTIQUEMENT PRÉLIMINAIRE**

1. Monsieur le président, Mesdames et Messieurs les juges, c'est toujours un honneur de prendre la parole devant la Cour. Je le fais cette fois-ci, comme la précédente, en défense des intérêts de la République du Chili et je tirerai quelques brèves conclusions des plaidoiries qui m'ont précédé. Le Chili a manifesté dans le passé tout le respect qu'il a pour votre compétence. Encore faut-il que celle-ci soit vérifiée lorsque l'objet de l'affaire introduite devant elle peut légitimement en faire douter.

2. Or, ainsi que ma collègue et amie, Mme le professeur Pinto, vous l'a dit avant moi, l'article VI du pacte de Bogotá combine des critères temporels et matériels pour marquer les limites de la compétence de la Cour, par ailleurs posée selon l'article XXXI du pacte de Bogotá. L'article VI — dois-je le rappeler encore une fois ? — exclut en effet de votre connaissance les «questions ... déjà ... régies par des accords ou traités en vigueur à la date de la signature du présent Pacte».

3. Or, la date de signature du pacte de Bogotá, c'était le 30 avril 1948, soit il y a presque exactement soixante-sept ans. Du point de vue matériel à présent, la question régie à l'époque par le traité de paix de 1904 était la détermination exacte du tracé des frontières entre les deux pays ; et le tracé retenu avait pour effet d'interdire un accès direct de la Bolivie à la mer. La question de savoir si la Bolivie dispose d'un droit d'accès souverain à la mer est donc, aujourd'hui, exclue de la compétence de la Cour, par détermination de l'article VI du pacte.

4. Tel est précisément le fondement d'une exception d'incompétence dont l'article 79 de votre Règlement indique à suffisance qu'elle doit être considérée comme *préliminaire*. Comme la Cour le rappelait elle-même en 2007, c'est «une question préliminaire qu'elle doit trancher afin de déterminer si elle a compétence»¹³⁹. Lorsque cette compétence fait question, il faut en effet, *in limine litis*, avant toute chose, procéder à sa vérification !

¹³⁹ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II), p. 852, par. 51.*

5. Il existe, de plus, une disposition convergente, propre, cette fois, non plus au Statut ou au Règlement de la Cour mais au pacte de Bogotá. A son article XXXIII, le pacte pose quant à lui la règle suivante : «Au cas où les parties ne se mettraient pas d'accord sur la compétence de la Cour au sujet du litige, la Cour elle-même décidera *au préalable* de cette question.»

6. On doit alors se souvenir de ce que la Cour elle-même a indiqué dans son arrêt du 13 décembre 2007 intervenu en l'affaire du *Différend territorial et maritime* entre le Nicaragua et la Colombie, au paragraphe 51. La Cour affirmait «une partie qui soulève des exceptions préliminaires a droit à ce qu'il y soit répondu au stade préliminaire de la procédure»¹⁴⁰.

7. Ce que le Chili demande par conséquent aujourd'hui, c'est ainsi tout simplement que lui soit reconnu *le droit* énoncé par le Règlement de la Cour.

8. Ce droit doit être respecté en règle générale et il ne peut être écarté, comme la Cour l'a elle-même indiqué dans son arrêt précité, que dans deux cas d'exception et deux seulement.

— D'une part, «si la Cour ne dispose pas de tous les éléments nécessaires pour se prononcer sur les questions soulevées»¹⁴¹ ; et

— d'autre part, «si le fait de répondre à l'exception préliminaire équivaudrait à trancher le différend, ou certains de ces éléments, au fond»¹⁴².

Or, nous ne nous trouvons dans aucune de ces deux situations — comme mes collègues vous l'ont montré et comme je le rappellerai brièvement.

1. La Cour dispose de tous les éléments nécessaires pour se prononcer sur les questions soulevées

9. Les écritures respectives des deux Parties et les annexes qui les accompagnent, particulièrement celles jointes au texte de l'exception chilienne, vous ont apporté toutes les explications requises sur les faits et documents propres à permettre la pleine compréhension de l'affaire. Au demeurant, pour constater qu'elle dispose de tous les éléments nécessaires pour se

¹⁴⁰ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II), p. 852, par. 51 (les italiques sont de nous).*

¹⁴¹ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II), p. 852, par. 51.*

¹⁴² *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II), p. 852, par. 51*

prononcer sur l'exception d'incompétence, il suffit à la Cour de comparer l'objet de la requête avec les termes du traité.

a) L'objet de la requête

10. La requête introduite par la Bolivie demande, certes, à la Cour de déclarer que la République du Chili a une obligation de négocier ; mais cette obligation doit avoir, selon la démarche bolivienne, un objet bien précis : celui d'accorder au demandeur «un accès pleinement souverain à l'océan Pacifique».

11. Alors la Bolivie a semblé par ailleurs, du moins dans son mémoire, appuyer sa requête sur l'existence d'un très hypothétique titre juridique à l'accès territorial à la mer qu'elle aurait acquis par l'intermédiaire du traité sur la cession de territoire conclu entre les deux pays en 1895.

12. Or, ce titre territorial fantôme n'a jamais existé. Au demeurant, est-il besoin de le rappeler, en ce qui concerne cet instrument — le traité de 1895 —, il ne peut nullement être invoqué puisque, par un échange de lettres conclu l'année suivante, en 1896, les deux Etats ont déclaré que l'accord de l'année précédente était dépourvu de tout effet juridique, n'ayant, entre-temps, jamais été ratifié. C'est, du reste, ce que la Bolivie a reconnu dans ses dernières écritures¹⁴³, en contradiction avec ce qu'elle avait imprudemment avancé dans son mémoire.

13. Les choses doivent par conséquent demeurer bien claires. Il n'y a qu'un seul traité liant les deux Parties : c'est — vous l'aurez reconnu sans peine — le traité du 20 octobre 1904 conclu à Santiago du Chili, et rapidement entré en vigueur après ratification par les parlements des deux pays. Or, l'objet comme le contenu de cet accord bilatéral, tout comme la permanence de sa validité, sont dépourvus de toute ambiguïté.

b) L'objet et le contenu du traité de 1904

14. Quant à l'objet et au contenu du traité de 1904, à ce stade de la procédure, Mesdames et Messieurs les juges, il n'a nul secret pour vous.

Rappelons seulement qu'il fait principalement deux choses, et qu'il les fait de façon parfaitement claire.

¹⁴³ Exposé écrit de la Bolivie concernant l'exception préliminaire du Chili, par. 60-62.

- D'une part, à son article II, il décrit de manière précise et détaillée la frontière entre les deux pays ; et cette frontière — on vous en a montré la carte tout à l'heure — est uniquement terrestre. Elle ne comporte aucun point d'aboutissement sur le littoral ;
- d'autre part, à son article VI, le Chili reconnaît à la Bolivie «el más amplio y libre derecho de tránsito comercial por su territorio y puertos del Pacífico» (le droit de transit commercial le plus ample et le plus libre sur son territoire ainsi que dans ses ports du Pacifique).

Ce droit de transit commercial est matériellement facilité par la construction, aux frais du Chili, d'un chemin de fer, ainsi qu'il est prévu à l'article III du traité, un chemin de fer dont il est par ailleurs convenu que la propriété de la section bolivienne sera transférée à la Bolivie elle-même, passé un délai de quinze ans.

15. Dans la présente affaire, il n'est par conséquent nul doute quant à la matière «régie» par le traité de 1904. Aujourd'hui, il résulte du contenu limpide de l'accord de 1904 que la Cour peut se contenter de constater qu'en outre, ce traité n'a jamais cessé d'être en vigueur depuis la date de son adoption par les deux pays pour aboutir à la conclusion qu'elle n'a pas compétence.

2. Le fait de répondre à l'exception préliminaire du Chili n'équivaudrait nullement à trancher le différend au fond

16. Et le fait de répondre à l'exception préliminaire du Chili n'équivaudrait nullement à trancher le différend au fond comme cela résulte déjà du point précédent, à savoir la comparaison des objets respectifs de la requête de la Bolivie et de l'exception à la compétence de la Cour soulevée par le Chili. Comme on l'a vu, la Bolivie ne prétend qu'une chose ; à savoir qu'elle a un droit d'accès souverain au Pacifique dont le Chili aurait l'obligation de négocier les modalités ; et le Chili ne réfute qu'une chose, en disant que vous n'avez pas compétence pour en connaître parce que toute remise en cause des frontières entre les deux pays remettrait inéluctablement en discussion une question réglée il y a déjà cent onze ans par le traité conclu en 1904, question qu'il régit toujours aujourd'hui comme c'était le cas en 1948 au moment de la signature du pacte.

17. Dois-je insister encore une fois sur cette date, Mesdames et Messieurs de la Cour ! 1948 ! C'est la date cruciale dans toute cette affaire. A la date de signature du pacte de Bogotá, les deux Parties au présent différend avaient exclu de la compétence de la Cour, déjà quarante-quatre ans auparavant, la question de savoir si la Bolivie avait ou non un droit d'accéder

territorialement à la mer. Cette question était réglée. Or, sur la base de l'article VI du pacte de Bogotá, la Cour n'a pas de compétence pour connaître une question réglée par un traité en vigueur en 1948 !

18. Il en résulte, on vous l'a déjà dit, que même si l'on acceptait d'envisager, «for the sake of argument», que certains comportements imputables au Chili *mais postérieurs à 1948* aient pu contribuer à la formation à son encontre d'une obligation de négocier, l'examen de pareils agissements ne pourrait pas rentrer dans la compétence de la Cour.

19. Ainsi que la Cour permanente de Justice internationale l'avait dit dès 1923 dans le cas concernant *Certains intérêts allemands en Haute-Silésie polonaise*¹⁴⁴, et qu'elle a eu l'occasion de le rappeler à plusieurs reprises, notamment dans son arrêt précité de 2007 entre le Nicaragua et la Colombie¹⁴⁵, la Cour, lorsqu'elle examine des questions de compétence ou de recevabilité, peut prendre en considération certaines questions qui «appellent par leur nature une étude préalable à celle de ces problèmes». Mais en l'espèce, *en l'espèce*, vous avez, Mesdames et Messieurs les juges, seulement besoin, sans vous engager dans l'examen au fond de la requête de la Bolivie, de caractériser celle-ci, en tant qu'elle postule au droit à l'accès souverain à la mer, et puis d'en tirer les conséquences en application de l'article VI du pacte de Bogotá.

20. Ainsi, parvenu au terme des conclusions générales de ces plaidoiries, Monsieur le président, Mesdames et Messieurs les juges, je terminerai par les rappels qui suivent :

a) L'intégralité de la requête de la Bolivie se place hors du champ de compétence de la Cour. La question de savoir si ce pays a un droit d'accès souverain à l'océan Pacifique ayant été réglée par le traité de 1904. Or, c'est bien la même question qui est visée par la requête bolivienne. Le Chili prie donc respectueusement la Cour de dire, à ce stade préliminaire, qu'elle n'a pas compétence pour connaître de cette requête.

¹⁴⁴ Affaire relative à *Certains intérêts allemands en Haute-Silésie polonaise, compétence, arrêt n° 6, 1925, C.P.J.I. série A n° 6, p. 15.*

¹⁴⁵ *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II), p. 851, par. 49 ; Affaire du Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963, p. 29 ; Appel concernant la compétence du Conseil de l'OACI (Inde c. Pakistan), arrêt, C.I.J. Recueil 1972, p. 56 ; Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974, p. 259, par. 22 ; Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998, p. 26, par. 47.*

- b) La prétention de la Bolivie selon laquelle elle disposerait d'un droit historique ininterrompu dont la naissance serait antérieure au traité de paix de 1904 ne saurait être admise par la Cour car elle serait incompatible avec ce traité lui-même, alors qu'il est le seul à avoir réglé la question.
- c) La Cour n'a pas compétence pour examiner une plainte qui se fonderait sur le traité de transfert de 1895 puisque l'échange de notes intervenu entre les mêmes Parties un an plus tard, a constaté que l'accord conclu antérieurement était dépourvu de tout effet juridique ; ceci a comme conséquence, en application de l'article VI du pacte, d'exclure le traité, jamais valide, de 1895 du consentement des Parties à la compétence de la Cour.
- d) Ainsi, Monsieur le président, le traité de paix de 1904 a définitivement réglé entre les deux Parties, en lui apportant une réponse négative, la question de savoir si la Bolivie avait, en pleine souveraineté, un droit d'accès à l'océan Pacifique.

Cette question est exactement du type de celles que l'article VI du pacte de Bogotá avait pour objet d'exclure de la compétence de la Cour ; et quant à lui, l'article XXXIII du même instrument, en parfaite convergence avec les dispositions du Statut et du Règlement de la Cour, confirmées par une jurisprudence constante, doit conduire à la conclusion que ce constat d'incompétence devrait être décidé à titre préliminaire et définitif.

Je vous remercie, Monsieur le président.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. Voilà qui met un terme au premier tour de plaidoiries du Chili. La Cour se réunira de nouveau le mercredi 6 mai, à 10 heures, pour entendre la Bolivie en son premier tour de plaidoiries. L'audience est levée.

L'audience est levée à 18 h 10.
