

DECLARATION OF JUDGE TOMKA

Power of the Court to interpret the submissions of the parties — Ordinary meaning to be given to the terms of the submissions — Decisive weight of the final submissions.

1. Today's Judgment of the Court most likely comes as a surprise to the Parties, in particular the Applicant. In fact, it decides almost nothing. Four of the final submissions of Chile are found to no longer have any object, and the last one is rejected. Of the three counter-claims made by Bolivia, the first two are found to no longer have any object, and the last one is rejected.

2. This outcome has been made possible by the Court's recourse to and reliance on its pronouncement in *Nuclear Tests (Australia v. France)* that it "is entitled to interpret the submissions of the Parties, and in fact is bound to do so; this is one of the attributes of its judicial functions" (Judgment, para. 43, referring to *I.C.J. Reports 1974*, p. 262, para. 29). As is well known, the approach adopted in that case was criticized by several Members of the Court who "vigorously dissent[ed]" (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, *I.C.J. Reports 1974*, p. 312, para. 1). They argued that the 1974 Judgment's "basic premise fail[ed] to correspond to and even change[d] the nature and scope of . . . formal submissions as presented in the Application" (*ibid.*, para. 3).

3. I accept that the Court may be entitled to interpret the final submissions of a party, in particular when their true meaning is not sufficiently clear. The Court is also entitled to seek clarification from the party that has formulated them. However, the Court should avoid an interpretation that is at odds with the ordinary meaning of the words and legal concepts used in the final submissions. While counsel for a party may use various formulations to advance the interests of a party, the decisive weight shall be put on the final submissions read out by the agent and subsequently submitted to the Registry in written, duly signed form.

4. It remains to be seen what useful role, if any, this Judgment will play in the relations between Chile and Bolivia.

(Signed) Peter TOMKA.
