

INTERNATIONAL COURT OF JUSTICE

***OBLIGATION TO NEGOTIATE ACCESS TO THE
PACIFIC OCEAN***

(BOLIVIA v. CHILE)

**COUNTER-MEMORIAL OF THE
REPUBLIC OF CHILE**

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PART I

CHAPTER 1. INTRODUCTION

A. Introductory observations

- 1.1 The question in this case is whether Chile is under a legal obligation to negotiate with Bolivia on granting it sovereign access to the Pacific Ocean. Chile is not under any such obligation. In arguing otherwise, Bolivia seeks to convert historical diplomatic exchanges and political discussions into legally binding commitments. At the time of those exchanges, as is plain from their terms, neither State had any intention to create any legal obligation. Nor has either State acted since then as if there were a legal obligation to negotiate.
- 1.2 The true position is that Chile entered into these exchanges as part of a dialogue with its neighbour, not because of any legal obligation to do so. Entering into negotiations does not create an obligation to negotiate again merely because one State becomes dissatisfied with the result.
- 1.3 Bolivia is seeking to knit together into an ongoing legal obligation to negotiate what are in fact sporadic diplomatic and political exchanges, and, occasionally, actual negotiations. These episodes punctuated longer periods of silence. Only once, from 1975-1978, were there sustained negotiations on the possible transfer from Chile to Bolivia of sovereignty over territory to grant Bolivia sovereign access to the Pacific. Even then, this was on the basis of an exchange of territories, not a unilateral transfer as is now sought by Bolivia. Bolivia brought those negotiations to an end and ruptured diplomatic relations with Chile in 1978.
- 1.4 After the restoration of democracy in Chile in 1990, the two States engaged in constructive dialogue on a range of issues between them, including what they together labelled the “maritime issue”. Neither State raised any supposed legal obligation to negotiate until 2011, when Bolivia

suddenly did so in a letter sent not to Chile but to the Court, in the context of the *Peru v. Chile* maritime delimitation case.¹ Bolivia has manufactured a claim based on an obligation to negotiate in order to allow it to bring a claim to the Court concerning “sovereign access” to the sea. The claim before the Court is rooted neither in agreements between the parties nor in their practice. It is a reformulation designed for the Court of Bolivia’s longstanding aspiration to change the settlement agreed in the 1904 Peace Treaty.²

- 1.5 Bolivia’s claim is both extreme and unheralded. It is extreme because it asserts an obligation to negotiate not just on access to the sea, but on “sovereign access”, over territory that is indisputably under Chilean sovereignty. This obligation is said to have arisen between the latter part of the nineteenth century and 1989, although Bolivia is unable to point to any specific date on which the obligation it claims came into existence.³ It is unheralded in that in more than 20 years of engagement following the restoration of democracy in Chile in 1990, including with respect to the issue of access to the sea, Bolivia never once alleged that Chile was under an obligation to negotiate with Bolivia over sovereign access to the Pacific Ocean. It is inconceivable that Bolivia would not have regularly asserted this claim had it considered that there was such an obligation.

¹ Letter from David Choquehuanca, Minister of Foreign Affairs of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 8 July 2011, **CPO Annex 65**.

² See “Morales wanted to denounce the 1904 Treaty”, *La Razón* (Bolivia), 24 December 2015, **CCM Annex 373**. Treaty of Peace and Amity between Bolivia and Chile, signed at Santiago on 20 October 1904 (the **1904 Peace Treaty**), **CCM Annex 106**.

³ See Bolivia’s second round of oral submissions of 8 May 2015, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/21, 8 May 2015, pp 33-34, para 9. See also the question posed at the conclusion of the first round of oral pleadings by Judge Greenwood: “On what date does Bolivia maintain that an agreement to negotiate sovereign access was concluded?” *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/19, 6 May 2015, p 60, para 31.

- 1.6 Bolivia’s recent formulation of the alleged obligation has already altered radically. As formulated in its Application and Memorial, Bolivia asserted an obligation to negotiate and to reach a particular result. Bolivia’s Request for Relief asked the Court to adjudge and declare that Chile was under an obligation to negotiate “in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean”⁴ and that Chile must perform this obligation “to grant Bolivia a fully sovereign access to the Pacific Ocean”.⁵ Bolivia claimed that Chile had agreed “to transfer territory to Bolivia in order to grant it a sovereign access to the sea”, with negotiations to concern only the details of this transfer, not the result.⁶
- 1.7 At the hearing on Chile’s preliminary objection Bolivia changed its position and indicated that in using the term “sovereign access”, it now intended to include as the subject of any negotiation potential results other than transfer of sovereignty over territory. These could include, Bolivia asserted, “a special zone, or some other practical solution” that would involve Chile remaining sovereign over all of its territory.⁷ This is an important change from Bolivia’s Memorial, apparently made with a view to meeting Chile’s objection that Bolivia was seeking to re-open a matter settled and governed by the 1904 Peace Treaty.
- 1.8 At the same May 2015 hearing, Bolivia also retreated from the submission in its Memorial that the 1895 Treaty on Transfer of Territory (the **1895 Transfer Treaty**)⁸ constituted a legally binding agreement, which had allegedly created an obligation on Chile to transfer territory to Bolivia to

⁴ Bolivia’s Memorial, Submissions and Prayer for Relief, para 500(a).

⁵ Bolivia’s Memorial, Submissions and Prayer for Relief, para 500(c).

⁶ Bolivia’s Memorial, para 361. See also paras 410, 411, 445, 483, 484, and 486.

⁷ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/19, 6 May 2015, p 51, para 3.

⁸ Treaty on Transfer of Territory between Bolivia and Chile, signed at Santiago on 18 May 1895, **CPO Annex 3**.

grant sovereign access to the Pacific Ocean to Bolivia.⁹ Bolivia's Memorial portrayed the 1895 Transfer Treaty as the foundation of the claim that there was an obligation on Chile to negotiate that transfer. However, as Bolivia had to accept in the course of the proceedings on Chile's preliminary objection, the 1895 Transfer Treaty never came into force and was, by agreement, "wholly without effect".¹⁰

- 1.9 With the 1895 Transfer Treaty unavailable as a source of legal obligation, Bolivia's case as presented in the second round of the hearing on the preliminary objection started to retreat from a claim of an obligation of result to one of conduct.¹¹ It follows that the context in which Bolivia now asks the Court to find an obligation to negotiate is materially different from that portrayed by Bolivia in its Memorial.
- 1.10 The dispute over which the Court has taken jurisdiction concerns an alleged obligation of conduct, not one of result. The Court has taken jurisdiction over a dispute in which "Bolivia does not ask the Court to

⁹ Bolivia's Memorial, paras 228, 338, 340 and 368 cf. *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/19, 6 May 2015, pp 43-44, para 16.

¹⁰ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153, p 9, para 16. See also Chile's Preliminary Objection of 15 July 2014, paras 4.2-4.8 and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/18, 4 May 2015, pp 44-45, para 51.

¹¹ Compare Bolivia's first round of oral submissions, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/19, 6 May 2015 p 51, para 4, with its second round of oral submissions, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/21, 8 May 2015, pp 32-33, para 7. See also Bolivia's second round of oral submissions of 8 May 2015, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/21, 8 May 2015, p 18, para 9; and Bolivia's rejection in clear terms in the second round of Chile's position that "Bolivia is asking the Court to order Chile to renegotiate to change Bolivia's non-sovereign access through Chilean territory into sovereign access": *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/21, 8 May 2015, p 28, para 11.

declare that it has a right to sovereign access to the sea”¹² and in which “it would not be for the Court to predetermine the outcome of any negotiation that would take place in consequence of that obligation”,¹³ as discussed further in Section B below.

1.11 These changes in the formulation of Bolivia’s claim reflect the impact of a recent and artificial legal construct being subjected to the scrutiny of the Court. They also reflect the absence of any legally binding agreement on the basis of which an obligation to negotiate could be identified. Instead, the Court is asked to consider different interactions between Chile and Bolivia occurring over more than a century, and to discern a “consistent course of conduct”¹⁴ that is said to give rise to a legal obligation to negotiate. Bolivia seeks incorrectly to portray a picture of continuity from what in reality were different incidents of political dialogue, arising in different contexts, and separated in time. Bolivia’s depiction of the different interactions between the two States over time involves repeated mischaracterization and inaccurate presentation to the Court of the evidential record.¹⁵ A more faithful analysis of the evidence readily establishes that the legal obligation that Bolivia asserts does not exist.

1.12 The essential task for the Court in this case will be to focus on each alleged statement or exchange said by Bolivia to establish a legal obligation to negotiate, and to determine whether there has been an objective intention to create a legal obligation. The undercurrent of Bolivia’s claim is a request that the Court intervene in what Bolivia portrays as an historical injustice. That portrayal is based on its incorrect

¹² *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153*, p 14, para 33.

¹³ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153*, p 14, para 33.

¹⁴ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Hearing on the Preliminary Objection, CR 2015/21, 8 May 2015*, p 34, para 11.

¹⁵ See further paras 2.6-2.9, 2.30, 5.5, 5.9, 5.11, 5.17-5.18, 5.20, 5.33-5.36, 6.5, 7.21, 8.12, 8.24 and 9.21 below.

narrative of nineteenth century history. Chile respectfully submits that it is not the Court's role to oblige the States before it to refashion the agreed settlement of nineteenth century conflicts.

1.13 Chile's case, as developed in this Counter-Memorial, is as follows:

- (a) It is the 1904 Peace Treaty, freely agreed to by Chile and Bolivia, that establishes the boundary between the two States, apportions sovereignty to each of them on either side of that boundary, and establishes "in perpetuity" the regime for Bolivia's access to the sea.¹⁶ That treaty definitively resolved the prior issues between the two States, and neither left nor led to any pending issue between them concerning sovereign access to the sea. Bolivia has no right to sovereign access to the Pacific and, given its inevitable change in position on the 1895 Transfer Treaty, is unable to identify any basis for asserting the contrary. Bolivia does have a right under Article VI of the 1904 Peace Treaty to free transit over Chilean territory, and the two States undertook that they would "agree, in special acts, upon the method suitable for securing" that right, as the two States have done through bilateral agreements and practice spanning more than a century.
- (b) While at particular points in time over the last century the two States did engage in dialogue over the possibility of Chile granting to Bolivia some form of sovereign access to the Pacific Ocean, this was never on the basis of, nor created, any legal obligation. Even if there were a binding obligation to negotiate at some point, Bolivia's case on breach would fail. This is because the two States did negotiate in good faith on sovereign access, which is all any obligation to negotiate would have required them to do. Those

¹⁶ It is Bolivia's case in these proceedings that it does not seek to modify or renegotiate the 1904 Peace Treaty: see Bolivia's Memorial, paras 467 and 473.

negotiations failed because of Bolivia's changes in position and Bolivia's decisions to rupture diplomatic relations. They remain ruptured today.

- 1.14 In the remaining sections of this Introduction, Chile makes brief submissions on the dispute over which the Court has taken jurisdiction (in **Section B**), before providing a more detailed summary of its case and the structure of this Counter-Memorial (in **Section C**). Before doing so, Chile notes that, both within these proceedings and before a wider public audience, Bolivia has unfairly sought to portray Chile as an expansionist aggressor, as having unilaterally started an unprovoked nineteenth century war, as refusing to grant Bolivia access to the Pacific Ocean, and as refusing to negotiate with Bolivia in good faith.
- 1.15 Bolivia's narrative is contrary to the true character of Chile's foreign policy. Chile wishes to emphasize that it has constructive relations with all of its neighbours and throughout the Latin American region, and is a consistent and reliable partner in the international system. Chile was a founding member of the United Nations, of the Organization of American States, and of the Union of South American Nations. Chile is a vibrant democracy that respects the rule of law domestically and internationally.¹⁷ Chile has ratified and fully implements the Almaty and Vienna Programs of Action for Landlocked Developing Countries and, in addition to the regime of access to the sea it has agreed with Bolivia, also provides a free zone facility to landlocked Paraguay at the Chilean Port of Antofagasta.

¹⁷ Chile has participated in, and in many cases been a leading proponent of, all initiatives for regional integration. Chile has signed trade agreements with all of its neighbours, from the Andean Pact in the 1960s to the recent Pacific Alliance. Chile is an active member of APEC (Asia-Pacific Economic Cooperation), has ratified all arms control agreements, and is an active party to and supporter of human rights treaties. Chile contributes to international peace, participating in peacekeeping operations in and beyond the region, is party to the Rome Statute and accepts and implements the decisions of international courts and tribunals. Chile signed the Convention on the Law of the Sea at the first opportunity and has since ratified it.

1.16 Despite the recent antagonistic attitude adopted by the Government of Bolivia towards Chile, the people of Bolivia and Chile continue to live and work in peace and harmony with each other. Trade between the two States continues to flourish, facilitated by the Economic Complementation Agreement signed in 1993. The number of Bolivian citizens who live and work in Chile increases every year, as does the number of Bolivian students who attend Chilean universities. The Government of Chile will continue to make every effort to ensure that such instances of peace and harmony continue and strengthen.

B. The dispute over which the Court has taken jurisdiction

1.17 In taking jurisdiction over Bolivia's claims, the Court reduced their scope, adopting its own characterization of the dispute before it.¹⁸ In its Memorial, Bolivia had alleged that it had a legal right to sovereign access to the Pacific, for example by submitting that following the 1904 Peace Treaty "Bolivia retained a right of sovereign access to the sea".¹⁹ The Memorial stated that:

"Bolivia is in a unique and unprecedented position: 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."²⁰

The same approach, proceeding on the basis of a supposed Bolivian title to Chilean territory, was evident at paragraphs 20, 21, 36, 94, 96, 143, 254,

¹⁸ See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153, p 14, para 33.

¹⁹ Bolivia's Memorial, para 94.

²⁰ Bolivia's Memorial, para 20.

271-273, 338, 493, 497 and 498 of Bolivia's Memorial.²¹

1.18 Bolivia further alleged in its Memorial that Chile was subject to an obligation of result that would persist until Chile agreed to satisfy the right to sovereign access to the Pacific that Bolivia alleged. For example, Bolivia submitted in its Memorial that Chile's obligation to negotiate "incorporates a predetermined result",²² and that the "obligation to negotiate will terminate only when an agreement is concluded materializing in concrete terms the sovereign access to the sea".²³ The same approach was evident at paragraphs 225-226, 238, 254, 281, 286, 287, 289, 356, 400, 404, 493 and 497 of Bolivia's Memorial.

1.19 In characterizing the dispute over which it was taking jurisdiction, the Court stated that "Bolivia does not ask the Court to declare that it has a right to sovereign access to the sea".²⁴ Of the obligation to negotiate that Bolivia claimed in its Memorial, the Court has held that even "assuming *arguendo* that the Court were to find the existence of such an obligation, it would not be for the Court to predetermine the outcome of any negotiation that would take place in consequence of that obligation".²⁵ The dispute over which the Court has taken jurisdiction is thus whether Chile is under an obligation of conduct to negotiate with Bolivia concerning sovereign access to the Pacific Ocean. The dispute as characterized by the Court in taking jurisdiction does not concern whether there is an obligation to reach a particular result, namely sovereign access to the Pacific Ocean for Bolivia.

²¹ The contention pre-supposed that the 1895 Transfer Treaty has legal effect, whereas it was "wholly without effect", and was also predicated on a failure to give effect to the 1904 Peace Treaty, which resolved the entire boundary between the two States.

²² Bolivia's Memorial, para 404.

²³ Bolivia's Memorial, para 287.

²⁴ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153, p 14, para 33.

²⁵ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153, p 14, para 33.

- 1.20 If an obligation of result were still at issue, and if the Court then found on the merits that Chile had an obligation to agree to transfer sovereignty over part of its territory to Bolivia on terms to be negotiated, as originally argued by Bolivia, this would engage Article VI of the Pact of Bogotá as “a matter . . . settled . . . or governed . . .” by the 1904 Peace Treaty.²⁶ The Court has avoided this jurisdictional issue by taking jurisdiction only over a dispute concerning an obligation of conduct, which is consistent with the shifts in Bolivia’s case in the course of the hearing on the preliminary objection. It follows that Chile does not focus on the claims in Bolivia’s Memorial alleging the existence of a right of sovereign access or an obligation of result.
- 1.21 The essence of the dispute on the merits is therefore whether Chile is under a legal obligation of conduct to negotiate concerning a grant by Chile to Bolivia of sovereign access to the sea and, if so, whether there has been a breach of that obligation.²⁷

C. Summary of Chile’s case and the structure of this Counter-Memorial

- 1.22 Following this introductory **Chapter 1**, Chile describes matters of historical context, in **Chapter 2**, and explains the enduring significance of the 1904 Peace Treaty and its importance to the merits of this case, in **Chapter 3**. These three chapters constitute Part I of Chile’s Counter-Memorial.
- 1.23 In Part II, comprised of **Chapter 4**, Chile identifies the relevant rules of international law. The obligation to negotiate that Bolivia posits is said to

²⁶ See Dissenting Opinion of Judge Arbour, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153, p 5, paras 25-26.

²⁷ As follows from para 1.7 above, such sovereign access, as now posited by Bolivia, includes alternatives that do not involve the transfer of sovereignty over territory.

have arisen through agreements with Chile and unilateral declarations.²⁸ The test of whether any particular document or statement rises to the level of a legally binding agreement or unilateral declaration is whether or not the State or States concerned intended to create legal rights or obligations. This is to be assessed objectively, by reference to the terms used in the relevant document or statement, the context in which those terms were used, and any relevant practice. Part II also analyses the content of obligations to negotiate where one can be identified, and issues relevant to establishing a breach of any such obligation.

1.24 Part III demonstrates that none of the events on which Bolivia relies satisfies the test for the creation of legal obligations. Each aspect of the practice on which Bolivia relies had a different context and content, and Chile therefore deals with each of them individually. Chile's case on the practice relied on by Bolivia following the 1904 Peace Treaty is in summary as follows:

(a) Bolivia relies on a series of exchanges and statements in the period between 1920 and 1926, which are addressed in **Chapter 5**. Particular weight is placed by Bolivia on certain minutes of 1920. Bolivia did not bring to the Court's attention the passage from that document most relevant to establishing whether or not it created any legal obligation. This reads: "the present declarations do not contain provisions that create rights or obligations for the States whose representatives make them".²⁹ Bolivia's decision to describe this document as an "indisputably formal, legally-binding" agreement³⁰ is a telling indication of the weakness of its case.

²⁸ Bolivia's Memorial, para 220. See also Bolivia's Application, para 31; and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/19, 6 May 2015, p 19, para 16.

²⁹ Minutes of 10 January 1920, **CCM Annex 118**, p 9.

³⁰ Bolivia's Memorial, para 368.

- (b) Twenty-four years later, the two States communicated to each other through diplomatic notes of 1 and 20 June 1950 an openness to enter into negotiations. These notes and events surrounding them are considered in **Chapter 6**. The notes are in different terms, and Chile's note of 20 June could in no sense be taken as agreeing to Bolivia's note of 1 June. Moreover, the language used by Chile is not that of legal obligation, but is markedly tentative in nature. Chile stated that it was "open" to enter into negotiations "aimed at finding a formula" which would "make it possible" to grant Bolivia sovereign access to the sea. These notes did not lead to any negotiations, due to a change of regime and political priorities on Bolivia's part. Openness to negotiations does not transform into a legal obligation when neither side manifests an intent to be bound.
- (c) Twenty-five years after the 1950 notes, in the Charaña process of 1975 to 1978, Bolivia and Chile discussed the possibility of an exchange of territories that would grant Bolivia sovereignty over territory on the shore of the Pacific Ocean. This is the only instance in the disparate episodes on which Bolivia relies in which there were sustained formal negotiations on transfer of sovereignty over territory from Chile to Bolivia. An essential basis of the negotiations was that they were to involve each State transferring territory to the other. Chile was willing to "consider" a territorial exchange within the context of "guidelines" that Bolivia accepted. As well as an exchange of territories, those guidelines also identified the need for Peru's consent under the 1929 Supplementary Protocol to the Treaty of Lima. Chile attempted in good faith to procure Peru's consent, but Peru instead made its own proposal, which both Bolivia and Chile rejected. Bolivia later unilaterally changed its position and rejected the concept of an exchange of territories, instead seeking cession of Chilean territory to it without providing any in exchange. Bolivia then brought the negotiations to an end in 1978, and ruptured diplomatic relations

with Chile. The Charaña process does not establish that Chile was either subject to or breached a legal obligation to negotiate. It does no more than demonstrate Chile's negotiation in good faith within a political framework, and Bolivia's unilateral withdrawal from a political process. It forms the subject of **Chapter 7**.

- (d) Bolivia next relies on a series of resolutions of the General Assembly of the Organization of American States recommending to Bolivia and Chile that they engage in a process of dialogue, none of which purported to create, or to confirm the prior existence of, any legal obligation. Consistently with the political objective of those resolutions, on two occasions from 1983 to 1987, Bolivia and Chile entered into a process of rapprochement. Chile considered in good faith Bolivia's proposals, but agreement was not reached because of Bolivia's inflexible insistence on transfer of sovereignty over territory. The OAS resolutions and the accompanying dialogue between Bolivia and Chile are considered in **Chapter 8**.
- (e) Bolivia does not assert that an obligation to negotiate was created any time after democracy was restored in Chile in 1990.³¹ As detailed in **Chapter 9**, from 1990 onwards, Chile and Bolivia focused on practical ways to improve Bolivia's access to the sea, and implemented a number of initiatives to that end. None of the discussions between the two States after 1990—whether in connection with the 2000 Algarve Declaration, the 2006 13-Point Agenda, or the Political Consultations Mechanism in place from 1993 to 2010—recalled or proceeded on the basis of any obligation to negotiate.

1.25 Part IV, comprised of **Chapter 10**, contains a brief conclusion and Chile's formal submission requesting the Court to dismiss all of Bolivia's claims.

³¹ See Bolivia's Memorial, paras 291-396.

- 1.26 As this Counter-Memorial explains, over the past 26 years since the restoration of democracy in Chile, many meetings took place between the democratic Governments of both countries. The “maritime issue” was discussed, and Chile maintained an attitude of dialogue and cooperation with its neighbour within the framework of the 1904 Peace Treaty. Never in the two decades before Bolivia wrote to the Court in 2011 in connection with the *Peru v. Chile* maritime delimitation case did Bolivia assert a supposed obligation to negotiate on sovereign access to the sea. Progress was made on practical arrangements benefitting both States, and in 2002 an agreement to export Bolivian natural gas through a Chilean port on the basis of concessions granted to Bolivia was almost reached. It was Bolivia that declined to conclude this agreement. Now, and for the past three years, Bolivia has adopted a negative posture towards Chile and abandoned the productive approach that prevailed in the previous two and a half decades.
- 1.27 The Court is now asked to consider whether the political negotiations and diplomatic exchanges that Bolivia relies on created any legal obligation, and whether the fact that negotiations on a topic have occurred and failed in the past creates an ongoing obligation for them to occur again in the future, under entirely different political conditions and democratic constraints.
- 1.28 Chile has been willing to conduct negotiations with Bolivia on any “practical solution” further to improve its access to the Pacific Ocean, provided that it is within the framework of the 1904 Peace Treaty. Chile rejects, however, that the events on which Bolivia relies create any legal obligation for Chile to negotiate. Chile’s position is simple: historical willingness to negotiate creates no legal obligation. Absent an identifiable international agreement or some other recognized source of international legal obligation, it cannot be that one country’s good faith political willingness to listen and discuss with a neighbour legally binds it to enter

formal negotiations if that neighbour is dissatisfied with a settlement reached more than a century earlier.

* * *

- 1.29 This Counter-Memorial is accompanied by the annexes referred to in the footnotes throughout it, together with an index of those annexes, organized in chronological order in Volumes 2 to 6. A number of the documents that Chile filed as annexes to its Preliminary Objection remain relevant to the merits, and Chile does not file them for a second time, except in cases necessary to provide a more complete³² or a corrected³³ translation. Chile begins the numbering of the annexes filed with this Counter-Memorial at Annex 78, with the first 77 being those filed with Chile's Preliminary Objection.
- 1.30 The 233 annexes filed by Bolivia with its Memorial did not include Spanish language originals, although they were deposited with the Registry. Bolivia's annexes contained translations that were in many cases inaccurate and incomplete, often providing a very short extract removed from its context. To ensure that the Court has accurate evidence before it, Chile therefore resubmits as part of its own annexes 109 documents already submitted by Bolivia, in each such case providing the original Spanish as part of the annex, accompanied by a new, correct and often more complete translation.
- 1.31 Chile also notes that most of Bolivia's footnotes that refer to factual documents simply cite an annex number without providing the title of the relevant document. Chile raises this because on numerous occasions Bolivia attributes statements to Chile in the body of its Memorial but,

³² This is the case for CCM Annexes 104, 150, 155, 172, 264, 302, 345 and 361, complementing CPO Annexes 28, 45(D), 46, 47(A), 50, 55, 58 and 67.

³³ This is the case for CCM Annexes 106, 158, 180, 181 and 369, correcting CPO Annexes 10, 48, 52, 53 and 73.

when the underlying annex is consulted, it becomes clear that it is a Bolivian internal document on which Bolivia relies for Chile's position.³⁴ As noted above, and developed by way of reference to specific examples below,³⁵ Bolivia's Memorial is replete with incomplete and inaccurate descriptions of the evidential record.

³⁴ See, for example, Bolivia's Memorial, footnotes 143, 170, 172, 173, 174, 181, and 483.

³⁵ At paras 2.6-2.9, 2.30, 5.5, 5.9, 5.11, 5.17-5.18, 5.20, 5.33-5.36, 6.5, 7.21, 8.12, 8.24 and 9.21.

CHAPTER 2. HISTORICAL CONTEXT

- 2.1 Bolivia's Memorial presents an inaccurate account of nineteenth century history and then seeks to use that inaccurate account as a foundation on which to claim the existence of an obligation to negotiate persisting in the twenty-first century.
- 2.2 In its Memorial, Bolivia placed particular emphasis on the 1895 Transfer Treaty as the source of the obligation to negotiate it alleged.³⁶ As Bolivia had to accept in the course of the proceedings on Chile's preliminary objection, the 1895 Transfer Treaty never entered into force and was, by agreement, "wholly without effect".³⁷ It follows that the 1895 Transfer Treaty cannot form the basis of a claim that Chile is under an obligation to negotiate on sovereign access to the Pacific Ocean for Bolivia.
- 2.3 Bolivia has also emphasized the War of the Pacific, depicting itself as a victim of an historical wrong. Since Bolivia's account in its Memorial of the causes of the war and of the protocol accompanying the 1884 Truce Pact that ended it was inaccurate, and since as a result the judgment of the Court on Chile's preliminary objection contains an incomplete account of it,³⁸ Chile is constrained to correct a number of inaccurate assertions made

³⁶ See paras 2.6-2.8 below.

³⁷ See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153*, p 9, para 16; Chile's Preliminary Objection of 15 July 2014, paras 4.2-4.8; and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Hearing on the Preliminary Objection, CR 2015/18, 4 May 2015*, pp 44-45, paras 49-52.

³⁸ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153*, p 9, para 16. See Separate Opinion of Judge Higgins, *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, pp 856-857, para 34 concerning findings of fact at the jurisdictional stage.

by Bolivia concerning that nineteenth century conflict, as Chile has also needed to do in the past.³⁹

A. The 1895 Treaties were “wholly without effect”

2.4 In May 1895 Bolivia and Chile signed a Treaty of Peace and Amity.⁴⁰ With it they signed the 1895 Transfer Treaty and the 1895 Treaty of Commerce.⁴¹ These three treaties (the *1895 Treaties*) were accompanied by four protocols.⁴² The two States agreed in an exchange of notes in April 1896 that a failure by the Congresses of both States to approve the latter two of those four protocols would make all three of the 1895 Treaties “wholly without effect”.⁴³ This congressional approval was not forthcoming, and so all of the 1895 Treaties were, by agreement, “wholly without effect”.⁴⁴ As the Court has already observed, the 1895 Transfer Treaty “never entered into force”.⁴⁵

³⁹ Letter from the Minister of Foreign Affairs of Chile to all Ministers of Foreign Affairs in Latin America, 29 May 1967, **CCM Annex 171**, pp 4-5.

⁴⁰ Treaty of Peace and Amity between Chile and Bolivia, signed at Santiago on 18 May 1895, **CCM Annex 103**.

⁴¹ 1895 Transfer Treaty, **CPO Annex 3**; and Treaty of Commerce between the Republics of Chile and Bolivia, signed at Santiago on 18 May 1895, **CPO Annex 15**.

⁴² Protocol on Debts between Bolivia and Chile, signed at Santiago on 28 May 1895, **CPO Annex 16**; Protocol on the Scope of the Treaty on Transfer of Territory between Bolivia and Chile, signed at Santiago on 28 May 1895, **CPO Annex 17**; Protocol of 9 December 1895 on the scope of the obligations agreed upon in the treaties of 18 May between Bolivia and Chile, signed at Sucre on 9 December 1895, **CPO Annex 4**; and Explanatory Protocol of the Protocol of 9 December 1895 between Bolivia and Chile, signed at Santiago on 30 April 1896, **CPO Annex 8**.

⁴³ Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 117, 29 April 1896, **CPO Annex 5**; Note from Adolfo Guerrero, Minister of Foreign Affairs of Chile, to Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 521, 29 April 1896, **CPO Annex 6**; and Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 118, 30 April 1896, **CPO Annex 7**.

⁴⁴ Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 117, 29 April 1896, **CPO Annex 5**; Note from Adolfo Guerrero, Minister of Foreign

- 2.5 In 1900, Chile wrote to Bolivia that the decisions of the two Congresses not to grant their approval to the relevant protocols made “ineffective all the treaties of 1895”.⁴⁶ One week later, Bolivia’s Minister of Foreign Affairs announced to his Congress that the 1895 Treaties “have been abandoned and forgotten”.⁴⁷
- 2.6 Without acknowledging the existence of the 1896 exchange of notes, which made clear that the 1895 Treaties were “wholly without effect”, Bolivia asserted in its Memorial that instruments of ratification for the 1895 Transfer Treaty “were duly exchanged, without any qualifications or conditions attached”.⁴⁸ On that faulty premise, Bolivia described the 1895 Transfer Treaty in its Memorial as an “indisputably formal, legally-binding” agreement,⁴⁹ which “created an international obligation for Chile ‘to transfer’ a pre-defined area of territory, materializing a sovereign access to the sea for Bolivia”.⁵⁰
- 2.7 Bolivia based its claim on the 1895 Transfer Treaty throughout its Memorial, for example at paragraphs 9, 36, 71-88 (especially at 76), 115, 131, 167, 228, 311, 338-344, 355, 368, 388, 410-411, 428 and 497. Bolivia

Affairs of Chile, to Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 521, 29 April 1896, **CPO Annex 6**; and Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 118, 30 April 1896, **CPO Annex 7**.

⁴⁵ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153, p 9, para 16. See also Chile’s Preliminary Objection of 15 July 2014, paras 4.2-4.8; and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/18, 4 May 2015, pp 44-45, paras 49-52.

⁴⁶ Note from Abraham König, Minister Plenipotentiary of Chile in Bolivia, to Eliodoro Villazón, Minister of Foreign Affairs of Bolivia, 13 August 1900, **CPO Annex 27**, p 79.

⁴⁷ Report of the Minister of Foreign Affairs of Bolivia to the Bolivian Congress, 20 August 1900, **CCM Annex 104**, p 23.

⁴⁸ Bolivia’s Memorial, para 343.

⁴⁹ Bolivia’s Memorial, para 368.

⁵⁰ Bolivia’s Memorial, para 340.

relied on the 1895 Transfer Treaty as a “key episode” in the “formation of the Chilean obligation”.⁵¹

2.8 Bolivia further relied on the 1895 Transfer Treaty as the “starting point”⁵² for an assessment of Chile’s alleged breach of the asserted obligation, as a result of which—

“there was no doubt whatever that Chile was committed, and bound as a matter of international law, to the creation of a sovereign access to the sea for Bolivia by the transfer of an area of the territory now held by Chile. A legal duty for Chile to negotiate the realisation of Bolivia’s sovereign access to the sea arose from the express terms of the 1895 Transfer Treaty.”⁵³

On that foundation, Bolivia’s principal allegation of breach of the postulated obligation to negotiate is that every subsequent episode in which Chile was not prepared to offer what had been contained in the 1895 Transfer Treaty constituted a “degradation of the negotiation terms”⁵⁴ because Chile “reduced the scope of what it had committed itself to in 1895”.⁵⁵

2.9 It being now established that the 1895 Treaties were, by agreement, “wholly without effect”, there are two direct consequences for Bolivia’s case.

(a) First, Bolivia can no longer rely on the 1895 Transfer Treaty as a source of the obligation to negotiate it alleges.

⁵¹ Bolivia’s Memorial, headings above para 335 and 291.

⁵² Bolivia’s Memorial, para 410.

⁵³ Bolivia’s Memorial, para 411.

⁵⁴ Bolivia’s Memorial, para 399.

⁵⁵ Bolivia’s Memorial, para 416, and more generally paras 410-416, 421 and 428.

- (b) Second, Bolivia can no longer rely on the 1895 Transfer Treaty as a comparator against which to allege that subsequent events amount to a “degradation in the negotiation terms”, constituting a breach of the alleged obligation to negotiate.

B. Bolivia’s inaccurate account of history

- 2.10 Bolivia devotes a significant portion of its Memorial to attempting to establish the proposition that it became landlocked because of what it portrays as a war of aggression for which, it asserts, Chile was solely responsible. Bolivia alleges that Chile had an expansionist policy and “military ambitions” with respect to Bolivia’s coastal territories and that these caused the War of the Pacific.⁵⁶ Bolivia also alleges that Chile used a commercial dispute between Bolivia and a private company as a “pretext” to launch hostilities against Bolivia.⁵⁷ Furthermore, Bolivia argues that the treaties that ended the war and definitively established the boundaries between Chile and Bolivia were imposed on Bolivia as a result of undue pressure, even though they were agreed well after hostilities had ceased.

1. The War of the Pacific was not an isolated event

- 2.11 The War of the Pacific and the resulting changes to the boundaries between Chile, Bolivia and Peru were not isolated events. They occurred at a time when the newly independent States of Latin America were being formed and their boundaries established. This process occurred in the nineteenth century and at the beginning of the twentieth century. Virtually all South American countries fought wars against their neighbours, ultimately leading to delimitations of and changes to the boundaries between them.⁵⁸

⁵⁶ Bolivia’s Memorial, paras 47-59.

⁵⁷ Bolivia’s Memorial, para 52.

⁵⁸ See A. Alvarez, *Le droit international américain* (1920), pp 65-68. By way of example, wars across Latin America during the nineteenth century led to the following

2.12 These wars changed the political landscape of South America in significant ways. The current boundaries in Latin America, including the boundary that separates Bolivia and Chile, arise out of treaties that were concluded following war or in order to avoid war.⁵⁹ Settling Chile's borders with its neighbours in the *Cordillera de los Andes* to the East, and the *Despoblado de Atacama* to the North, was a difficult and lengthy process.

territorial changes: a) the formation of the Republic of "Gran Colombia", founded by Simon Bolivar in the territory of the old Viceroyalty of Nueva Granada, which could not overcome the regional tensions provoked by its territorial extension nor the ambition of local *caudillos* and factions and, consequently, broke apart a few years after its formation, leading to the birth of the independent republics of Ecuador, Colombia and Venezuela; b) the Peru-Bolivia Confederation, forged under Bolivian President Andrés de Santa Cruz, which never really united both countries and disintegrated in 1839, just three years after its foundation; and c) the War of the Triple Alliance (1864-1870), which opposed Argentina, Brazil and Uruguay to Paraguay, and changed significantly the borders of those four countries.

⁵⁹ See, for example, as regards Bolivia and Argentina: the Boundaries Treaty between Argentina and Bolivia, signed at Buenos Aires on 10 May 1889; the Final Treaty on Boundaries between Argentina and Bolivia, signed at La Paz on 9 July 1925; and the Supplementary Protocol to the Argentine-Bolivian Boundaries Treaty of 9 July 1925, signed at Buenos Aires on 10 February 1941. As regards Bolivia and Brazil, see: the Treaty of Friendship, Boundaries, Navigation, Commerce, and Extradition between Brazil and Bolivia, signed at La Paz de Ayacucho on 27 March 1867; the Boundary Treaty between Brazil and Bolivia, signed at Petrópolis on 17 November 1903 (the **1903 Treaty of Petrópolis**), **CCM Annex 105**, discussed below at paras 2.33-2.34; and the Treaty on Boundaries and Railway Communications between Brazil and Bolivia, signed at Rio de Janeiro on 25 December 1928. As regards Bolivia and Paraguay, see the Treaty of Peace, Friendship and Boundaries between Bolivia and Paraguay, signed at Buenos Aires on 21 July 1938. As regards Bolivia and Peru, see: the Preliminary Treaty of Peace and Amity between Peru and Bolivia, signed at Puno on 7 June 1842; the Treaty on Demarcation of Frontiers between Peru and Bolivia, signed at La Paz on 23 September 1902; the Treaty on Rectification of Borders between Peru and Bolivia, signed at La Paz on 17 September 1909; the Protocol for the Demarcation of the Border between Peru and Bolivia, signed at La Paz on 2 June 1925; and the Ratifying Protocol for the Demarcation of the Second Section of the Bolivian-Peruvian Border, signed at La Paz on 15 January 1932. All of these treaties have been made available to the Court by Chile in a bound collection of readily available documents filed on 22 April 2015 in advance of the hearing on Chile's preliminary objection.

2. *Chile participated actively in the processes of independence of South American countries*

- 2.13 One of Chile's first acts as an independent State was to help Peru attain independence. The Liberation Expedition commanded by General San Martin liberated parts of Peru, ultimately gave birth to the Republic of Peru and, subsequently, to the creation of the Republic of Bolivia.
- 2.14 Chile thereafter remained committed to a foreign policy of American integration and solidarity, including by participating in regional conferences⁶⁰ and ratifying treaties for the friendly settlement of controversies. In 1866, Chile also took part in a coalition with Peru and Bolivia to prevent Spain from taking certain Peruvian islands by force. In the same year, the Spanish fleet shelled Valparaíso, the main port of Chile, causing severe damage to Chilean commerce.

3. *As long as the land appeared to be of no value, the boundary between Chile and Bolivia was not delimited*

- 2.15 The Atacama region was largely uninhabited until major guano deposits were discovered in the 1840s. That discovery caused a significant flow of Chilean migrants to the region. By the 1870s, the region was populated by a majority of Chilean workers.⁶¹ In those years, Chile and Bolivia began to disagree on the question of sovereignty over this region. Chile initially maintained that its territory extended as far north as the 23rd parallel.

⁶⁰ Chile participated in the Latin American Congress held in Lima in 1847. Chile later hosted, in Santiago, the Latin American Conference named the "Continental Conference on Union and Defense", at which the Santiago Continental Treaty was signed in 1856. This Treaty constituted a common American code, including codes on civil, commercial, military and international matters. Later on, Chile participated once again in the Latin American Conference held in Lima between 1864 and 1865. At that conference, Chile proposed measures to avoid the occupation of territory by foreign powers.

⁶¹ Ninety-three percent of the population in that region was Chilean. See A. Arguedas, *General History of Bolivia* (1922), **CCM Annex 121**, pp 260-261.

Bolivia on the other hand claimed that its southern boundary ran along the 26th parallel.⁶²

2.16 Negotiations between the two countries were complicated by the political situation prevailing in Bolivia, where several authoritarian regimes succeeded each other, making the country's policies unpredictable. For example, in 1863 the Bolivian Congress authorized the President to declare war on Chile,⁶³ whereas three years later, in 1866, the two countries formed an alliance against Spain.

2.17 Also in 1866, Bolivia and Chile signed their first delimitation treaty, agreeing that the boundary between them would follow the 24th parallel of latitude South.⁶⁴ By this treaty Chile and Bolivia also agreed to establish a special zone straddling their boundary, limited in the north by the 23rd parallel and in the south by the 25th parallel.⁶⁵ The two States agreed to share equally export duties collected on minerals extracted from that zone.⁶⁶

2.18 In 1874, Chile and Bolivia signed a new treaty in which they reaffirmed that the boundary between them followed the 24th parallel of latitude South and defined its Eastern terminus.⁶⁷ The 1874 Treaty of Limits also established specific obligations binding on Bolivia regarding Chilean interests in the area located between the 23rd and 24th parallels. Chile did not take away land from Bolivia in the 1874 Treaty of Limits. Instead, Chile renounced its right to receive an equal share of export duties

⁶² Memoria of the Ministry of Foreign Affairs of Bolivia, 1863, **CCM Annex 78**, pp 4-5.

⁶³ Bolivian Law of 5 June 1863, **CCM Annex 79**.

⁶⁴ Treaty of Limits between Chile and Bolivia, signed at Santiago on 10 August 1866 (the *1866 Treaty of Limits*), **CCM Annex 80**, Article 1.

⁶⁵ 1866 Treaty of Limits, **CCM Annex 80**, Article 2.

⁶⁶ 1866 Treaty of Limits, **CCM Annex 80**, Article 5.

⁶⁷ Treaty of Limits between Chile and Bolivia, signed at La Paz on 6 August 1874 (the *1874 Treaty of Limits*), **CCM Annex 83**, Article 1.

collected on minerals extracted between the 23rd and 24th parallels, in exchange for a freeze in the level of taxes levied on Chilean companies and nationals in that zone.⁶⁸

4. *The cause of Chile's occupation of Antofagasta was Bolivia's violation of the 1874 Treaty of Limits*

2.19 Less than four years after it had been signed, Bolivia breached the 1874 Treaty of Limits. Article 4 of that treaty provided as follows:

“Export duties over minerals taken from the area referred to in the preceding articles shall not exceed the amount currently in force and individuals, industries and Chilean capitals shall not be subject to any contributions other than those currently in place, regardless of their nature.

The provisions in this article shall last for twenty-five years.”⁶⁹

2.20 In breach of this agreement, in February 1878 Bolivia introduced new taxes on minerals exported by a Chilean company (the Chilean Nitrate Company)⁷⁰ that had been granted the right to export nitrate through the port of Antofagasta free of any export duties or other fiscal charges for a 15-year term.⁷¹ In January 1879, Bolivia then seized the assets belonging to that company to cover amounts allegedly owed to the Bolivian fiscal

⁶⁸ 1874 Treaty of Limits, **CCM Annex 83**, Articles 4 and 5.

⁶⁹ 1874 Treaty of Limits, **CCM Annex 83**, Article 4.

⁷⁰ Bolivian Law of 14 February 1878, **CCM Annex 85**; Letter from the Minister of Finance of Bolivia to the Governor of Caldera in Bolivia, 31 December 1878, **CCM Annex 88**; Note from the Legation of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, 2 July 1878, **CCM Annex 86**, pp 73-76; and Note from the Legation of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, No 42, 20 January 1879, **CCM Annex 91**, pp 87 and 89.

⁷¹ Bolivian Decree approving the bases for the concession in favour of the Chilean Nitrate Company, 27 November 1873, **CCM Annex 82**.

authorities and blocked outbound shipments from it.⁷² Lastly, in February 1879, Bolivia unilaterally terminated the concession granted to the Chilean Nitrate Company and took steps to sell assets belonging to it.⁷³

2.21 Bolivia asserts in its Memorial that Chile invaded the Bolivian Littoral “despite Bolivia’s proposal to submit the controversy to arbitration, and the cancellation of the tax” on exported nitrate.⁷⁴ The correct position is that Bolivia did not cancel the tax, and ignored Chile’s request for arbitration. In December 1878 Bolivia informed Chile that the tax was already being applied and made a reference to the arbitration provision in the Protocol to the 1874 Treaty of Limits.⁷⁵ In January 1879 Chile invited Bolivia to restore the status quo and submit the dispute to arbitration,⁷⁶ and the Chilean company concerned had already indicated its willingness to establish a bond for the amount of the disputed tax while the dispute was resolved.⁷⁷ In violation of the Protocol to the 1874 Treaty of Limits,⁷⁸

⁷² Letter from Severino Zapata, Colonel of the Bolivian Army, to the Customs Administrator in Antofagasta, 11 January 1879, **CCM Annex 90**.

⁷³ Bolivian Resolution of 1 February 1879, **CCM Annex 92**, p 22; Telegram from a correspondent of the newspaper *La Patria* (Peru), 15 February 1879, **CCM Annex 96**; and Letter from the Consul General of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 7 February 1879, **CCM Annex 93**.

⁷⁴ Bolivia’s Memorial, para 7. See also Bolivia’s Memorial, para 54, citing Note from the Legation of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, 2 July 1878, **CCM Annex 86**, pp 75-76.

⁷⁵ Letter from the Minister of Foreign Affairs of Bolivia to the Chargé d’Affaires of Chile in Bolivia, 26 December 1878, **CCM Annex 87**, pp 20-21; and Letter from the Minister of Finance of Bolivia to the Governor of Caldera in Bolivia, 31 December 1878, **CCM Annex 88**. See Supplementary Protocol to the 1874 Treaty of Limits between Chile and Bolivia, signed at La Paz on 21 July 1875 (the **1875 Protocol**), **CCM Annex 84**, Article 2.

⁷⁶ Note from the Legation of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, No 42, 20 January 1879, **CCM Annex 91**, pp 87 and 89.

⁷⁷ Letter from the Minister of Foreign Affairs of Chile to the Government of Bolivia, 3 January 1879, **CCM Annex 89**.

⁷⁸ 1875 Protocol, **CCM Annex 84**, Article 2.

Bolivia failed to respond to any of Chile's requests to submit the matter to arbitration.⁷⁹

- 2.22 On the day on which Bolivia had scheduled an auction to sell the assets of the Chilean Nitrate Company, 14 February 1879, Chile occupied the city of Antofagasta and its surrounding area in order to protect Chilean nationals and property in that zone from imminent harm.⁸⁰
- 2.23 On 1 March 1879, President Hilarión Daza of Bolivia ordered the suspension of trade relations and communications with Chile for as long as his country was at war with Chile⁸¹ and thereafter informed friendly Missions accredited in Bolivia of the "state of war".⁸² Bolivia mobilized its army⁸³ and ordered the expulsion of all Chilean nationals residing in Bolivia as well as the seizure of their property.⁸⁴

⁷⁹ Letter from the Minister of Foreign Affairs of Chile to the Government of Bolivia, 3 January 1879, **CCM Annex 89**; Note from the Legation of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, No 42, 20 January 1879, **CCM Annex 91**, pp 89-92; Note from the Chargé d'Affaires of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, 8 February 1879, **CCM Annex 94**; and Note from the Chargé d'Affaires of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, 12 February 1879, **CCM Annex 95**.

⁸⁰ Telegram from a correspondent of the newspaper *La Patria* (Peru), 15 February 1879, **CCM Annex 96**.

⁸¹ Bolivian Presidential Decree declaring the rupture of communications with Chile and the seizure of properties belonging to Chilean nationals, 1 March 1879, **CCM Annex 97**, Article 1.

⁸² Letter from the Ministry of Foreign Affairs of Bolivia to the Minister of Foreign Affairs of Peru, 31 March 1879, **CCM Annex 100**, p 179: "I ask that Your Excellency make this communication known to your Government, such that, informed of the current state of war, it will understand the forced position Bolivia has been left in, and will fulfill its duties to it as required under the law of Nations."

⁸³ Order of the Ministry of War of Bolivia, 1 March 1879, **CCM Annex 98**.

⁸⁴ Bolivian Presidential Decree declaring the rupture of communications with Chile and the seizure of properties belonging to Chilean nationals, 1 March 1879, **CCM Annex 97**, Articles 2-6.

2.24 On 4 April 1879, in accordance with the Treaty of Defensive Alliance concluded between Peru and Bolivia on 6 February 1873,⁸⁵ Peru declared that it was in a state of war with Chile and mobilized its army.⁸⁶ Chile in turn declared war on Bolivia and on Peru.⁸⁷

5. *In negotiating the 1884 Truce Pact, Bolivia's priority was not the return of the Littoral Province, but rather the territories of Tacna and Arica*

2.25 Bolivia and Chile were in a state of war for around 14 months. After the battle of Tacna, Bolivia withdrew to the highlands, while the war continued between Chile and Peru for three more years.

2.26 The War of the Pacific formally ended between Bolivia and Chile with the signing of the Truce Pact of 1884 in which the two States “declare[d] the end of the state of war”⁸⁸ between them and which was intended to “prepare and facilitate the establishment of a strong and stable peace between the two Republics”.⁸⁹ This provided that Chile would “continue to govern” coastal territory that had previously been Bolivian,⁹⁰ and it explicitly envisaged the subsequent conclusion of a “definitive treaty of peace”.⁹¹

2.27 The provisional delimitation effected by the 1884 Truce Pact took place twenty years before the 1904 Peace Treaty. Indeed, until the early 1900s,

⁸⁵ Secret Defensive Alliance Treaty between Bolivia and Peru, signed at Lima on 6 February 1873, **CCM Annex 81**, acknowledged by Bolivia at para 67 of its Memorial.

⁸⁶ Letter from the Legation of Chile in Peru to the Minister of Foreign Affairs of Chile, 22 March 1879, **CCM Annex 99**; and Peruvian Presidential Decree declaring Peru to be in a state of war with Chile, 4 April 1879, **CCM Annex 101**.

⁸⁷ Communiqué from Guillermo Matta, Mayor and Commandant-General of the Armed Forces in the Province of Atacama, 5 April 1879, **CCM Annex 102**.

⁸⁸ Truce Pact between Bolivia and Chile, signed at Valparaíso on 4 April 1884 (the **1884 Truce Pact**), **CPO Annex 2**, Article 1.

⁸⁹ 1884 Truce Pact, **CPO Annex 2**, Article 8.

⁹⁰ 1884 Truce Pact, **CPO Annex 2**, Article 2.

⁹¹ 1884 Truce Pact, **CPO Annex 2**, Preamble and Article 8.

the two States were unable to agree on a mutually satisfactory territorial framework. During the last two decades of the nineteenth century, Bolivia concentrated on attempting to reach agreement with Chile to obtain a new access to the sea, in particular across the territories of Tacna and Arica. The Littoral Province was largely inhabited by Chileans, not by Bolivian nationals.⁹² Bolivian investment did not exist there and the presence of Bolivian authorities had been sparse.

2.28 After 1884, and in the diplomatic exchanges on the matters at issue before the Court in this case, Bolivia has focused its diplomatic efforts on Arica or territories adjacent to that port. That land has never been Bolivian.

2.29 Bolivia alleges in its Memorial that:

“Bolivia expressly stipulated that its acceptance of the Truce would be subject to maintaining Bolivia’s sovereign access to the sea. It was formally recorded in a Protocol of 13 February 1884 that: ‘Bolivia cannot resign itself to a total lack of an outlet to the Pacific, without the risk of condemning itself to perpetual isolation and a painful existence, even in the midst of its great elements of wealth’.”⁹³

2.30 The translation in the annex to Bolivia’s Memorial quoted in this passage refers to Bolivia’s representative asking Chile to recall that Bolivia “cannot resign itself to a total lack” of “communication with the Pacific”.⁹⁴ In its Memorial Bolivia changed the quote from its own annex to read “an outlet to the Pacific” instead of “communication with the Pacific”.⁹⁵ Bolivia thus takes a statement that referred not to sovereign access, but to “communication with the Pacific”, and purports to use it as evidence for

⁹² See footnote 61.

⁹³ Bolivia’s Memorial, para 65.

⁹⁴ Protocol to Make an Arrangement to Put an End to the War of the Pacific, 13 February 1884, **BM Annex 103**, p 410.

⁹⁵ Bolivia’s Memorial, para 65.

the proposition that “Bolivia expressly stipulated that its acceptance of the Truce would be subject to maintaining Bolivia’s sovereign access to the sea”.⁹⁶

2.31 After the 1884 Truce Pact, Bolivia and Chile did turn to the possibility of a transfer of sovereignty over territory from Chile to Bolivia at the northern extremity of Chile. That was in the 1895 Transfer Treaty, discussed at paragraphs 2.4-2.9 above. The 1895 Treaties, including the 1895 Treaty of Peace and Amity, having been wholly without effect, Bolivia and Chile then negotiated afresh their definitive peace settlement. That was and is the 1904 Peace Treaty.

6. Bolivia was not forced into signing the 1904 Treaty of Peace

2.32 Bolivia has repeatedly asserted that its Government was “forced” to sign the 1904 Peace Treaty.⁹⁷ This assertion cannot be reconciled with the fact that the Governments that ruled Bolivia during the first two decades of the twentieth century actively participated in the negotiation, drafting and conclusion of this Treaty.

⁹⁶ Bolivia’s Memorial, para 65. See also footnote 144 below, recording the statement of Bolivia’s President in 1910 that the Arica-La Paz railway, to be built in compliance with the 1904 Peace Treaty, “will ultimately provide our country with the most important means of communication with the Pacific”: Bolivia, Opening Session of Congress, 6 August 1910 (La Paz, 1911), **CPO Annex 33**, p 6. See paras 3.23-3.25 below on the Arica-La Paz railway more generally.

⁹⁷ See Speech delivered by President Evo Morales, 23 March 2011, **CCM Annex 358**: “The 1904 Treaty was signed due to pressure and duress from Chile”; Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**, p 159: “in 1904 Chile imposed an arrangement on Bolivia by means of force”; Letter from David Choquehuanca, Minister of Foreign Affairs of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 8 July 2011, **CPO Annex 65**, p 4: “Bolivia’s forced acceptance of the 20 October 1904 Treaty”; and Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 5 June 2012, **CCM Annex 363**, p 197: “it was forced to sign the unjust and imposed 1904 Treaty. With military occupation of the usurped territory and under the threat that hostilities would start up again, how could my country refuse to sign an imposed treaty? This time what reason could not justify was imposed by force.”

- 2.33 The bases on which Bolivia accepted to conclude the definitive peace treaty did not include the maintenance of any prior claim to sovereign access to the Pacific. Bolivia sought and received financial advantages, the construction of a railway, and free transit. Bolivia carefully negotiated these benefits twenty years after the conclusion of hostilities with Chile, using as a precedent the Treaty of Petrópolis between Bolivia and Brazil, which had been signed on 17 November 1903 (*1903 Treaty of Petrópolis*).⁹⁸
- 2.34 Bolivia's envoy to Brazil who signed the 1903 Treaty of Petrópolis, Claudio Pinilla, had, as that treaty records, already been designated as Bolivia's Foreign Minister by the time he did so.⁹⁹ He was still Foreign Minister of Bolivia when the 1904 Peace Treaty was signed and was, alongside President Ismael Montes, one of the members of Bolivia's Cabinet who approved the treaty after it had been signed.¹⁰⁰ Both treaties had provisions apportioning sovereignty over territory as between the contracting parties,¹⁰¹ granting Bolivia monetary payment as part of the settlement of disputes over sovereignty,¹⁰² granting Bolivia the right of free transit,¹⁰³ granting Bolivia the right to maintain customs officers in designated foreign ports,¹⁰⁴ and providing for the construction of railways at the expense of Bolivia's counterparty.¹⁰⁵

⁹⁸ 1903 Treaty of Petrópolis, **CCM Annex 105**.

⁹⁹ 1903 Treaty of Petrópolis, **CCM Annex 105**, recitals.

¹⁰⁰ See 1904 Peace Treaty, **CCM Annex 106**, p 7.

¹⁰¹ 1903 Treaty of Petrópolis, **CCM Annex 105**, Article I; and 1904 Peace Treaty, **CCM Annex 106**, Article II.

¹⁰² 1903 Treaty of Petrópolis, **CCM Annex 105**, Article III; and 1904 Peace Treaty, **CCM Annex 106**, Article IV.

¹⁰³ 1903 Treaty of Petrópolis, **CCM Annex 105**, Article V; and 1904 Peace Treaty, **CCM Annex 106**, Article VI.

¹⁰⁴ 1903 Treaty of Petrópolis, **CCM Annex 105**, Article VI; and 1904 Peace Treaty, **CCM Annex 106**, Article VII.

¹⁰⁵ 1903 Treaty of Petrópolis, **CCM Annex 105**, Article VII; and 1904 Peace Treaty, **CCM Annex 106**, Article III.

- 2.35 The 1904 Peace Treaty with Chile was signed 24 years after the end of hostilities, 20 years after the 1884 Truce Pact and almost a decade after the failure of the 1895 Transfer Treaty. Bolivia's leaders defended the treaty in Congress, which voted in favour of it, as explained at paragraphs 3.5-3.7 below. President Ismael Montes continued to govern Bolivia until the end of his term (1909), and was subsequently elected again in 1913.
- 2.36 With the new Government that came into power in 1920, Bolivia changed its policies and requested a revision of the 1904 Peace Treaty.¹⁰⁶ But that is a matter of internal politics, without effect under international law. Chile did not accept that request for revision then and will not accept it now. Chile recognizes that Bolivia has declared before the Court that it does not challenge the 1904 Peace Treaty.¹⁰⁷
- 2.37 The 1904 Peace Treaty established a regime the solid foundations of which have regulated the relations between Chile and Bolivia for more than a century. The two pillars of this regime are Chile's sovereignty over coastal territory and Bolivia's free transit through these lands and access to Chile's ports on the Pacific, including the right to establish and maintain its own customs authorities in those ports.

¹⁰⁶ As to which, see Chapter 5, below.

¹⁰⁷ See, for example, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/21, 8 May 2015, p 12, para 10; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/19, 6 May 2015, p 42, para 13; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/19, 6 May 2015, p 37, para 34; and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/21, 8 May 2015, p 28, para 11.

CHAPTER 3. THE ENDURING SIGNIFICANCE OF THE 1904 PEACE TREATY

- 3.1 More than a century ago, the 1904 Peace Treaty established lasting peace between Bolivia and Chile. This chapter explains its enduring significance and its relevance to the present dispute, sets forth its principal terms, and elaborates on the implementation over time of the right of free transit it grants to Bolivia over Chilean territory and in Chilean ports.
- 3.2 There are at least three significant respects in which the 1904 Peace Treaty is important to the merits of this dispute as defined by the Court.¹⁰⁸ First, it settled any Bolivian claim to sovereign access to the sea that may have existed prior to the 1904 Peace Treaty, rendering Bolivia's extensive reliance in its Memorial on events preceding the 1904 Peace Treaty as without foundation. Second, the 1904 Peace Treaty, and in particular its Article VI, has provided and continues to provide the principal treaty foundation for Bolivia's free access to the Pacific Ocean across Chilean territory and through Chilean ports. More specific agreements on the modalities of Bolivia's free access to the sea have since been concluded. Third, the 1904 Peace Treaty has provided the settled position against the background of which any negotiations subsequent to 1904 on further improving Bolivia's access to the Pacific have taken place.
- 3.3 This is not a case in which sovereignty is disputed. It has been settled since 1904 that the coastal territory in question is subject only to Chilean sovereignty. There have been diplomatic exchanges and political negotiations that could have led to that allocation of sovereignty being changed in some way, but those negotiations having failed, the legal rights and obligations relevant to the territorial boundaries between Chile and Bolivia and to the regime of access to the sea are those contained in the

¹⁰⁸

As to which definition see *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153, p 14, paras 32-34.

1904 Peace Treaty. Both States have repeatedly affirmed the 1904 Peace Treaty.¹⁰⁹

3.4 The 1904 Peace Treaty constituted a comprehensive settlement between Bolivia and Chile concerning issues of sovereignty:

(a) The two States “restored” their “relations of peace and friendship”.¹¹⁰

¹⁰⁹

See, for example, Minutes of 23 March 1906 signed by the Bolivian and Chilean Directors of the Commission of Engineers, attached to the Letter from the Chilean Director of the Commission of Engineers to the Minister of Foreign Affairs of Chile, 26 July 1906, **CCM Annex 111**; Protocol that Designates an Arbitrator between Bolivia and Chile, signed at Santiago on 16 April 1907, **CPO Annex 32**; Protocol on Exchange of Territories between Bolivia and Chile, signed at Santiago on 1 May 1907, **CCM Annex 112**; Protocol on Railway Guarantees between Chile and Bolivia, signed at Santiago on 26 May 1908, **CCM Annex 113**, recitals and Article 1; Convention on Trade between Chile and Bolivia, signed at Santiago on 6 August 1912 (the *1912 Convention on Trade*), **CPO Annex 34**, recitals and Article I; Act of the Inauguration of the Railroad from Arica to the Plateau of La Paz, signed at Arica on 13 May 1913, **CPO Annex 36**; Protocol Regarding the Transfer of the Bolivian Section of the Railroad from Arica to La Paz between Bolivia and Chile, signed at Santiago on 2 February 1928, **CPO Annex 42**; Act of Transfer of the Railroad from Arica to the Plateau of La Paz – Bolivian Section between Bolivia and Chile, signed at Viacha on 13 May 1928, **CPO Annex 43**; Protocol on the Management of the Chilean and Bolivian Sections of the Railway from Arica to La Paz, signed at La Paz on 29 August 1928, **CCM Annex 132**; Convention on Transit between Bolivia and Chile, signed at Santiago on 16 August 1937 (the *1937 Convention on Transit*), **CPO Annex 44**, Article I; Chile-Bolivia Treaty of Economic Complementation, signed at Arica on 31 January 1955 (the *1955 Treaty of Economic Complementation*), **CCM Annex 151**, Articles 2(f) and 2(g); Operating Manual, Integrated Transit System for the Ports of Arica and Antofagasta, 2003, **CCM Annex 326**, p 3. See also Agreement on the Sica Sica – Arica Oil Pipeline of Yacimientos Petrolíferos Fiscales Bolivianos, Transiting through Chilean Territory between Bolivia and Chile, signed at Santiago on 24 April 1957 (the *1957 Agreement on the Sica Sica – Arica Pipeline*), **CCM Annex 155**; Amendment to the Agreement on the Sica Sica – Arica Oil Pipeline of Yacimientos Petrolíferos Fiscales Bolivianos, Transiting Through Chilean Territory between Bolivia and Chile, 4 December 1974, **CPO Annex 47(F)**; and Agreement entered into for Yacimientos Petrolíferos Fiscales Bolivianos to perform works on the Sica Sica – Arica Oil Pipeline between Bolivia and Chile, signed at Santiago on 5 November 1992, **CPO Annex 47(G)**, all implementing Article 2(g) of the 1955 Treaty of Economic Complementation, **CCM Annex 151** as amended by the Supplementary Protocol to the Treaty of Economic Complementation on Facilities for the Construction of the Oil Pipeline, signed at La Paz on 14 October 1955, **CCM Annex 153**.

- (b) Bolivia recognized Chilean sovereignty over coastal territory that had been Bolivian.¹¹¹
- (c) The two States agreed on a complete boundary delimitation between them that apportioned no coastal territory to Bolivia.¹¹²
- (d) Chile granted to Bolivia in perpetuity the broadest right of commercial free transit not only over the former Littoral province, but over the entirety of Chilean territory and at Chilean ports,¹¹³ together with the right to establish Bolivian customs posts at Chilean ports.¹¹⁴
- (e) Chile also agreed to build and pay for a railway from Arica (Chile's northernmost port) to the plateau of La Paz in Bolivia to facilitate Bolivia's access to the sea,¹¹⁵ and to guarantee obligations incurred by Bolivia to attract investment in other railways in Bolivia.¹¹⁶

A. The comprehensive character of the 1904 Peace Treaty

3.5 The Peace Treaty was signed on 20 October 1904. It was approved by the Congress of each State, instruments of ratifications were exchanged, and it entered into force on 10 March 1905.¹¹⁷

¹¹⁰ 1904 Peace Treaty, **CCM Annex 106**, Article I.

¹¹¹ 1904 Peace Treaty, **CCM Annex 106**, Article II.

¹¹² 1904 Peace Treaty, **CCM Annex 106**, Article II.

¹¹³ 1904 Peace Treaty, **CCM Annex 106**, Article VI.

¹¹⁴ 1904 Peace Treaty, **CCM Annex 106**, Article VII.

¹¹⁵ 1904 Peace Treaty, **CCM Annex 106**, Article III.

¹¹⁶ 1904 Peace Treaty, **CCM Annex 106**, Article III.

¹¹⁷ Bolivian Supreme Resolution approving the 1904 Treaty of Peace and Amity between Bolivia and Chile, 11 November 1904, **CCM Annex 107**; Bolivian Law approving the 1904 Treaty of Peace and Amity between Bolivia and Chile, 4 February 1905, **CCM Annex 108**; Bolivian Supreme Decree ratifying the 1904 Treaty of Peace and

3.6 In presenting the 1904 Peace Treaty to the Bolivian Congress on 2 February 1905, and referring to the detailed negotiations that preceded it, the Chairman of the Bolivian Congress stated the following:

“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.

Having recovered, as a consequence of this Treaty, its autonomy in trade and customs matters, it 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.”¹¹⁸

3.7 The President of Bolivia appeared before Bolivia’s Congress on the occasion of its approval of the 1904 Peace Treaty, and responded to the Chairman of Congress by referring to Congressional approval of the 1904 Peace Treaty as “the most important act of the current legislature” and as “the beginning of a new era in the foreign affairs of Bolivia” that put “an end to the uncertainties and hesitations that lasted a quarter of a

Amity between Bolivia and Chile, 10 March 1905, **CCM Annex 109**; Act of Exchange of Instruments of Ratification for the 1904 Treaty of Peace and Amity between Bolivia and Chile, 10 March 1905, **CPO Annex 31**; and Official Gazette of the Republic of Chile recording the promulgation and ratification of the 1904 Treaty of Peace and Amity between Bolivia and Chile, 27 March 1905, **CCM Annex 110**.

¹¹⁸ Bolivia, 13th Closing Session of the Honourable National Congress, 2 February 1905 (La Paz, 1905), **CPO Annex 30**, p 119 (emphasis added). The Spanish original of the sentence with emphasis added is: “*Negociación laboriosa, larga y accidentada, que ha acabado con dicho arreglo, que comprende todas nuestras cuestiones.*”

century”.¹¹⁹ He referred to its establishment of “our clear and finally determined borders” and responded to those who had opposed the treaty as follows:

“Fortunately, 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. The facts will promptly come to dispel, with their unquestionable reality, the patriotic scruples of those who thought to have found some disadvantages in the treaty, and soon, due to the same sequence of events as those who have supported energetically and unequivocally the treaty, they will feel the warm palpitations caused by the success of a good work.”¹²⁰

3.8 Against this background, Bolivia now asserts in its Memorial that: “Sovereign access to the sea was not addressed in the 1904 Treaty”¹²¹ and that Bolivia is “a State temporarily deprived of access to the sea as a result of war”.¹²² Bolivia resorted to heavy reliance on the 1895 Transfer Treaty, and asserted that the 1904 Peace Treaty “did not cancel previous Chilean declarations and commitments concerning Bolivia’s sovereign access to the sea”.¹²³ Bolivia’s case is thus that there were legally binding commitments on access to the sea prior to 1904, and that those commitments were not affected by the 1904 Peace Treaty. Bolivia is incorrect that there were any legally binding commitments on access to the sea prior to 1904. As noted in the first section of the previous chapter, the 1895 Transfer Treaty was, by agreement, “wholly without effect”. Bolivia’s position that any commitment on access to the sea prior to 1904

¹¹⁹ Bolivia, 13th Closing Session of the Honourable National Congress, 2 February 1905 (La Paz, 1905), **CPO Annex 30**, p 123.

¹²⁰ Bolivia, 13th Closing Session of the Honourable National Congress, 2 February 1905 (La Paz, 1905), **CPO Annex 30**, p 123.

¹²¹ Bolivia’s Memorial, para 10.

¹²² Bolivia’s Memorial, para 396.

¹²³ Bolivia’s Application, para 14.

was not affected by the 1904 Peace Treaty is also untenable, as is plain from the terms of the 1904 Peace Treaty.

- 3.9 The 1904 Peace Treaty was the “definitive treaty of peace” envisaged in Article 8 of the 1884 Truce Pact. In its Preamble, the 1904 Peace Treaty noted that it was concluded in “order to implement the purpose stated in Article 8 of the Truce Pact of April 4th, 1884” and Article I of the 1904 Peace Treaty referred to “the regime established by the Truce Pact” being thereby terminated.¹²⁴

1. Sovereignty

- 3.10 Article II of the 1904 Peace Treaty delimited the entire boundary between Bolivia and Chile, with Bolivia to the East of the boundary and, to the West of the boundary, from South to North:

- (a) the coastal territory that had been Bolivian;
- (b) the province of Tarapacá, which Peru had ceded to Chile in 1883; and
- (c) the provinces of Tacna and Arica, which were both under Chilean control in 1904.¹²⁵

The boundary was delimited by reference to 96 points,¹²⁶ shown in **Figure 1**.

¹²⁴ 1904 Peace Treaty, **CCM Annex 106**, Preamble and Article I.

¹²⁵ On the subsequent agreement between Chile and Peru concerning Tacna and Arica, see paras 3.13-3.16 below and the Treaty 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), 94 *LNTS* 401 (the *Treaty of Lima*), **CPO Annex 11**.

¹²⁶ 1904 Peace Treaty, **CCM Annex 106**, Article II.

Figure 1



For illustrative purposes only

3.11 It was within Article II that Bolivia recognized Chile as being sovereign over coastal territory that had been Bolivian:

“By the present Treaty, the territories occupied by Chile by virtue of Article 2 of the Truce Pact of April 4th, 1884, are recognized as belonging absolutely and in perpetuity to Chile.”¹²⁷

3.12 This recognition was unconditional, and was not subject to any purported right of Bolivia later to negotiate with Chile concerning potentially obtaining any right of access greater than that provided for in the 1904 Peace Treaty. Both States recognized Chile’s sovereignty over that territory “absolutely and in perpetuity”.

3.13 As to the territory north of the Loa River, which has never been Bolivian, in 1883 Peru had ceded to Chile “in perpetuity and unconditionally the territory of the littoral province of Tarapacá”, bounded on the north by “the ravine and river Camarones; on the south, the ravine and river Loa; on the east, the Republic of Bolivia; and on the west the Pacific Ocean.”¹²⁸ Thus at the time of the 1904 Peace Treaty, Tarapacá was definitively under the sovereignty of Chile, with Bolivia to its East.

3.14 Although sovereignty over Tarapacá had been settled, the definitive status of the provinces of Tacna and Arica remained open as between Chile and Peru in 1904. In the 1883 Treaty of Peace between Chile and Peru, those two States agreed that Tacna and Arica “shall continue in the possession of Chile and subject to Chilean laws and authorities for a period of ten years, from the date of the ratification of the present Treaty of Peace”.¹²⁹ They also agreed that after that term of ten years, the question whether Tacna and Arica would “remain definitively under the dominion and sovereignty

¹²⁷ 1904 Peace Treaty, **CCM Annex 106**, Article II.

¹²⁸ Treaty of Peace of Ancón between Chile and Peru, signed at Lima on 20 October 1883 (the *Treaty of Ancón*), **CPO Annex 1**, Article 2.

¹²⁹ Treaty of Ancón, **CPO Annex 1**, Article 3.

of Chile or continue to form part of Peruvian territory” would be decided by plebiscite.¹³⁰ Whilst as between Chile and Peru the question of sovereignty over the provinces of Tacna and Arica remained open in 1904, Chile controlled both of them, and agreed with Bolivia on the boundary between them and Bolivia.

3.15 As depicted above in **Figure 1**, the boundary between Tacna and Arica, on the one hand, and Bolivia, on the other, was definitively agreed between Bolivia and Chile in Article II of their 1904 Peace Treaty. This renders entirely inaccurate Bolivia’s contention in its Memorial that: “The 1904 Treaty addressed the cession of Bolivia’s Department of Littoral but not Bolivia’s sovereign access to the sea on occupied coastal territories further to the north.”¹³¹ Bolivia was only able to make that assertion because, in its passing reference to Article II of the 1904 Peace Treaty in its Memorial, it mentioned only the cession of the Littoral Province to Chile, and was silent on the complete boundary delimitation between Bolivia and Chile, which extends further to the North than the Littoral Province.¹³² Bolivia agreed in the 1904 Peace Treaty that its sovereignty stopped at the boundary, seaward of which it enjoyed the treaty-based right of free transit in Article VI of that same treaty.

3.16 In 1929 Chile and Peru agreed in the Treaty of Lima that the province of Tacna would be under Peruvian sovereignty and the province of Arica under Chilean sovereignty. They also agreed that without the consent of the other State, there could be no subsequent cession of territory by either of them in the provinces of Tacna or Arica to any third State:

“The Governments of Chile and Peru shall not, without previous agreement between them, cede to any third Power the whole or part of the territories which, in conformity with

¹³⁰ Treaty of Ancón, **CPO Annex 1**, Article 3.

¹³¹ Bolivia’s Memorial, para 93.

¹³² See Bolivia’s Memorial, para 92.

the Treaty of this date, come under their respective sovereignty, nor shall they, in the absence of such an agreement, construct through those territories any new international railway lines.”¹³³

That provision remains in force today.

2. *Bolivia's free transit across Chilean territory*

- 3.17 An integral part of the overall peace settlement agreed between Bolivia and Chile in 1904 was that Bolivia would have in perpetuity free access to the sea over Chilean territory.
- 3.18 Article VI of the 1904 Peace Treaty provided that Chile would accord “in favor of Bolivia, and in perpetuity, the fullest and most unrestricted right of commercial transit through its territory and ports on the Pacific.”¹³⁴
- 3.19 Article VII of the 1904 Peace Treaty provided that Bolivia “shall have the right to establish customs agencies in the ports which it may designate for its commerce. For the time being, it indicates . . . those of Antofagasta and Arica.”¹³⁵
- 3.20 To facilitate Bolivia’s free transit to the Pacific, the 1904 Peace Treaty also provided, in Article III, for the construction of a railway between the port of Arica and the plateau of La Paz, exclusively at Chile’s expense.¹³⁶

¹³³ Supplementary Protocol to the Treaty of Lima, signed at Lima on 3 June 1929 (entry into force 28 July 1929), 94 *LNTS* 401, **CPO Annex 11**, Article 1, agreed in Article 3 to form “an integral part” of the Treaty of Lima.

¹³⁴ 1904 Peace Treaty, **CCM Annex 106**, Article VI.

¹³⁵ 1904 Peace Treaty, **CCM Annex 106**, Article VII.

¹³⁶ 1904 Peace Treaty, **CCM Annex 106**, Article III.

Chile further agreed to guarantee obligations incurred by Bolivia to attract investment in other railways in Bolivia.¹³⁷

B. Bolivia's access to the sea

3.21 As well as providing Bolivia with a right of free transit, Article VI of the 1904 Peace Treaty provides that: "Both Governments will agree, by special acts, upon the suitable regulations to ensure, without prejudice to their respective fiscal interests" the perpetual right of free transit that Bolivia enjoys.¹³⁸ Pursuant to this provision, and as detailed further below, Chile and Bolivia have reached agreements implementing Bolivia's right of free transit on matters including: (i) the railway across Chilean territory that granted Bolivia practical access to the sea it did not have when it was sovereign over coastal territory; (ii) Bolivian exercise of customs powers under Bolivian law on Chilean territory; and (iii) exemption from Chilean tax of all goods transiting through Chile to or from Bolivia.

3.22 Bolivia's access to the sea more broadly has been facilitated over time through a number of subsequent bilateral agreements, and in Chilean law and practice, on a range of other subjects, also detailed below.¹³⁹ Bolivia and Chile have a long history of successfully agreeing on and implementing practical solutions to augment Bolivia's access to the Pacific.

1. The Arica-La Paz Railway

3.23 The railway envisaged by Article III of the 1904 Peace Treaty, from the Port of Arica, over the Andes, to the plateau of La Paz, was inaugurated on

¹³⁷ 1904 Peace Treaty, **CCM Annex 106**, Article III; and Protocol on Railway Guarantees between Chile and Bolivia, signed at Santiago on 26 May 1908, **CCM Annex 113**, Articles 5 and 6.

¹³⁸ 1904 Peace Treaty, **CCM Annex 106**, Article VI.

¹³⁹ Chile does not accept the accuracy of the report submitted by Bolivia as Annex 180 to its Memorial that purports to quantify the economic cost to Bolivia of being landlocked, but Chile equally sees no need to respond to that report before the Court.

13 May 1913.¹⁴⁰ The cost, entirely borne by Chile, was approximately 44,454,941.86 Chilean pesos, being approximately US\$20 million at that time, or approximately US\$500 million in today's terms.¹⁴¹ It is depicted in **Figure 2**.

Figure 2



¹⁴⁰ Act of the Inauguration of the Railroad from Arica to the Plateau of La Paz, signed at Arica on 13 May 1913, **CPO Annex 36**.

¹⁴¹ A. Decombe, Ministry of Industry and Public Works of Chile, General Inspectorate of Railways Under Study and Construction, *History of the Arica-La Paz Railway* (1913), **CCM Annex 114**, pp 63-65.

- 3.24 In accordance with the 1904 Peace Treaty, fifteen years after the completion of the railway, the section of the railway in Bolivian territory was transferred to the Government of Bolivia, free of any charge.¹⁴² Chile and Bolivia agreed in 1928 to provide “all necessary facilities” to preserve and promote the increase of traffic on the Arica-La Paz Railway, and in 1955 they committed to use excess railway income for the improvement of the railway.¹⁴³
- 3.25 Construction of this railway was of particular importance to Bolivian access to the Pacific,¹⁴⁴ and Chile maintains its section of the railway in operation today (although its importance has now diminished due to the development of transport by road¹⁴⁵). Before Chile constructed it, including in the time when Bolivia had sovereignty over coastal territory, by Bolivia’s own admission it had “to seek other routes of transit, concluding treaties and granting concessions of all kinds”, due to the difficult geographical conditions in the region.¹⁴⁶

¹⁴² 1904 Peace Treaty, **CCM Annex 106**, Article III; and Act of Transfer of the Railroad from Arica to the Plateau of La Paz – Bolivian Section between Bolivia and Chile, signed at Viacha on 13 May 1928, **CPO Annex 43**. The preparation for this Act of Transfer included the Protocol Regarding the Transfer of the Bolivian Section of the Railroad from Arica to La Paz between Bolivia and Chile, signed at Santiago on 2 February 1928, **CPO Annex 42**.

¹⁴³ Protocol on the Management of the Chilean and Bolivian Sections of the Railway from Arica to La Paz, signed at La Paz on 29 August 1928, **CCM Annex 132**; and Agreement Modifying Article Two of the Protocol on the Exploitation of the Bolivian Section of the Arica-La Paz Railway of 29 August 1928, agreed by exchange of notes on 10 November 1955, **CCM Annex 154**.

¹⁴⁴ See Bolivia, Opening Session of Congress, 6 August 1910 (La Paz, 1911), **CPO Annex 33**, p 6: “The works on the Arica railway . . . will ultimately provide our country with the most important means of communication with the Pacific, which will expand our industries and foreign trade”.

¹⁴⁵ As to which, see para 3.38 below.

¹⁴⁶ Note from Eliodoro Villazón, Minister of Foreign Affairs of Bolivia, to Abraham König, Minister Plenipotentiary of Chile in Bolivia, No 25, 15 October 1900, **CPO Annex 29**, p 356.

1. Bolivian cargo in transit is exempt from all Chilean taxes

3.26 Cargo in transit to or from Bolivia is exempt from all taxes in Chile, including for services ancillary to transportation, such as the loading, unloading and cleaning of containers.¹⁴⁷ A Chilean Circular dated 20 June 1951 makes explicit that any type of direct or indirect tax or levy “entailed a restriction to the ‘free commercial transit’ recognized by Chile in favor of the Republic of Bolivia under Article 6 of the 1904 Treaty of Peace, Friendship and Commerce”.¹⁴⁸

2. Bolivia exercises customs powers in Chilean ports

3.27 In implementation of its right under Article VII of the 1904 Peace Treaty, set forth at paragraph 3.19 above, Bolivia has continuously maintained its own customs authorities in the Chilean ports of Antofagasta and Arica in connection with cargo transiting to or from Bolivia.¹⁴⁹ Bolivia’s “official customs agent[s] . . . exercise the authority of the Bolivian State” in these Chilean ports and carry out their functions in Chile “on behalf of the Bolivian Government” and pursuant to Bolivian law.¹⁵⁰ Bolivia also has the discretionary power to apply its own import duties and set the rates for

¹⁴⁷ Letter from the Chilean Internal Tax Administration to the Chilean Ambassador Deputy Secretary of the Ministry of Foreign Affairs, No 1270, 29 July 2010, **CPO Annex 45(E)**.

¹⁴⁸ Chilean Circular No 36 on the collection of taxes on revenue relating to persons and goods in transit from or to Bolivia, 20 June 1951, **CPO Annex 45(A)**.

¹⁴⁹ See Bolivian Supreme Decree No 24434 of 12 December 1996, **CPO Annex 60**, Section 4; and Bolivian Supreme Decree No 8866, 28 July 1969, **CCM Annex 172**, Preamble and Article 1.

¹⁵⁰ Bolivian Supreme Decree No 24434 of 12 December 1996, **CPO Annex 60**, Sections 4 and 5. Bilateral agreements also make explicit that Bolivian law governs customs procedures in Chilean ports designated for Bolivian commerce: 1912 Convention on Trade, **CPO Annex 34**, Article II (in respect of liability for goods that are damaged or which have been tampered with where Chile is not responsible); and 1937 Convention on Transit, **CPO Annex 44**, Article IV(f) (appointment of agents) and Article IV(i) (issuance of customs documentation).

export duties relating to Bolivian cargo passing through Bolivian “customs territory” in the Chilean Ports of Arica and Antofagasta.¹⁵¹

3.28 That Bolivia exercises customs powers on Chile’s territory was further confirmed by the Declaration of Arica signed on 25 January 1953, in which the Ministers of Foreign Affairs of Bolivia and Chile announced that:

“All types of freight, without any exception, in transit through Chilean territory, from or to Bolivia, shall be subject to the exclusive jurisdiction and competence of the Bolivian customs authorities, represented by the respective customs agents duly empowered by the Government of Bolivia, from the moment when the Chilean authorities deliver the freight to the Bolivian customs agents”¹⁵²

3. *Bolivia’s preferential arrangements for the storage of cargo at Arica and Antofagasta*

3.29 Chile provides, maintains and upgrades at its cost special warehouses and other facilities for the storage of Bolivian cargo in transit both inside the primary zones of the Ports of Arica and Antofagasta,¹⁵³ and at the vast out-

¹⁵¹ Bolivian Customs Law No 1990, 28 July 1999 (as amended in December 2015), **CCM Annex 317**, Articles 4, 6, 7, 8, 13, 63, 82 and 98.

¹⁵² Declaration of Arica by the Ministers of Foreign Affairs of Bolivia and Chile, signed at Arica on 25 January 1953, **CCM Annex 150**, Article 1. See also 1937 Convention on Transit, **CPO Annex 44**, Article IV(d): “Once the cargo is unloaded at the docks, it will be handed by the Chilean customs office to personnel of the Bolivian customs agency. Once the cargo is received, it will become subject to the jurisdiction, care, supervision and responsibility of the Bolivian customs agency”; and Bolivian Customs Law No 1990, 28 July 1999 (as amended in December 2015), **CCM Annex 317**, Article 102.

¹⁵³ 1912 Convention on Trade, **CPO Annex 34**, Article III; 1937 Convention on Transit, **CPO Annex 44**, Articles IV(h) and V(b); Empresa Portuaria de Chile, Resolution No 160, 15 April 1987, **CCM Annex 288**; Minutes of the Tenth Meeting of the Working Group on Chile-Bolivia Free Transit, 29 May 2009, **CCM Annex 343**; and Minutes of the Twenty-Second Meeting of the Political Consultations Mechanism, 14 July 2010, **CCM Annex 348**.

of-port site at Portezuelo near Antofagasta that houses, on Chilean public land, purpose-built facilities for the storage of Bolivian minerals.¹⁵⁴

- 3.30 Bolivian goods may remain at these facilities for a period of one year.¹⁵⁵ After the expiry of that time, the Chilean customs authorities shall, pursuant to customs rules, grant a 90-day extension.¹⁵⁶ In contrast, Chilean goods and those of third countries may only remain for 90 days, after which they are considered abandoned.¹⁵⁷
- 3.31 Bolivia enjoys, at Chile's expense,¹⁵⁸ free storage for non-hazardous cargo for 365 days for imports into Bolivia and 60 days for exports from Bolivia.¹⁵⁹ Neither Chilean cargo nor that of third States benefits from a general right to free storage at Chilean ports.¹⁶⁰ Hazardous cargo

¹⁵⁴ Minutes of the Sixth Meeting of the Political Consultations Mechanism, 9 February 1998, **CCM Annex 315**; and Minutes of the Tenth Meeting of the Working Group on Chile-Bolivia Free Transit, 29 May 2009, **CCM Annex 343**.

¹⁵⁵ 1937 Convention on Transit, **CPO Annex 44**, Article IX; Chilean National Customs Service, Resolution No 6153, 11 September 2009, **CCM Annex 345**, Articles 1.3.2, 1.3.5 and 3.1; Empresa Portuaria de Chile, Resolution No 99, 26 December 1996, **CCM Annex 313**, Article 10; and Terminal Puerto Arica S.A., Service Manual for the Port of Arica, 1 December 2011, **CCM Annex 361**, Article 89(d).

¹⁵⁶ Chilean National Customs Service, Resolution No 6153, 11 September 2009, **CCM Annex 345**, Articles 1.3.4, 1.3.5 and 3.1.

¹⁵⁷ Terminal Puerto Arica S.A., Service Manual for the Port of Arica, 1 December 2011, **CCM Annex 361**, Articles 75 and 76.

¹⁵⁸ The collection and storage of Bolivian cargo is not merely provided free of charge, it is a financial outlay borne by the Chilean Treasury that is paid to the private company with a concession to operate the port: Concession Contract between the Empresa Portuaria Arica and Consorcio Portuario Arica S.A., 20 September 2004, **CCM Annex 333**, Section 5.35(2)(b).

¹⁵⁹ Empresa Portuaria de Chile, Resolution No 99, 26 December 1996, **CCM Annex 313**, Article 2; and Client Letter from Terminal Puerto Arica S.A., 19 January 2015, **CCM Annex 372**.

¹⁶⁰ Cf. at the Port of Arica, all cargo is exempt from payment for storage if stored for very short periods of time prior to export (72 hours) or import where the collection is pre-scheduled (24 hours): Terminal Puerto Arica S.A., Service Manual for the Port of Arica, 1 December 2011, **CCM Annex 361**, Annex I, Item 2, Notes 1 and 2. Bolivian port users also have the right to conclude preferential agreements with the respective port manager for transit cargo to be stored at the ports of Arica and Antofagasta. That right is not available to port users from Chile or third States who are subject to the

originating in or destined for Bolivia benefits from preferential storage rates compared to those for Chilean cargo or that of third States.¹⁶¹

3.32 Chile also established storage facilities for Bolivian cargo in the Port of Iquique and the out-of-port area at Alto Hospicio following a request by Bolivia to designate the Port of Iquique under the free transit regime founded on the 1904 Peace Treaty.¹⁶² Negotiations between Chile and Bolivia to enable the Port of Iquique for this purpose reached an advanced stage, with the States agreeing on the text of notes to be exchanged and Chile passing implementing domestic legislation. However, Bolivia's lack of willingness to exchange the notes constituting the special agreement required by Article VI of the 1904 Peace Treaty means that the storage facilities established at Chile's expense and exclusively for Bolivian cargo remain unused.¹⁶³

4. Bolivia's preferential rates and services at Arica and Antofagasta

3.33 Bolivia benefits from preferential rates for certain port services. Cargo in transit to or from Bolivia incurs a fixed tariff for the use of the loading dock of US\$0.85 per ton for FIO cargo, which has remained unchanged

standard conditions: Empresa Portuaria de Chile, Resolution No 99, 26 December 1996, **CCM Annex 313**, Article 14.

¹⁶¹ At the Port of Arica, Bolivia pays US\$0.68 per ton for exports and \$1.04 per ton for imports for a period of five days' covered storage. All other port users pay US\$113.37 per ton for the same service for the same period. Bolivian port users also receive a 50% discount for storage of hazardous goods in uncovered areas, which is a greater discount than that offered to port users from Chile and third States. Tariffs for storage of hazardous cargo in transit to or from Bolivia have not changed since at least 1996: Empresa Portuaria de Chile, Resolution No 99, 26 December 1996, **CCM Annex 313**, Articles 3 and 4; and Client Letter from Terminal Puerto Arica S.A., 19 January 2015, **CCM Annex 372**.

¹⁶² As to which, see paras 3.18 and 3.21 above.

¹⁶³ Letter from the Chilean Consulate General in Bolivia to the Bolivian Ministry of Foreign Affairs, No 15/13, 14 January 2015 attached to a Note from the Chilean Consulate General in Bolivia to the Chilean National Directorate of Frontiers and Limits of the State, No 33, 14 January 2015, **CCM Annex 371**; and Minutes of the Twelfth Meeting of the Political Consultations Mechanism, 17 February 2004, **CCM Annex 329**, item 4.

since 1996.¹⁶⁴ All other clients, including Chilean clients, must pay US\$2.02 per ton at the Port of Arica and US\$5.62 per ton at the Port of Antofagasta for the same service, which is subject to annual price adjustments.¹⁶⁵

5. *Rights in relation to the Sica Sica – Arica oil pipeline*

3.34 Between 1955 and 1957, Chile and Bolivia agreed through a series of instruments to provide all necessary facilities for a Bolivian State-owned company, Yacimientos Petrolíferos Fiscales Bolivianos (*YPFB*), to construct, operate and maintain an oil pipeline from Sica Sica in Bolivia to the Chilean Port of Arica.¹⁶⁶ They agreed that the “works shall be constructed, to the extent possible, on Chilean public land to be granted at no cost to Yacimientos Petrolíferos Fiscales Bolivianos for use under a concession for the duration of the exploitation of the pipeline.”¹⁶⁷ To that end Chile has:

- (a) granted five concessions to YPFB, three for the use of public land necessary for the construction of the pipeline, one for the use of public land for the construction of housing for personnel, and one free maritime concession over the foreshore, seabed and waters of

¹⁶⁴ FIO (free in and out) is cargo in respect of which the consignee, not the carrier, is responsible for the cost of loading or unloading the goods. Empresa Portuaria de Chile, Resolution No 99, 26 December 1996, **CCM Annex 313**, Article 1; Client Letter from Terminal Puerto Arica S.A., 19 January 2015, **CCM Annex 372**; and Terminal Puerto Antofagasta, List of Fees for the Period 2015-2016, **CCM Annex 370**.

¹⁶⁵ Client Letter from Terminal Puerto Arica S.A., 19 January 2015, **CCM Annex 372**; and Terminal Puerto Antofagasta, List of Fees for the Period 2015-2016, **CCM Annex 370**.

¹⁶⁶ 1955 Treaty of Economic Complementation, **CCM Annex 151**, Article 2(g); Supplementary Protocol to the Treaty of Economic Complementation on Facilities for the Construction of the Oil Pipeline, signed at La Paz on 14 October 1955, **CCM Annex 153**; and 1957 Agreement on the Sica Sica – Arica Pipeline, **CCM Annex 155**.

¹⁶⁷ 1957 Agreement on the Sica Sica – Arica Pipeline, **CCM Annex 155**, Section D.

the Port of Arica for the construction and protection of the submarine pipeline;¹⁶⁸

- (b) granted an exemption from all taxes on the importation of materials and equipment necessary for the construction, operation and maintenance of the pipeline;¹⁶⁹
- (c) agreed in 1974 at Bolivia's request to a significant increase in the storage capacity at the terminal in Arica from 50,000 barrels to approximately 700,000 barrels, in order to facilitate greater Bolivian exports and associated revenue;¹⁷⁰ and
- (d) agreed in 1992 at Bolivia's request to the use of the pipeline in both directions, thus enabling Bolivia to use it for imports as well as exports.¹⁷¹

¹⁶⁸ Chilean Ministry of Land and Settlement, Decree No 336, 16 April 1958, **CPO Annex 47(B)**; Chilean Ministry of Land and Settlement, Decree No 657, 2 July 1958, **CPO Annex 47(C)**; Chilean Ministry of Land and Settlement, Decree No 1133, 8 October 1958, **CPO Annex 47(D)**; Chilean Ministry of Land and Settlement, Decree No 708, 18 June 1959, **CPO Annex 47(E)**; Chilean Ministry of National Defence, Secretary of the Navy, Decree No 180, 8 February 1961 (notarized in Maritime Concession, Merchant Navy and Coastal Area Office – Yacimientos Petrolíferos Fiscales Bolivianos, 9 March 1961), **CCM Annex 157** (granting YPFB a maritime concession over the beachfront lands, beach, sea beds and water portions of the Port of Arica); Chilean Ministry of National Defence, Undersecretary of the Navy, Supreme Decree No 923, 26 November 1979, **CCM Annex 251** (renewing the maritime concession for a further 20 years); and Chilean Ministry of National Defence, Undersecretary of the Navy, Decree No 009, 29 February 2000, **CCM Annex 319** (renewing the maritime concession for a further 20 years).

¹⁶⁹ 1957 Agreement on the Sica Sica – Arica Pipeline, **CCM Annex 155**, Section C.

¹⁷⁰ Amendment to the Agreement on the Sica Sica – Arica Oil Pipeline of Yacimientos Petrolíferos Fiscales Bolivianos, Transiting Through Chilean Territory between Bolivia and Chile, 4 December 1974, **CPO Annex 47(F)**.

¹⁷¹ Agreement entered into for Yacimientos Petrolíferos Fiscales Bolivianos to perform works on the Sica Sica – Arica Oil Pipeline between Bolivia and Chile, signed at Santiago on 5 November 1992, **CPO Annex 47(G)**.

6. *Reduced administrative formalities for Bolivian cargo in transit*

- 3.35 Chile and Bolivia have agreed on a number of measures to facilitate the efficient transit of Bolivian cargo through Chilean ports. In the 1912 Convention on Trade and the 1937 Convention on Transit, Chile and Bolivia agreed to reduce and standardize procedures for the receipt, inspection, dispatch and documentation of Bolivian cargo in the Chilean Ports of Arica and Antofagasta.¹⁷² These uniform procedures have been implemented in Chilean law.¹⁷³
- 3.36 In 1975 Chile and Bolivia agreed to further streamline documentation and procedures by creating the Integrated Transit System (*ITS*). The ITS brings together representatives from the Chilean and Bolivian customs and transport authorities, the Chilean port authorities, the Bolivian Chambers of Industry and Commerce, and the Arica-La Paz and Antofagasta railway companies, to coordinate decisions on the simplification of procedures and documentation.¹⁷⁴ The ITS has been authoritatively and independently described as “the most successful attempt to rationalize and streamline procedures in the ports of transit.”¹⁷⁵ The ITS was implemented in the Port of Arica on 1 August 1975 and in the Port of Antofagasta on 1 April 1978, and continues to operate and to be continually improved.¹⁷⁶

¹⁷² 1912 Convention on Trade, **CPO Annex 34**, Articles II and XIV; and 1937 Convention on Transit, **CPO Annex 44**, Articles IV(d) and V(b).

¹⁷³ Chilean National Customs Service, Resolution No 6153, 11 September 2009, **CCM Annex 345**.

¹⁷⁴ Operating Manual, Integrated Transit System for the Ports of Arica and Antofagasta, 2003, **CCM Annex 326**, pp 3-6 and 12.

¹⁷⁵ Report of René Peña Castellon, United Nations Conference on Trade and Development Consultant, to the Meeting of Governmental Experts from Landlocked and Transit Developing Countries and Representatives of Donor Countries and Financial and Development Institutions, 16 July 2001, UN Doc UNCTAD/LDC/113, **CCM Annex 322**, para 24.

¹⁷⁶ The ITS was implemented following a 1974 study conducted by the United Nations Economic Commission for Latin America and the Caribbean at the request of the Chilean and Bolivian Governments into how the regime for the free transit of Bolivian goods through Chilean ports could be improved: Memorandum of the Ministry of

3.37 Further, in 2004 Chile and Bolivia agreed to harmonize the procedures for the exchange of information relating to the transit of cargo through the customs administrations of Bolivia and Chile.¹⁷⁷

7. *Improved access to Chilean ports through the construction and upgrading of roads*

3.38 Chile constructs, maintains and upgrades roads connecting Bolivia to Chilean ports, notably the Arica-La Paz highway (linking the Port of Arica to the Bolivian border at Tambo-Quemado) and the Iquique-Oruro highway (linking the Port of Iquique to the Bolivian border at Colchane-Pisiga).¹⁷⁸ The improvement of Chilean roads and of fluidity at border crossings to facilitate the movement of persons and cargo in transit between Bolivia and Chilean ports has been a common feature of bilateral negotiations since the mid-1990s.¹⁷⁹ In 2004, Chile and Bolivia concluded

Foreign Affairs of Chile on Bolivian Transit through Chile: Advantages Additional to those Established by Treaties and Conventions, June 1988, **CCM Annex 301**; and Operating Manual, Integrated Transit System for the Ports of Arica and Antofagasta, 2003, **CCM Annex 326**, p 3. For discussions on improving the ITS through amending the Operating Manual, see, for example, Minutes of the Twelfth Meeting of the Political Consultations Mechanism, 17 February 2004, **CCM Annex 329**, item 3.

¹⁷⁷ Agreement on Customs Cooperation and Information Exchange between Bolivia and Chile, signed at Santiago on 17 February 2004, **CCM Annex 330**.

¹⁷⁸ Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 5 June 2012, **CCM Annex 363**, pp 207-208 (where Chile referred to the refurbishment of the road from Arica to Bolivia, the opening of a new route, and the integrated border complexes in the context of improving Bolivia's access to Chilean ports); and Minutes of the Twelfth Meeting of the Political Consultations Mechanism, 17 February 2004, **CCM Annex 329**, item 10 (where Chile referred to its planned investment the highways from Arica to Tambo Quemado and from Huara (near Iquique) to Colchane). See also the reference to the (then) envisaged road from Iquique to Oruro and the desire to expand and improve existing media and transport between Chile and Bolivia in Article 2(g) of the 1955 Treaty of Economic Complementation, **CCM Annex 151**.

¹⁷⁹ See, for example, Minutes of the Third Meeting of the Political Consultations Mechanism, 11 June 1995, **CCM Annex 312**, item IV; Minutes of the Fifth Meeting of the Political Consultations Mechanism, 21 March 1997, **CCM Annex 314**, item h; and Letter from the Ministry of Foreign Affairs of Chile to the Bolivian Consulate General in Chile, attaching a document titled "Chile-Bolivia Work Proposal", No 12045, 27 July 2005, **CCM Annex 334**, paras 15, 22 and 23. An historical example of such efforts is the special regime Chile and Bolivia established in 1937 and extended in 1958 that simplified documentation for the movement of persons

the Convention on Integrated Controls of the Border to simplify and expedite border crossings.¹⁸⁰

between Bolivia and Chilean port regions with “the exclusive aim of facilitating transit and reciprocal trade”: Explanatory Notes to the Convention on Passports between Bolivia and Chile, agreed by exchange of notes on 20 March 1940, **CCM Annex 134** referring to the regime established in the Convention on Passports between Bolivia and Chile, signed at La Paz on 18 September 1937, **CCM Annex 133**, Articles V-VIII; and Agreement Extending the 1937 Convention on Passports between Bolivia and Chile, agreed by exchange of notes on 7 August 1958, **CCM Annex 156**. See also Article I of the 1937 Convention on Transit, **CPO Annex 44**, in which it was agreed that visas for persons transiting through Chilean territory or ports to or from Bolivia, or through Bolivian territory to or from Chile, would be free.

¹⁸⁰

Convention between Chile and Bolivia on Integrated Border Controls, signed at Santiago on 17 February 2004, **CCM Annex 331**, Preamble and Section 2.

PART II

CHAPTER 4. THE RULES OF INTERNATIONAL LAW GOVERNING THIS DISPUTE

4.1 This chapter identifies the rules of international law against which Bolivia's claims are to be tested, dealing first with the formation of obligations to negotiate, second with their scope if formed, and third with their breach. It is by reference to these rules that the episodes on which Bolivia relies are assessed in Part III. The essential point in this part is that a legal obligation to negotiate can only arise if, objectively construed, that is the intention of the States concerned. The essential point in Part III is that neither Bolivia nor Chile ever demonstrated such an intention.

A. Formation of obligations to negotiate

4.2 Bolivia's case is premised on the notion that mere expressions of willingness to negotiate, and participation in negotiations, give rise to legal obligations of unrestricted duration. Political or diplomatic discussions that precede or take place in the context of negotiations do not create legal obligations. Nor do negotiations themselves.

4.3 Throughout its Memorial, Bolivia takes no account of the important distinction between an intention to create a legal obligation and a political expression of willingness to act in a particular way. As ILC Special Rapporteur on the law of treaties Sir Hersch Lauterpacht observed: "There exist formal international instruments . . . which . . . are in the nature of statements of policy rather than instruments intended to lay down legal rights and obligations."¹⁸¹ The ILC later added that such instruments "merely contained declarations of principles or statements of policy, or

¹⁸¹ *Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur*, Yearbook of the International Law Commission, 1953, Vol. II, UN Doc A/CN.4/63, pp 96-97, para 4.

expressions [of] opinion, or *vœux*”.¹⁸² Bolivia’s case to this Court of law is based on political expressions of willingness, not statements demonstrating an intention to be legally bound.

1. *Distinguishing legally binding agreements from non-binding instruments*

4.4 An agreement between States that creates legal rights and obligations governed by international law is binding on those States, whatever its designation.¹⁸³ For the purposes of the Vienna Convention on the Law of Treaties, a treaty is—

“an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.¹⁸⁴

¹⁸² *Report of the Commission to the General Assembly*, Yearbook of the International Law Commission, 1959, Vol. II, UN Doc A/4169, p 96, commentary to draft Article 2, para 8(b). See also C. Eckart, *Promises of States under International Law* (2012), p 38: “The element of a manifested will to undertake a *legal* commitment first of all distinguishes legal action from ‘merely’ politically relevant state conduct. Drawing the line between the two is often difficult in practice; nevertheless, the international legal order assumes a clear difference to exist between the display of political goodwill through statements of intent, on the one side, and undertakings which will create a legal tie, on the other” (emphasis in original). The importance of distinguishing between provisions containing hortatory aspirations “not considered to be legally binding except by those who seek to apply them to the other fellow” and “definite legal obligations” was remarked upon in the Separate Opinion of Judge Dillard, *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, *Judgment*, *I.C.J. Reports* 1972, p 107, footnote 1.

¹⁸³ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Judgment*, *I.C.J. Reports* 1978, p 39, para 96; and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports* 1994, pp 120-122, paras 23-30.

¹⁸⁴ Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969 (entry into force 27 January 1980), 1155 *UNTS* 331, Article 2(1)(a). See also United Nations, Office of Legal Affairs, *United Nations Secretariat Treaty Handbook* (2012), para 5.3.4, which provides that: “A treaty or international agreement must impose on the parties legal obligations binding under international law, as opposed to mere political commitments. It must be clear on the face of the instrument, whatever its form, that the parties intend to be legally bound under international law.”

4.5 Bolivia correctly acknowledges as a matter of principle that in order to distinguish binding agreements from non-binding instruments the “decisive point” is “to determine the intention of the parties to create rights and obligations governed by international law, and to do so objectively.”¹⁸⁵

4.6 The arbitral tribunal in the *Iron Rhine* case noted that a “key factor in distinguishing a ‘non-legally binding instrument’ from a treaty is the intention of the parties.”¹⁸⁶ Leading scholars have similarly emphasized that—

“an international agreement is not legally binding unless the parties intend it to be. Put more formally, a treaty or international agreement is said to require an intention by the parties to create legal rights and obligations or to establish relations governed by international law. If that intention does not exist, an agreement is considered to be without legal effect (‘sans portée juridique’).”¹⁸⁷

4.7 A State’s intention is to be construed objectively. Conversely, subjective declarations of intent given by signatories of the instrument under consideration are of limited significance, in particular if they are issued after the emergence of a dispute or by only one of the parties.¹⁸⁸ Whether States have the requisite intention is to be discerned from the instrument’s

¹⁸⁵ Bolivia’s Memorial, para 300.

¹⁸⁶ *Arbitration regarding the Iron Rhine (“IjzerenRijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, Decision*, 24 May 2005, XXVII RIAA, p 92, para 142.

¹⁸⁷ O. Schachter, “The Twilight Existence of Nonbinding International Agreements” (1977) 71 *American Journal of International Law*, pp 296-297 (footnotes omitted). See also S. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), p 86; R. Jennings and A. Watts, *Oppenheim’s International Law* (9th edn, 1996), p 1202; A. McNair, *The Law of Treaties* (1961), p 15; and J.E.S. Fawcett, “The Legal Character of International Agreements” (1953) 30 *British Yearbook of International Law*, p 385.

¹⁸⁸ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1994, pp 121-122, para 27.

“actual terms and . . . the particular circumstances in which it was drawn up.”¹⁸⁹

4.8 If an instrument contains an express provision indicating that it is not binding, that will constitute conclusive evidence of an intention by the parties not to undertake legal obligations.¹⁹⁰ In cases where the parties’ intention is not expressly stated one way or the other, careful analysis of all of the terms of the instrument is of course necessary, together with consideration of the circumstances in which they were drawn up.

4.9 Accordingly, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court considered the terms of the 1990 Minutes concluded in connection with consultations between the Foreign Ministers of Qatar and Bahrain and signed by them. In deciding that those minutes constituted a legally binding agreement, it was crucial to the Court’s decision that the minutes referred explicitly to what “was agreed”, that one of the matters agreed was to “reaffirm what was agreed previously between the two parties”, and that the minutes “enumerate the commitments to which the parties have consented”.¹⁹¹ As will appear from

¹⁸⁹ *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p 39, para 96. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 1994, pp 120-122, paras 23-30.

¹⁹⁰ A. Aust, *Modern Treaty Law and Practice* (3rd edn, 2013), p 33.

¹⁹¹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 1994, p 119, para 19, and p 121, paras 24-25, in which the text of the relevant minutes was:

“The following was agreed:

1. To reaffirm what was previously agreed between the two parties.
2. The good offices of the Custodian of the Two Holy Mosques, King Fahd b. Abdul Aziz will continue between the two countries until the month of Shawwal 1411 A.H., corresponding to May 1991. The two parties may, at the end of this period, submit the matter to the International Court of Justice in accordance with the Bahraini formula, which the State of Qatar has accepted, and with the procedures consequent on it. The good offices of the Kingdom

Part III below, Bolivia is unable in this case to point to any text that is in equivalent or analogous terms.

- 4.10 Even using the word “agree” will not necessarily evidence an intention for that agreement to be governed by international law where the “language is suggestive of an aspirational arrangement rather than a legally binding agreement.”¹⁹² Nor does repetition of aspirational political statements across multiple documents transform them into a legally binding agreement.¹⁹³
- 4.11 The importance to determining the objective intention of the parties of the circumstances in which an instrument was drawn up, and of the conduct of the parties preceding and following its issuance, was confirmed in the Court’s judgment in the *Aegean Sea Continental Shelf* case. Greece had invoked a Joint Communiqué issued by the Presidents of Greece and Turkey on 31 May 1975 as establishing the Court’s jurisdiction over the dispute submitted to it by Greece. In interpreting the Joint Communiqué, the Court considered it necessary to examine “what light is thrown on its meaning by the context in which the meeting of 31 May 1975 took place and the Communiqué was drawn up.”¹⁹⁴ The Court concluded that the Joint Communiqué was not a basis for jurisdiction over Greece’s application, holding that in the context of the negotiations leading to the

of Saudi Arabia will continue during the period when the matter is under arbitration.

3. If a brotherly solution acceptable to the two parties is reached, the case will be withdrawn from arbitration.”

¹⁹² *The Republic of the Philippines v. The People’s Republic of China*, PCA Case No 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, paras 242 and 243.

¹⁹³ *Republic of the Philippines v. The People’s Republic of China*, PCA Case No 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, para 244. See also *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, Case No 16, p 38, para 98.

¹⁹⁴ *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p 41, para 100.

Joint Communiqué, and subsequent diplomatic exchanges, “the two Prime Ministers did not by their ‘decision’ undertake an unconditional commitment to submit the continental shelf dispute to the Court.”¹⁹⁵ In particular, the Court looked at Greece’s subsequent conduct and concluded that it had not “found any mention by Greece, prior to the filing of the Application, of the possibility that the dispute might be submitted to the Court unilaterally on the basis of the Joint Communiqué.”¹⁹⁶

4.12 In the present case, Bolivia and Chile have corresponded countless times on issues concerning access to the sea, in particular since the restoration of democracy in Chile in 1990. Not once in the two decades following 1990, up until 2011 when Bolivia wrote to the Court in connection with the *Peru v. Chile* maritime delimitation case, did Bolivia claim that an obligation to negotiate concerning sovereign access to the sea had previously come into existence. As in the *Aegean Sea Continental Shelf* case, this absence of subsequent reference to any legal obligation indicates that one had not been undertaken.

4.13 In the *Bay of Bengal* case, the International Tribunal for the Law of the Sea similarly placed emphasis on “the circumstances in which the 1974 Agreed Minutes were adopted”¹⁹⁷ and considered that these circumstances did not—

“suggest that they were intended to create legal obligations or embodied commitments of a binding nature. From the beginning of the discussions Myanmar made it clear that it

¹⁹⁵ *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p 43, para 106.

¹⁹⁶ *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p 44, para 106. See also D.P. O’Connell, *International Law: Vol One* (2nd edn, 1970), p 205: consideration should be given to “whether the signatories acted in a manner consistent with the view that they intended to enter into binding engagement as distinct from merely assenting to an *ad hoc* political aim.”

¹⁹⁷ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, Case No 16, p 37, para 93.

did not intend to enter into a separate agreement on the delimitation of territorial sea and that it wanted a comprehensive agreement covering the territorial sea, the exclusive economic zone and the continental shelf.”¹⁹⁸

The Tribunal also concluded that the reaffirmation of the content of the 1974 Agreed Minutes in the 2008 Agreed Minutes did not create any “independent commitment”.¹⁹⁹

4.14 On the approach indicated by these authorities, Bolivia’s post-hoc mischaracterizations of the contemporaneous evidence cannot establish an objective intention of the two States to undertake a legal obligation to negotiate. In this Counter-Memorial, consistently with authority, Chile analyses the actual text of the instruments on which Bolivia relies and the circumstances in which they were drawn up, to demonstrate that neither State had any intention of creating any legal obligation to negotiate concerning sovereign access to the sea.

2. *Distinguishing legally binding unilateral declarations from non-binding unilateral statements*

4.15 In its Memorial, Bolivia claims that:

“Chile made numerous unilateral statements which confirmed its agreement to negotiate a sovereign access to the sea for Bolivia. These statements, taken as a whole or individually, are unilateral acts that create legal obligations binding upon Chile.”²⁰⁰

¹⁹⁸ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, Case No 16, p 37, para 93.*

¹⁹⁹ *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012, Case No 16, p 38, para 98.*

²⁰⁰ Bolivia’s Memorial, para 312.

Bolivia does not, however, identify how the content and circumstances of any unilateral conduct it relies on may be said to have created any legal obligation.

4.16 The Court observed in the *Nuclear Tests* cases that:

“It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.”²⁰¹

4.17 The intention of the State making the declaration is determinative of whether it creates any legal obligation. The Chamber of the Court emphasized this point in its judgment concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*:

“Such declarations ‘concerning legal or factual situations’ may indeed ‘have the effect of creating legal obligations’ for the State on whose behalf they are made, as the Court observed in the *Nuclear Tests* cases. But the Court also made clear in those cases that it is *only* ‘when it is the intention of the State making the declaration that it should become bound according to its terms’ that ‘that intention confers on the declaration the character of a legal

²⁰¹ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p 267, para 43; and *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p 472, para 46. See also *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, Yearbook of the International Law Commission, 2006, Vol. II(2), UN Doc A/61/10, Principle 1, p 162: “Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations”.

undertaking'. Thus it all depends on the intention of the State in question . . .".²⁰²

4.18 The intention of the State issuing a unilateral statement is to be assessed by regard to the terms used, objectively assessed. The Court has confirmed that it must "form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text."²⁰³ The objective intention necessary to create a legal obligation cannot be inferred from another State's expectations, as Bolivia suggests.²⁰⁴

4.19 As the Court indicated in the *Nuclear Tests* cases, it is of course the case that not all unilateral statements constitute legally binding undertakings.²⁰⁵ In finding that France had made legally binding unilateral declarations, the Court emphasized their unequivocal character. After drawing particular attention to statements by the French President that "I had myself made it

²⁰² *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p 573, para 39 (emphasis added and references omitted). See also *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment, I.C.J. Reports 1961, p 32; and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p 50, para 120.

²⁰³ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p 269, para 48; and *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p 474, para 50. See also *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p 573, para 39.

²⁰⁴ See Bolivia's Memorial, paras 332, 334, 396 and 436. Although Bolivia has not developed its reliance on what it calls the "legal doctrine" of "legitimate expectations" in public international law, Bolivia appears to contend that: (i) there is a "principle" of international law which would require fulfillment of a State's legitimate expectations; and (ii) that principle can somehow make another State's unilateral declaration or statement legally binding. For present purposes, it is sufficient to note that: as to (i), Bolivia has not developed this assertion by reference to any relevant legal authority; and as to (ii), the weight of authority, discussed above, emphasizes that what is crucial is the intention of the declaring State, objectively assessed, and does not suggest that such intention can be deduced from any expectation of another State.

²⁰⁵ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p 267, para 44; and *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p 472, para 47.

clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect”,²⁰⁶ and by the French Minister of Defence that “there would not be any atmospheric tests in 1975”,²⁰⁷ the Court found that “the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression ‘in the normal course of events’” used in earlier French statements.²⁰⁸ The Court concluded that:

“In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective . . . It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. . . . The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.”²⁰⁹

²⁰⁶ *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p 266, para 37; and *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports 1974*, p 471, para 40.

²⁰⁷ *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p 266, para 40; and *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports 1974*, p 471, para 43.

²⁰⁸ *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p 267, para 41; and *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports 1974*, p 472, para 44.

²⁰⁹ *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, pp 269-270, para 51; and *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports 1974*, pp 474-475, para 53.

4.20 The burden for establishing the existence of a legally binding obligation on the basis of a unilateral statement is high, and requires a clear and specific statement evidencing an intention to be legally bound.²¹⁰ In particular when “States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.”²¹¹ This is especially so concerning matters of sovereignty over territory. The Court observed in *Sovereignty over Pedra Branca/Pulau Batu Puteh* that—

“any passing of sovereignty over territory on the basis of the conduct of the Parties, as set out above, must be manifested clearly and without any doubt by that conduct and the relevant facts. That is especially so if what may be involved, in the case of one of the Parties, is in effect the abandonment of sovereignty over part of its territory.”²¹²

4.21 Regard must also be had to the circumstances in which a unilateral statement is made and the reactions to which it gives rise.²¹³ In its

²¹⁰ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p 267, para 43 and p 269, para 51; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p 472, para 46 and p 474, para 53; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, pp 28-29, paras 50-52; and C. Eckart, *Promises of States under International Law* (2012), p 208. The ILC’s “Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations” similarly emphasize that: “A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner”: *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, Yearbook of the International Law Commission, 2006, Vol. II(2), UN Doc A/61/10, Principle 7, p 164.

²¹¹ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p 267, para 44; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p 473, para 47; and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p 82, para 229.

²¹² *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p 51, para 122.

²¹³ *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, pp 573-574, paras 39-40; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p 28, para 49; *Military and Paramilitary*

judgment concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the Chamber of the Court referred to the fact that in the *Nuclear Tests* cases, “the French Government could not express an intention to be bound otherwise than by unilateral declarations” to “the world at large”. The Chamber went on to hold that a more restrictive interpretation may be called for in a bilateral context. On the facts of that case, the Chamber held that:

“The circumstances of the present case are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity. Since no agreement of this kind was concluded between the Parties, the Chamber finds that there are no grounds to interpret the declaration made by Mali’s head of State . . . as a unilateral act with legal implications in regard to the present case.”²¹⁴

4.22 Similarly in the present case, any legal obligation to negotiate to which Bolivia and Chile wished to subject themselves could and in the normal course would have been undertaken by bilateral agreement. That did not occur, despite the contacts between the two States on the issue of the possibility of granting Bolivia sovereign access to the Pacific. In such circumstances, assertions that an obligation to negotiate was undertaken unilaterally should be approached with a high degree of scepticism. Moreover, unlike in *Nuclear Tests* where the obligation undertaken could be performed unilaterally, negotiations cannot occur unilaterally. It is

Activities in and against Nicaragua (Nicaragua v. United States of America), *Merits, Judgment*, *I.C.J. Reports 1986*, p 132, para 261; and *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, Yearbook of the International Law Commission, 2006, Vol. II(2), UN Doc A/61/10, Principle 3, p 162: “To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise”.

²¹⁴ *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, *I.C.J. Reports 1986*, p 574, para 40.

therefore surprising that Bolivia alleges that Chile undertook an obligation to negotiate with Bolivia by way of unilateral declarations, to which, by definition, Bolivia, as the putative negotiating partner, was not party. It is entirely unsurprising that Bolivia has not been able to cite any precedent for an obligation to negotiate having been undertaken unilaterally.

* * *

4.23 A binding commitment to negotiate may not be found in the absence of an objective intention to create a legal obligation. States must feel free to explore in good faith potential compromise solutions through political and diplomatic exchanges. They do so precisely because that creates no legal obligation. The legal framework against which to measure whether the practice Bolivia relies upon created any legal obligation is, in summary, that:

(a) the parties to an agreement or the State issuing a unilateral statement must have had the intention to create rights and obligations governed by international law;

(b) that intention is to be assessed objectively;

(c) that objective intention is to be determined from the terms of the agreement or of the unilateral statement in their context; and

(d) regard may also be had to the circumstances in which the agreement was reached or the unilateral statement made and the conduct of the parties preceding and following it, as to whether they regarded it as creating any legal obligation.

4.24 In Part III, these legal principles are applied to the events relied on by Bolivia to demonstrate that Chile never undertook any legal obligation to negotiate with Bolivia on granting it sovereign access to the Pacific Ocean.

Neither State considered that the interactions on which Bolivia now relies created any legal obligation.

B. Determining the content of obligations to negotiate

4.25 Even assuming, *arguendo*, that there was any legal obligation, it could only have been an obligation of limited scope and duration. It would be inconsistent with the reality of diplomatic and political conduct, and with the law, for the interchanges that occurred between Bolivia and Chile at particular points in time in particular political circumstances to give rise to a legal obligation unlimited in time.

4.26 There is no standard content to an obligation to negotiate.²¹⁵ The content of any given obligation to negotiate is determined by the instrument creating it, and it is thus essential to focus on and interpret the specific wording agreed by the parties to establish the specific obligation they have accepted. In the *Lac Lanoux* arbitration, the arbitral tribunal said of obligations to negotiate that:

“En réalité, les engagements ainsi pris par les Etats prennent des formes très diverses et ont une portée qui varie selon la manière dont ils sont définis et selon les procédures destinées à leur mise en œuvre”.²¹⁶

4.27 Since the content of an obligation to negotiate is determined by the instrument by which it was created, Bolivia’s inability to identify when the alleged obligation arose²¹⁷ creates obvious difficulties. Chile nevertheless

²¹⁵ As Bolivia acknowledges: see Bolivia’s Memorial, para 404.

²¹⁶ *Affaire du lac Lanoux (Espagne, France)*, 16 November 1957, XII *RIAA*, pp 306-307, para 11 (“In reality, the engagements thus undertaken by States take very different forms and have a scope that varies according to the manner in which they are defined and according to the procedures for implementing them.”).

²¹⁷ See, for example, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/21, 8 May 2015, pp 33-34, para 9.

sets out below some principles that would be relevant in general terms to an assessment of the content of any given obligation to negotiate.

4.28 In general terms, an obligation to negotiate requires States to enter into and conduct negotiations in good faith. Absent specific language, such an obligation would not, however, require a State to accept any suggestions put forward by another State which the first State considered to be unreasonable or contrary to its own interests. Nor, absent specific language to the contrary, would an obligation to negotiate require the States concerned to reach any agreement or continue with negotiations indefinitely. These matters are developed further in the remainder of this chapter.

1. *An obligation to negotiate requires States to pursue negotiations in good faith but does not require States to forego their own interests*

4.29 In the *North Sea Continental Shelf Case* and more recently in the *Pulp Mills* case, the Court emphasized that an obligation to negotiate required meaningful negotiations, such that the parties cannot insist on their respective positions without contemplating any modification. States—

“are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it”.²¹⁸

4.30 In *Application of the Interim Accord of 13 September 1995*, the Court stated that the requirement that negotiations be meaningful implies that “the parties should pay reasonable regard to the interests of the other”.²¹⁹

²¹⁸ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p 47, para 85. See also *Case Concerning the Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p 67, para 146. See also p 68, para 150.

²¹⁹ *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011*, p 685 para 132.

This is consistent with the award in *Greece v. Germany*, in which the tribunal held that negotiations—

“shall be meaningful and not merely consist of a formal process of negotiations. Meaningful negotiations cannot be conducted if either party insists upon its own position without contemplating any modification of it.”²²⁰

4.31 Therefore, as a general matter, and subject to the terms of the instrument creating any particular obligation, an obligation to negotiate requires States to negotiate and to do so meaningfully, in the sense that States must consider their counterpart’s position in good faith. Indeed, the requirement that negotiations be meaningful is no more than a manifestation of, and does not go beyond, the requirement that the obligation be performed in good faith.

4.32 An obligation to negotiate does not require either side to act contrary to its own interests. That is one reason why agreement is not the test of compliance. As stated in the award rendered in the *Tacna-Arica question* arbitration between Chile and Peru:

“As the Parties agreed to enter into a special protocol, but did not fix its terms, their undertaking was in substance to negotiate in good faith to that end . . . with respect to the negotiations looking to such an agreement they retained the rights of sovereign States acting in good faith. Neither Party waived the right to propose conditions which it deemed to be reasonable and appropriate to the holding of the plebiscite, or to oppose conditions proposed by the other Party which it deemed to be inadvisable. The agreement to make a special protocol with undefined terms, *did not mean that either Party was bound to make an agreement*

²²⁰ *Kingdom of Greece v. Federal Republic of Germany*, Arbitral Tribunal for the Agreement on German External Debts, 26 January 1972, 47 *ILR* 418, p 462, operative para 4.

unsatisfactory to itself provided it did not act in bad faith.”²²¹

That Chile cannot be required in any negotiation to forego its own interests is a point to which Bolivia’s Memorial pays no attention.

2. *An obligation to negotiate does not imply an obligation to reach agreement or to negotiate indefinitely*

- 4.33 In its Memorial, Bolivia alleges that in “the present case . . . Chile is under a more specific obligation to negotiate with Bolivia concerning sovereign access to the sea”,²²² and that Chile’s “obligation to negotiate ceases only once negotiations have succeeded”.²²³ Bolivia similarly argues that Chile’s “obligation to negotiate will terminate only when an agreement is concluded materializing in concrete terms the sovereign access to the sea.”²²⁴
- 4.34 In support of its argument that Chile’s obligation to negotiate survives until an agreement is reached granting sovereign access to the sea to Bolivia,²²⁵ Bolivia relies on the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.²²⁶ Bolivia states that, in that case, the “Court declared that the effect of an obligation to negotiate in good faith can in certain circumstances be to create not only an obligation to

²²¹ *Tacna-Arica question (Chile, Peru)*, 4 March 1925, II *RIAA*, p 929 (emphasis added). See also *Affaire du lac Lanoux (Espagne, France)*, 16 November 1957, XII *RIAA*, p 315, quoted by Bolivia at para 251 of its Memorial.

²²² Bolivia’s Memorial, para 237.

²²³ Bolivia’s Memorial, para 281.

²²⁴ Bolivia’s Memorial, para 287.

²²⁵ As to which see also Bolivia’s Memorial, paras 225, 226, 238, 254, 287, 356, 404, 493 and 497.

²²⁶ Bolivia’s Memorial, para 283.

negotiate but also an obligation to conclude an agreement”²²⁷ and that “the obligation to negotiate is not extinguished before a result is obtained”.²²⁸

4.35 First, as observed at paragraphs 1.17-1.21 above, the Court has not taken jurisdiction over a dispute that involves any alleged obligation to agree. Second, since the precise scope of an obligation to negotiate depends upon the terms by which it was assumed, the Court’s opinion in the *Nuclear Weapons* case can only be considered in the specific context of Article VI of the Nuclear Non-Proliferation Treaty,²²⁹ which is part of a treaty, and worded differently from the documents relied on by Bolivia in this case. The Court in *Nuclear Weapons* considered the specific treaty provision before it to impose a “twofold obligation to pursue and to conclude negotiations”,²³⁰ not that such a twofold obligation arose in connection with obligations to negotiate more generally.

4.36 In *Railway Traffic between Lithuania and Poland*, the Permanent Court was asked to define the scope of an obligation to negotiate binding upon Poland and Lithuania. Poland argued that Lithuania had undertaken not only to negotiate, but also to come to an agreement, with the result that it

²²⁷ Bolivia’s Memorial, para 283.

²²⁸ Bolivia’s Memorial, para 284.

²²⁹ The text of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons is as follows: “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.” Treaty on the Non-Proliferation of Nuclear Weapons, signed at London, Moscow and Washington on 1 July 1968 (entry into force 5 March 1970), 729 *UNTS* 161. See also *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *I.C.J. Reports 1996*, p 263, para 99.

²³⁰ *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *I.C.J. Reports 1996*, p 264, para 100.

had undertaken to open the Landwarów-Kaisiadorys railway sector to traffic.²³¹ The Permanent Court considered that an—

“obligation to negotiate *does not imply an obligation to reach an agreement*, nor in particular does it imply that Lithuania, by undertaking to negotiate, has assumed an engagement, and is in consequence obliged to conclude the administrative and technical agreements indispensable for the re-establishment of traffic on the Landwarów-Kaisiadorys railway sector.”²³²

4.37 In its judgment in *Application of the Interim Accord of 13 September 1995*, the Court similarly held that—

“the failure of the Parties to reach agreement, 16 years after the conclusion of the Interim Accord, does not itself establish that either Party has breached its obligation to negotiate in good faith. Whether the obligation has been undertaken in good faith cannot be measured by the result obtained.”²³³

This is a longstanding and widely accepted principle, from which Bolivia has proposed no basis to depart other than by reference to the Court’s analysis in the *Nuclear Weapons* case of a treaty provision with different wording from the documents now before the Court.²³⁴

4.38 Bolivia makes the further argument in its Memorial that the obligation allegedly accepted by Chile “is a permanent” one.²³⁵ If an obligation of

²³¹ *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)*, Advisory Opinion, 1931, P.C.I.J. Series A/B, No 42, p 116.

²³² *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)*, Advisory Opinion, 1931, P.C.I.J. Series A/B, No 42, p 116 (emphasis added).

²³³ *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, I.C.J. Reports 2011, p 685, para 134.

²³⁴ Cf. Bolivia’s Memorial, paras 283-286.

²³⁵ Bolivia’s Memorial, para 287.

conduct were “permanent”, in the sense that it persisted until an agreement was reached, it would be tantamount to an obligation of result. An obligation of conduct will require negotiations to occur. It will not require them to occur permanently, absent specific language to that effect.

- 4.39 Where there have been good faith, meaningful efforts to negotiate over a period of time that is reasonable in the circumstances, an obligation of conduct will be discharged.²³⁶ In *Railway Traffic between Lithuania and Poland*, in holding that there was no obligation to reach a result, the Permanent Court considered that negotiations need only be pursued “as far as possible”.²³⁷ Even that is putting it too high, since the test is whether there have been good faith, meaningful efforts to negotiate over an appropriate period of time, not whether further negotiations would have been “possible”.
- 4.40 An obligation to negotiate will certainly be discharged if a deadlock has been reached. As noted by the Permanent Court in *Mavrommatis Palestine Concessions*:

²³⁶ See, for example, D. Anzilotti, *Cours de droit international* (trans G Gidel, 1929; Editions Pantheon Assas, 1999), p 440, who said with respect to discharge of treaty obligations: “*L’exécution est la prestation exacte de ce qui a été promis, faite de la manière due. Puisque l’efficacité juridique du traité consiste précisément dans l’obligation d’exécuter la prestation promise, une fois que cette prestation a eu lieu, l’obligation s’éteint et l’on ne peut plus parler de l’existence de traité comme acte juridique : il demeure sans doute comme fait historique, mais c’est une toute autre chose. Les objections faites par quelques auteurs récents à la doctrine courante qui classe l’exécution dans les modes d’extinction des traités, ne semblent donc pas fondées*” (references omitted). (“Execution is the carrying out of exactly what was promised, in the manner promised. Since the legal efficacy of a treaty consists precisely in the obligation to perform the action promised, once this action has taken place, the obligation is extinguished and one can no longer speak of the existence of the treaty as a legal act: it no doubt remains as an historic fact, but that is another matter. The recent objections made by certain writers to the current doctrine that counts execution as a method of extinction of treaties, are therefore not well-founded.”)

²³⁷ *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaikiadorys)*, *Advisory Opinion, 1931, P.C.I.J. Series A/B, No 42*, p 116.

“Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this *discussion may have been very short; this will be the case if a dead lock is reached*, or if finally a point is reached at which *one of the Parties definitively declared himself unable, or refuses, to give way*, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation.”²³⁸

4.41 Likewise, in the *Tehran Hostages* case, in circumstances where diplomatic relations between the two States were ruptured, the Court held that—

“when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a ‘dispute . . . not satisfactorily adjusted by diplomacy’”.²³⁹

4.42 Unlike *Mavrommatis* and *Tehran Hostages*, the question in the present case does not concern an obligation to negotiate concerning a dispute before seising the Court of that dispute. The point of principle is, however, similar, as indicated by Bolivia’s recognition that States are discharged from an obligation to negotiate when pursuing talks would be futile.²⁴⁰ It is not necessary for one State to have acted in a recalcitrant manner for an obligation to negotiate to be discharged. The obligation may be discharged if both States have engaged in meaningful negotiations over an appropriate

²³⁸ *Mavrommatis Palestine Concessions, Judgment No 2, 1924, P.C.I.J. Series A, No 2*, p 13 (emphasis added). See also *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p 27, para 51.

²³⁹ *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p 27, para 51.

²⁴⁰ Memorial, para 281, citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p 133, para 159.

period of time but each State's own interests prevent any agreement being reached. When that brings the negotiations to an end, any obligation to negotiate is terminated.

C. The legal framework for assessing Bolivia's allegations of breach of an obligation to negotiate

4.43 Failure to reach agreement does not in general terms establish that any party has breached an obligation to negotiate in good faith. Similarly, refusal to accept proposals on grounds that they are inconsistent with a State's own best interests is insufficient to demonstrate a breach of an obligation to negotiate. In the award rendered in the arbitration concerning the *Tacna-Arica question* between Chile and Peru, the arbitrator held that for a finding of bad faith in negotiations—

“there must be found an intent to frustrate the [negotiations]; that is, not simply the refusal of a particular agreement . . . because of its terms, but the purpose to prevent any reasonable agreement. . . . [I]t is plain that such a purpose should not be lightly imputed . . . A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion.”²⁴¹

4.44 Relying on this decision, in the case concerning the *Application of the Interim Accord of 13 September 1995* the Court held that:

“As for the proof required for finding of the existence of bad faith . . . ‘something more must appear than the failure of particular negotiations’ . . . It could be provided by circumstantial evidence but should be supported ‘not by

²⁴¹

Tacna-Arica question (Chile, Peru), 4 March 1925, II *RIAA*, p 930.

disputable inferences but by clear and convincing evidence which compels such a conclusion”²⁴².

- 4.45 On the facts of that case, the Court held that although both States had at times made public statements suggesting an inflexible position, there was also evidence that they had considered a range of proposals over the years. “Taken as a whole”, therefore, the Court concluded that the evidence indicated that the applicant “showed a degree of openness to proposals” such that it had not breached its obligation to negotiate in good faith.²⁴³
- 4.46 In circumstances where the parties have actually negotiated, a party alleging breach of an obligation to negotiate will need to meet a high threshold to succeed with such an allegation.
- 4.47 Chapter III of Bolivia’s Memorial is dedicated to its argument that Chile breached an obligation to negotiate. In that chapter, Bolivia does not argue that Chile breached the alleged obligation through some general failure to negotiate in good faith. Rather, Bolivia makes two specific allegations of breach.
- 4.48 In the first section of Chapter III, Bolivia claims that Chile breached the alleged obligation through “degradation of the negotiation terms”.²⁴⁴ Bolivia argues that:

“Chile systematically reduced the scope and ambit of what it was prepared to consider during negotiations, contrary to prior agreements that it had made. Additional conditions

²⁴² *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, I.C.J. Reports 2011, p 685, para 132, referring to *Tacna-Arica question (Chile, Peru)*, 4 March 1925, II RIAA, p 930.

²⁴³ *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, I.C.J. Reports 2011, p 686, para 135 and more generally pp 683-686, paras 127-138.

²⁴⁴ Bolivia’s Memorial, para 399 and following.

have been imposed by Chile at each turn, and have, so far, blocked any possibility of reaching an agreement.”²⁴⁵

Bolivia argues that this “systematic reduction” took place from 1895 to 1978. As to the starting point for this argument, in Chapter 2 Chile has already explained that the 1895 Transfer Treaty does not establish legal rights from which there can be said to have been some subsequent “degradation”.²⁴⁶ As to the end point, in Chapter 7, Chile sets out the detail of the Charaña process of 1975 to 1978, from which it is clear that the guidelines for negotiation on the basis of which the two States proceeded, and which included a requirement of territorial exchange, were freely and repeatedly accepted by Bolivia.²⁴⁷ Thus, the starting point that Bolivia relies on to allege a “degradation” is illusory, whilst the endpoint simply reflects what Bolivia accepted.

4.49 In the second section of Chapter III of its Memorial, Bolivia claims that there was a breach of the alleged obligation due to “the refusal of Chile to negotiate the sovereign access”.²⁴⁸ This of course depends on the existence of an extant obligation, which is not supported by the evidence. In 1975-1978 Chile did negotiate with Bolivia, on the basis of an exchange of territories. As explained in Chapter 7, that negotiation came to an end because of Bolivia’s change of position and decision to rupture diplomatic relations. Bolivia and Chile have reached a number of agreements facilitating Bolivia’s access to the sea, as detailed in Chapter 3, Section B, above, and since the restoration of democracy in Chile in 1990 have conducted additional negotiations on further improving that access, as detailed in Chapter 9 below.

²⁴⁵ Bolivia’s Memorial, para 409.

²⁴⁶ See paras 2.4-2.9 above.

²⁴⁷ See paras 7.20-7.26 below.

²⁴⁸ Bolivia’s Memorial, paras 440 and following.

4.50 As Part III, immediately below, demonstrates, when Bolivia did not achieve what it sought in negotiations, it ruptured diplomatic relations and abandoned negotiations.

PART III

- III.1 In this Part III, Chile analyses the events subsequent to the 1904 Peace Treaty on the basis of which Bolivia asserts the existence of a continuous and extant legal obligation binding on Chile and Bolivia to negotiate concerning sovereign access to the Pacific Ocean.
- III.2 Bolivia seeks to portray a continual process of creating and confirming a legal obligation to negotiate throughout the course of the last century. In fact there are five discrete and very different periods, each forming the subject of one of the chapters in this part. They all concerned exchanges that were purely diplomatic and political. Each of them was a product of its own particular political and historical context, which renders unrealistic, as well as legally unfounded, Bolivia's claim that the Court should now order further negotiations of a kind that have already occurred and failed in the past.
- III.3 Of the "key episodes" it identifies, Bolivia places particular weight on diplomatic notes passing between Bolivia and Chile in June 1950 and on a negotiation that took place within the Charaña process of 1975 to 1978. However, neither episode reflected nor established any legal obligation to negotiate over sovereign access to the sea, and both demonstrate the continuing and mutually accepted importance of the 1904 Peace Treaty.
- III.4 Only in the Charaña process, discussed in Chapter 7, did the two States reach an advanced stage of negotiations on transfer of sovereignty over territory from Chile to Bolivia, with a reciprocal transfer from Bolivia to Chile. That took place almost forty years ago, under Generals Pinochet and Banzer, and there have been no equivalent negotiations either before or since. The fact of having entered into one negotiation of this kind does not create a legal obligation to do so again forty years later. Nor could it be correct that Chile's openness over time to act as a good neighbour and engage in constructive dialogue with Bolivia on issues of concern to it has

created a legal obligation to negotiate. An openness to negotiate does not create a legal obligation to do so, still less to do so again decades after negotiations have already occurred and ended.

III.5 It is essential to the success of Bolivia's case that, in one or more of the "key episodes" on which it relies, it be able to establish (i) an international agreement or binding unilateral undertaking to negotiate on sovereign access to the sea that would (ii) require Chile to negotiate again now despite the fact that Chile has already participated in prolonged negotiations with Bolivia within the Charaña process, and those negotiations failed due to the approach of Bolivia. An analysis of the documents on which Bolivia relies reveals that Bolivia is unable to establish the existence of any legal obligation, let alone an obligation that would endure today.

CHAPTER 5. DIPLOMATIC INTERACTIONS FROM 1920 TO 1926

- 5.1 Following the 1904 Peace Treaty, Bolivia accepted the comprehensive settlement that it contained and Chile implemented its obligations under it, including by building the railway through the Andes from Arica to La Paz. When a new Government came to power in Bolivia in 1920, Bolivia sought for the first time to revise the 1904 Peace Treaty. It did not do so by suggesting that an obligation to negotiate persisted in parallel to the 1904 Peace Treaty, as it does now,²⁴⁹ but rather by requesting revision of that treaty.
- 5.2 For its new claim of an obligation to negotiate, Bolivia relies in its Memorial on:
- (a) the 1920 Minutes, which explicitly stated that they did not create any legal obligation;
 - (b) exchanges before the League of Nations in 1921 and 1922, in which Chile made clear that it was willing to assist Bolivia with its development, but not grant it a port;
 - (c) correspondence exchanged between the two States in 1923, in which Chile refused Bolivia's request for revision of the 1904 Peace Treaty; and
 - (d) the Kellogg Proposal of 1926, which was addressed to Chile and Peru, not Bolivia, and obviously did not concern any legal obligation.

²⁴⁹

Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Hearing on the Preliminary Objection, CR 2015/19, 6 May 2015, pp 15-16, para 4.

5.3 Bolivia asserts that these four episodes—

“confirmed 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”.²⁵⁰

That is wholly incorrect, as this chapter demonstrates. The terms and context of the documents on which Bolivia relies make clear that they neither confirmed any existing legal obligation to negotiate concerning sovereign access to the Pacific, nor created any new one, and neither State thought so at the time.

A. The 1920 Minutes

5.4 The “*Acta Protocolizada*” of 10 January 1920 on which Bolivia relies is the minutes of a series of meetings ending on that date between Emilio Bello Codesido, Minister of Chile, and Carlos Gutiérrez, Minister of Foreign Affairs of Bolivia (the *1920 Minutes*).²⁵¹

5.5 Bolivia asserts that the 1920 Minutes are a source of legal obligation, without bringing to the Court’s attention the following important content from the penultimate paragraph of the document—

“the present declarations do not contain provisions that create rights or obligations for the States whose representatives make them...”²⁵²

5.6 As noted in Chapter 4, an express provision indicating that an instrument is not legally binding constitutes conclusive evidence of an intention by its

²⁵⁰ Bolivia’s Memorial, para 353.

²⁵¹ Minutes of 10 January 1920, **CCM Annex 118**.

²⁵² Minutes of 10 January 1920, **CCM Annex 118**, p 9.

parties not to assume legal obligations.²⁵³ The 1920 Minutes are therefore incapable of creating any legal obligation.

5.7 The 1920 Minutes go on to record in the same paragraph that Bolivia's Foreign Minister referred to "maintaining the freedom of both Governments to direct their diplomatic efforts in a way which best takes into account their respective interests".²⁵⁴

5.8 Bolivia acknowledges as a matter of principle that the intent of the Parties is the determining factor in the creation of legally binding obligations.²⁵⁵ Bolivia then fails to refer to these important caveats contained in the 1920 Minutes and submits that, in those Minutes, Chile was "expressing an intention to be legally bound".²⁵⁶ The explicit statement of the intention not to create rights or obligations cannot be erased by a decision not to bring it to the Court's attention.

5.9 The same may be said of Bolivia's argument that in the 1920 Minutes Chile "reaffirmed its commitment to negotiate sovereign access to the sea"²⁵⁷ and that "Chile had made it clear in 1920 that it still agreed to grant Bolivia a sovereign access to the sea".²⁵⁸ The assertion concerning the matter "still" remaining "agreed" is a reference to Bolivia's immediately prior assertion in its Memorial of what "Chile had agreed" in the 1895 Transfer Treaty.²⁵⁹ Bolivia's case that Chile is subject to a legal obligation to negotiate thus builds statements expressly stated not to involve the

²⁵³ See para 4.8 above.

²⁵⁴ Minutes of 10 January 1920, **CCM Annex 118**, p 9.

²⁵⁵ Bolivia's Memorial, para 300. See also para 4.5 above.

²⁵⁶ Bolivia's Memorial, para 347(2).

²⁵⁷ Bolivia's Memorial, para 98.

²⁵⁸ Bolivia's Memorial, para 415.

²⁵⁹ Bolivia's Memorial, para 414.

creation of legal rights and obligations, on top of a treaty that was by the parties' agreement wholly without effect.²⁶⁰

- 5.10 Even without the express statement in the 1920 Minutes as to their not creating rights or obligations, the remaining text of the Minutes is clear that no legal obligation was being confirmed or created. In particular, the 1920 Minutes refer to the two States agreeing to hold the meetings “to exchange general ideas”.²⁶¹ The Minutes record that the Minister of Chile proposed seven “ideas”, which might in the future become the “bases for an agreement”.²⁶² The first was that the 1904 Peace Treaty “defines the political relations of the two countries in a definitive manner and put an end to all the questions derived from the war of 1879.”²⁶³ Another was that Bolivia’s “aspiration to its own port” was “replaced by the construction of the railway” and the “rest of the obligations undertaken by Chile” under the 1904 Treaty.²⁶⁴
- 5.11 Bolivia also relies in its Memorial on correspondence preceding the 1920 Minutes in which Bolivia now says that Chile “reiterated its agreement to negotiate Bolivia’s sovereign access to the sea”.²⁶⁵ To take one example, which again demonstrates Bolivia’s unsatisfactory approach to the

²⁶⁰ As to which see paras 2.4-2.9 above.

²⁶¹ Minutes of 10 January 1920, **CCM Annex 118**, p 1.

²⁶² Minutes of 10 January 1920, **CCM Annex 118**, pp 1-2.

²⁶³ Minutes of 10 January 1920, **CCM Annex 118**, p 1.

²⁶⁴ Minutes of 10 January 1920, **CCM Annex 118**, p 2.

²⁶⁵ Bolivia’s Memorial, paras 97-98, relying on E.B. Codesido, *Annotations for the history of diplomatic negotiations with Peru and Bolivia 1900-1904* (1919), **CCM Annex 115**; Note from the Minister of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Bolivia in Chile, No 126, 24 May 1919, **CCM Annex 116**; and Chilean Memorandum of 9 September 1919, **CCM Annex 117**. In arguing that Chile reiterated its agreement to negotiate, Bolivia purports to rely on Note No 77 of 30 November 1917, citing page 205 of the book extracted at Annex 184 to its Memorial. That book does not refer anywhere to Note No 77 of 30 November 1917 and reflects only Codesido’s personal views at a time when he was no longer representing Chile. The appearance of the heading “Note No 77 of 30 November 1917” in the translation provided by Bolivia as its Annex 184 does not correspond to anything in the Spanish original.

evidence, Bolivia says at paragraph 98 of its Memorial that Chile's Minister of Foreign Affairs "stated that Bolivia's claim for its own port on the Pacific Ocean on terms aligned with the 1895 settlement was legitimate and just, and that Chile could fulfil that wish on the basis of sufficient and fair compensation". The accompanying footnote refers to Annex 42 to Bolivia's Memorial, without identifying what that document is. The English translation in the annex then represents that it is a document authored and signed by the Minister of Foreign Affairs of Chile.²⁶⁶ In fact, as the Spanish original, not included in Bolivia's annex, indicates, it is a document sent by Bolivia's Minister of Foreign Affairs to Bolivia's own envoy to Chile. It is thus (i) an internal Bolivian document, which Bolivia nonetheless represents as having been authored by Chile's Minister, (ii) the content of which in any event does not support the assertion that Bolivia makes.

B. Exchanges before the League of Nations

- 5.12 Bolivia states inaccurately that before the League of Nations Chile "confirmed" that it "was under an obligation to negotiate with Bolivia".²⁶⁷ Bolivia never claimed before the League that Chile was subject to any obligation to negotiate. Nor did Bolivia claim that the 1895 Transfer Treaty or the 1920 Minutes created any obligation to negotiate.
- 5.13 On 1 November 1920, Bolivia wrote to the Secretary-General of the League invoking "Article 19 of the Treaty of Versailles to obtain the revision by the League of Nations of the Treaty of Peace signed between Bolivia and Chile on 20 October 1904."²⁶⁸

²⁶⁶ Bolivian Minister of Foreign Affairs and Worship's Note No 126 of 24 May 1919, **BM Annex 42** (represented in the translation as having been signed by "Alberto Gutierrez Minister of Foreign Affairs of Chile").

²⁶⁷ Bolivia's Memorial, paras 106 and 107.

²⁶⁸ Letter from the Delegates of Bolivia to the League of Nations to James Eric Drummond, Secretary-General of the League of Nations, 1 November 1920,

5.14 Chile opposed the League considering Bolivia's request based on "the absolute and radical incompetence of the League of itself to revise treaties, and especially treaties of peace."²⁶⁹ In the same speech, Chile's representative referred to the extensive free transit that Bolivia enjoyed under the 1904 Peace Treaty—

“although Bolivia does not now wield sovereignty over the coast, she has nevertheless free access to the sea, and that . . . access is free to such an extent that she was able recently to utilise it for the purpose of importing through Chilean ports, without let or hindrance, arms and munitions of war at the very moment when her Government was declaring its intention to lay claim to Chilean territory.

Bolivia to-day has far better access to the sea than she had before the war of 1879. At that time she exercised no more than a nominal sovereignty over a lonely stretch of coast separated from the seat of her Government by mountains which no railway traversed.”²⁷⁰

5.15 The Assembly of the League referred the question of whether it was competent to consider Bolivia's request to a Commission of three jurists, which determined that: “The Bolivian complaint, as submitted, is inadmissible, because the Assembly of the League of Nations cannot of itself modify any Treaty, the modification of treaties lying solely within

CPO Annex 37. Article 19 of the Treaty of Versailles provided that: “The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world”: Treaty of Versailles, 28 June 1919, 225 *CTS* 188.

²⁶⁹ Statement by the Delegate of Chile, Augustín Edwards, during the Fifth Plenary Meeting of the League of Nations Assembly, 7 September 1921, **CCM Annex 119**, p 45.

²⁷⁰ Statement by the Delegate of Chile, Augustín Edwards, during the Fifth Plenary Meeting of the League of Nations Assembly, 7 September 1921, **CCM Annex 119**, p 48.

the competence of the contracting States.”²⁷¹ Bolivia then withdrew its request for that reason.²⁷²

5.16 Chile’s delegate noted before the Assembly that:

“Bolivia can seek satisfaction through the medium of direct negotiations of our own arranging. Chile has never closed that door to Bolivia, and I am in a position to state that nothing would please us better than to sit down with her and discuss the best means of facilitating her development.”²⁷³

5.17 Bolivia relies in its Memorial on Chile’s willingness to discuss with Bolivia “the best means of facilitating her development”, as support for its argument that “Chile provided further reassurance to Bolivia that it would get a sovereign access to the sea, so long as Chile obtains sovereignty over . . . Tacna and Arica”.²⁷⁴

5.18 Following that mischaracterization, Bolivia then refers in its Memorial to a statement made by the President of the Assembly of the League of Nations, Herman Van Karnebeek, at the end of the debate concerning Bolivia’s request. Bolivia states that the President “commended Bolivia and Chile for their agreement to negotiate”.²⁷⁵ It is on the basis of constant mischaracterization of the historical record that Bolivia seeks to build its case. Nowhere in his statement did the President of the Assembly refer to any “agreement to negotiate”. He referred only to acceptance by Bolivia

²⁷¹ League of Nations, Report of the Commission of Jurists on the Complaints of Peru and Bolivia, 21 September 1921, **CPO Annex 39**.

²⁷² Statement by the Delegate of Bolivia, M.C. Aramayo, during the Twenty-Second Plenary Meeting of the Assembly of the League of Nations, 28 September 1921, **CCM Annex 120**, p 468.

²⁷³ Statement by the Delegate of Chile, Agustín Edwards, during the Twenty-Second Plenary Meeting of the Assembly of the League of Nations, 28 September 1921, **CCM Annex 120**, p 467.

²⁷⁴ Bolivia’s Memorial, para 106.

²⁷⁵ Bolivia’s Memorial, para 108.

and Chile of the Opinion handed down by the Commission of three jurists finding that Bolivia's request was outside the jurisdiction of the League. His speech, delivered in French, referred to the parties' statements containing "*des éléments qui nous permettent de féliciter les deux délégations de l'attitude qu'elles ont prise*".²⁷⁶ Language of this kind is no basis to allege any acknowledgement of any objective intention to undertake or affirm any legal obligation.²⁷⁷

- 5.19 Bolivia then wrote once more to the League of Nations reporting on the sending of a Bolivian mission to Chile.²⁷⁸ Bolivia relies in its Memorial on Chile's response to that letter, citing the following language as evidence "confirming Chile's commitment":²⁷⁹

"in accordance with the declaration made by its delegation at the second Assembly, the Chilean Government has expressed the greatest willingness to enter into direct negotiations, which it would conduct in a spirit of frank conciliation, and in the ardent desire that the mutual interests of the two parties might be satisfied."²⁸⁰

- 5.20 Bolivia omitted to cite the following passage from the same page of that letter:

²⁷⁶ Statement by the President of the League of Nations Assembly during the Twenty-Second Plenary Meeting of the Assembly of the League of Nations, 28 September 1921, **CCM Annex 120**, p 470 ("elements of promise which allow us to congratulate both delegations on the attitude they have to-day adopted towards the dispute which has divided them.")

²⁷⁷ See paras 4.2-4.23 above.

²⁷⁸ Letter from A. Gutierrez, Bolivian Delegate to the General Assembly of the League of Nations, to the Secretary-General of the League of Nations, 8 September 1922, **CCM Annex 122**.

²⁷⁹ Bolivia's Memorial, para 109.

²⁸⁰ Letter from Manuel Rivas-Vicuña, Chilean Delegate to the General Assembly of the League of Nations, to the Secretary-General of the League of Nations, 19 September 1922, **CCM Annex 123**.

“The President of the Republic of Chile, referring to recent official Bolivian documents, informed the Bolivian representative, with that frankness which should characterise all friendly negotiations, that he did not recognise the right of the Bolivian Government to claim a port on the Pacific Ocean, since Bolivia abandoned that aspiration when it signed the Treaty of Peace of 1904, and obtained in exchange the assumption by Chile of heavy engagements which have been entirely carried out. The President of the Republic added that the aspirations of Bolivia might be satisfied by other means, and that his Government was quite ready to enter into negotiations on this subject in a sincere spirit of peace and conciliation.”²⁸¹

Chile being “quite ready” to negotiate on practical means to improve Bolivia’s access to the sea, without granting it a port, is not a basis on which Bolivia can claim that Chile expressed an intention to undertake a legal commitment to negotiate concerning sovereign access.

C. The correspondence exchanged between Bolivia and Chile in 1923

- 5.21 Bolivia next relies on correspondence exchanged between Chile and Bolivia in early 1923, asserting that it constituted “yet more reassurances” and “commitments” that Chile would negotiate with Bolivia on the topic of granting it sovereign access to the Pacific Ocean.²⁸²
- 5.22 The sequence of correspondence relied on by Bolivia started with the letter of 27 January 1923 from Bolivia’s Minister of Foreign Affairs to his Chilean counterpart, again proposing “the revision of the Treaty of 20 October 1904 in order to open the doors to a new international situation

²⁸¹ Letter from Manuel Rivas-Vicuña, Chilean Delegate to the General Assembly of the League of Nations, to the Secretary-General of the League of Nations, 19 September 1922, **CCM Annex 123**.

²⁸² Bolivia’s Memorial, paras 111-114 and 350-352.

that would allow Bolivia to live in full possession of its sovereignty, with its own access to the sea”²⁸³.

5.23 Chile’s response on 6 February 1923 was emphatic that:

“The Peace Treaty is not revisable; it is by its very nature definitive and my Government has complied with it with the same loyalty and acceptance to international commitments that your Excellency invokes in favour of Bolivia.”²⁸⁴

5.24 Chile’s Foreign Minister went on to refer, as Bolivia’s letter had done, to Chile’s declarations before the League, quoted at paragraphs 5.14 and 5.16 above. He added that “in accordance with” these previous statements—

“my Government maintains its purpose to listen, with the utmost spirit of conciliation and equity, to the proposals that Your Excellency’s Government wishes to submit in order to celebrate a new Pact regarding Bolivia’s situation, but without modifying the Peace Treaty and without interrupting the continuity of the Chilean territory.”²⁸⁵

5.25 Chile then invited Bolivia to submit to it “concrete proposals” as “the bases of direct negotiations” which would include “mutual compensation” and no “detriment to inalienable rights”.²⁸⁶ Bolivia did not accept that invitation.

5.26 In a letter sent to Chile on 12 February 1923, which Bolivia did not annex to its Memorial, Bolivia’s Minister emphasized that “my country’s

²⁸³ Note from the Minister of Foreign Affairs of Bolivia to the Minister of Foreign Affairs of Chile, 27 January 1923, **CCM Annex 124**.

²⁸⁴ Note from the Minister of Foreign Affairs of Chile to the Special Envoy and Minister Plenipotentiary of Bolivia in Chile, 6 February 1923, **CCM Annex 125**.

²⁸⁵ Note from the Minister of Foreign Affairs of Chile to the Special Envoy and Minister Plenipotentiary of Bolivia in Chile, 6 February 1923, **CCM Annex 125**.

²⁸⁶ Note from the Minister of Foreign Affairs of Chile to the Special Envoy and Minister Plenipotentiary of Bolivia in Chile, 6 February 1923, **CCM Annex 125**.

maritime claim cannot be situated outside the legal background of the Treaty of 1904”.²⁸⁷ Bolivia went on to state that if Chile refused to consider revising the 1904 Treaty, Bolivia would not participate in negotiations.²⁸⁸ Three days later Bolivia informed Chile that because of Chile’s refusal to discuss revision of the 1904 Peace Treaty, Bolivia would not participate in the Pan-American Conference to be held in Santiago.²⁸⁹

5.27 Chile responded to these two Bolivian letters on 22 February 1923, noting that—

“without modifying the Treaty and leaving its provisions intact and in full force and effect, there is no reason to fear that the well intentioned efforts of the two Governments would not find a way to satisfy Bolivia’s aspirations, provided that they are limited to seeking free access to the sea and do not take the form of the maritime vindication that Your Excellency’s note suggests.”²⁹⁰

Chile’s Foreign Minister concluded by taking “this opportunity to state, once again, my Government’s willingness to discuss the proposals that the Bolivian Government wishes to present”.²⁹¹ Chile’s expressed “willingness” was not language capable of evidencing an intention to

²⁸⁷ Note from Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Luiz Izquierdo, Minister of Foreign Affairs of Chile, 12 February 1923, **CPO Annex 40**, p 120.

²⁸⁸ Note from Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Luiz Izquierdo, Minister of Foreign Affairs of Chile, 12 February 1923, **CPO Annex 40**, p 122.

²⁸⁹ Note from Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Luiz Izquierdo, Minister of Foreign Affairs of Chile, 15 February 1923, **CPO Annex 41**.

²⁹⁰ Note from the Minister of Foreign Affairs of Chile to the Special Envoy and Minister Plenipotentiary of Bolivia in Chile, 22 February 1923, **CCM Annex 126**.

²⁹¹ Note from the Minister of Foreign Affairs of Chile to the Special Envoy and Minister Plenipotentiary of Bolivia in Chile, 22 February 1923, **CCM Annex 126**.

create any legal obligation, let alone one to negotiate on a reallocation of sovereignty.²⁹²

5.28 Bolivia also relies on a statement by the President of Chile two months later, in April 1923.²⁹³ There are two relevant aspects of that statement.

(a) The first is that the President of Chile stated in connection with the “aspirations of Bolivia” that “legally, we have no commitment towards Bolivia.”²⁹⁴ He continued: “We have had our relations completely and definitively settled by . . . the Treaty of Peace and Amity [of] 20 October 1904.”²⁹⁵

(b) The second is that the Chilean President stated that:

“If the arbitral award, which will naturally be based in law and the principle of justice, so provides, I will generously consider Bolivia’s aspirations in the manner and under the terms that have been clearly and previously established in the note of the Chilean Ministry of Foreign Affairs, addressed to the Minister of Bolivia in Chile on 6 February” 1923.²⁹⁶

That was the note described above at paragraphs 5.23-5.25.

5.29 This correspondence and Presidential interview from 1923 are described by Bolivia in its Memorial as “further reassurances by senior Chilean officials that Chile would engage in direct negotiations to secure Bolivia’s

²⁹² See paras 4.2 and following above.

²⁹³ Bolivia’s Memorial, para 115 citing “President Alessandri explains the guidelines of Chile’s foreign policy”, *El Mercurio* (Chile), 4 April 1923, **CCM Annex 127**.

²⁹⁴ “President Alessandri explains the guidelines of Chile’s foreign policy”, *El Mercurio* (Chile), 4 April 1923, **CCM Annex 127**.

²⁹⁵ “President Alessandri explains the guidelines of Chile’s foreign policy”, *El Mercurio* (Chile), 4 April 1923, **CCM Annex 127**.

²⁹⁶ “President Alessandri explains the guidelines of Chile’s foreign policy”, *El Mercurio* (Chile), 4 April 1923, **CCM Annex 127**.

sovereign access to the sea”.²⁹⁷ What these documents actually show is that:

- (a) Bolivia continued to insist on revision of the 1904 Peace Treaty.
- (b) That was rejected by Chile.
- (c) Chile nonetheless expressed a disposition towards negotiating on practical proposals that Bolivia might wish to make involving mutual compensation and protection of the rights of each State.
- (d) This disposition neither created nor confirmed the existence of any legal obligation, and Chile said so explicitly.²⁹⁸
- (e) Bolivia was unwilling to negotiate on anything other than obtaining sovereignty over coastal territory, which it recognized, indeed emphasized, was only possible through revision of the 1904 Peace Treaty.²⁹⁹
- (f) On the basis of Chile’s refusal to discuss revision of the 1904 Peace Treaty, Bolivia refused to attend an inter-State Pan-American conference to be held in Santiago, beginning a pattern of withdrawing from dialogue when it did not achieve its aspirations.³⁰⁰

D. The 1926 Kellogg Proposal and the reactions of Chile and Bolivia to it

5.30 Bolivia relies in its Memorial on the proposal made to Chile and Peru on 30 November 1926 by US Secretary of State Frank Kellogg (the *Kellogg*

²⁹⁷ Bolivia’s Memorial, para 350.

²⁹⁸ See para 4.8 above.

²⁹⁹ See paras 5.22 and 5.26 above.

³⁰⁰ See further paras 6.27, 7.50, 8.44 and 9.12 below.

Proposal).³⁰¹ Chile and Peru were seeking to settle the question of sovereignty over the provinces of Tacna and Arica, with the aid of the good offices of the United States. In the context of the dispute between Chile and Peru, Secretary of State Kellogg's proposal to them was that they agree to transfer sovereignty over all of Tacna and Arica to Bolivia. He noted that:

“While the attitude of Bolivia has not been ascertained, save that her aspiration to secure access to the Pacific is common knowledge, it seems reasonable to assume that Bolivia, by virtue of her geographical situation, is the one outside Power which would be primarily interested in acquiring, by purchase or otherwise, the subject matter of the pending controversy.”³⁰²

5.31 The Kellogg Proposal suggested to Chile and Peru the cession of both Tacna and Arica to Bolivia on the following terms:

“The Republics of Chile and Peru, either by joint or by several instruments freely and voluntarily executed, to cede to the Republic of Bolivia, in perpetuity, all right, title and interest which either may have in the Provinces of Tacna and Arica . . .”³⁰³

5.32 Chile responded to this proposal just four days later, on 4 December 1926, in a document known by the name of its author as the *Matte memorandum*.³⁰⁴ It stated that the Kellogg Proposal “goes much farther than the concessions which the Chilean Government has generously been able to make”, in particular because it involved “the definitive cession to

³⁰¹ Bolivia's Memorial, para 117.

³⁰² Memorandum on Tacna-Arica delivered by the Secretary of State of the United States to the Governments of Chile and Peru, 30 November 1926, **CCM Annex 128**, p 14.

³⁰³ Memorandum on Tacna-Arica delivered by the Secretary of State of the United States to the Governments of Chile and Peru, 30 November 1926, **CCM Annex 128**, p 14.

³⁰⁴ Memorandum of the Minister of Foreign Affairs of Chile Delivered to the Secretary of State of the United States regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**.

the republic of Bolivia of the territory in dispute” between Chile and Peru.³⁰⁵

5.33 In its Memorial, Bolivia relies on two sentences from the Matte memorandum: Chile’s statement that “in the course of the negotiations . . . and within the formula of territorial division, the Government of Chile has *not rejected* the idea of granting a strip of territory and a port to the Bolivian nation”; and that “the Chilean Government would honour its declarations in regard to the consideration of Bolivian *aspirations*”.³⁰⁶ Based on these extracts, Bolivia states that the Matte memorandum “recorded Chile’s pre-existing commitment in clear and precise terms”³⁰⁷ and that Chile undertook to “fulfil its previous commitment to grant Bolivia a sovereign access to the sea”.³⁰⁸

5.34 Those propositions are plainly unsupported even by the limited extracts of the Matte memorandum on which Bolivia relies. Further, in addition to the passages cited by Bolivia, Chile stated that:

“The republic of Bolivia which twenty years after the termination of the war spontaneously renounced the total seacoast, asking, as more suitable for its interests, compensation of a financial nature and means of communication, has expressed its desire to be considered in the negotiations which are taking place to determine the nationality of those territories. Neither in justice nor in equity can justification be found for this demand which it formulates today as a right.

³⁰⁵ Memorandum of the Minister of Foreign Affairs of Chile Delivered to the Secretary of State of the United States regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, p 40.

³⁰⁶ Bolivia’s Memorial, para 354 (emphasis added); and Memorandum of the Minister of Foreign Affairs of Chile Delivered to the Secretary of State of the United States regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, p 40 (emphasis added).

³⁰⁷ Bolivia’s Memorial, para 357.

³⁰⁸ Bolivia’s Memorial, para 355.

Nevertheless, the Government of Chile has not failed to take into consideration, this new interest of the Government of Bolivia and has subordinated its discussion, as was logical, to the result of the pending controversy with the Government of Peru.”³⁰⁹

5.35 Chile equally emphasized that at no time had Chile abandoned its “solid juridical position” but that—

“in deference to the great cause of American confraternity and being anxious to foster reconciliation among the countries involved in the war of the Pacific, Chile has always been disposed *to listen* to all propositions for settlement which might contribute toward such lofty aims and at the same time might offer compensation proportionate to the sacrifice of that part of its legitimate rights which such proposal imports.”³¹⁰

Chile emphasized its—

“desire[] to attest once more, that in discussing such propositions it does not abandon those rights, but has solely considered the possibility of sacrificing them freely and voluntarily on the altar of a superior national or American interest.”³¹¹

³⁰⁹ Memorandum of the Minister of Foreign Affairs of Chile Delivered to the Secretary of State of the United States regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, pp 39-40.

³¹⁰ Memorandum of the Minister of Foreign Affairs of Chile Delivered to the Secretary of State of the United States regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, p 40 (emphasis added).

³¹¹ Memorandum of the Minister of Foreign Affairs of Chile Delivered to the Secretary of State of the United States regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, p 40.

- 5.36 Chile nowhere used the language of legal obligation.³¹² Further, Chile used language which conveyed that its willingness to consider different alternatives was without prejudice to Chile's legal rights.³¹³
- 5.37 Bolivia also contends in its Memorial that in a note dated 7 December 1926, Bolivia "immediately accepted the Chilean offer . . . to proceed with the discussion and examination of the details of the transfer of territory and a port referred to in the 1926 Matte Memorandum" and that this exchange of communications "constituted a new written agreement" between the two States "reaffirming Chile's commitment to negotiate with Bolivia to grant it a sovereign access to the sea".³¹⁴
- 5.38 This is obviously misconceived. First, Chile addressed its 1926 Matte memorandum not to Bolivia, but to Secretary of State Kellogg in response to the proposal he made to Chile and to Peru. Second, the language of the 1926 Matte memorandum in which Chile expressed that it was open to discussions was not capable of generating any legal obligation, let alone an undertaking to discuss "the details of the transfer of territory and a port" as Bolivia now asserts.³¹⁵ Third, Bolivia's own note was also drafted in very general terms and concluded by "reiterating the friendly willingness of my country to welcome any suggestion of neighbor and friendly countries".³¹⁶
- 5.39 The Kellogg Proposal was rejected by Peru.³¹⁷ And although Chile had "not rejected" it,³¹⁸ Chile's willingness to consider Bolivia's aspiration was expressed to be subject to the resolution of the dispute between Chile

³¹² See paras 4.2-4.23 above.

³¹³ See para 4.8 above.

³¹⁴ Bolivia's Memorial, para 356.

³¹⁵ Bolivia's Memorial, para 356.

³¹⁶ Note from the Minister of Foreign Affairs of Bolivia to the Special Envoy and Minister Plenipotentiary of Chile in Bolivia, 7 December 1926, **CCM Annex 130**.

³¹⁷ Memorandum of the Government of Peru Delivered to the Secretary of State of the United States regarding Tacna-Arica, 12 January 1927, **CCM Annex 131**.

³¹⁸ See para 5.33 above.

and Peru over Tacna and Arica in Chile's favour. The province of Tacna was returned to Peru in 1929. Chile did not undertake any legal obligation to negotiate with Bolivia about granting it sovereign access to the Pacific in any part of the province of Arica, over which Chile was agreed to be sovereign. This was agreed between Bolivia and Chile in 1904³¹⁹ and between Chile and Peru in 1929.³²⁰

* * *

5.40 It cannot credibly be said that the terms of any statement made by Chile in the period from 1920 to 1926, viewed in context,³²¹ evidences an objective intention on the part of Chile to bind itself as a matter of international law to negotiate with Bolivia concerning sovereign access to the Pacific. Throughout the period from 1920-1926 and subsequently, Bolivia never suggested that anything that occurred in this period created an obligation to negotiate, still less that any such obligation had been breached. This absence of subsequent practice suggesting that the States considered themselves to be bound by a legal obligation to negotiate indicates that they had not undertaken one.³²²

³¹⁹ See paras 3.10 and 3.15 above.

³²⁰ See para 3.16 above.

³²¹ See paras 4.6-4.13 above, referring to *Arbitration regarding the Iron Rhine ("IjzerenRijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision, 24 May 2005, 27 RIAA, p 92, para 142, citing *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p 39, para 96. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 1994, pp 119-121, paras 20, 23 and 25; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, Case No 16, p 37, para 93.

³²² See paras 4.11-4.12 above; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p 44, para 106; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, Case No 16, p 37, para 93.

CHAPTER 6. CHILE'S STATEMENT OF OPENNESS TO NEGOTIATE OF 20 JUNE 1950

- 6.1 According to Bolivia's Memorial, the next "key episode" following the 1926 Matte memorandum was an "Exchange of Notes" in June 1950, more than two decades later.³²³ Bolivia says that the notes of June 1950 embodied an "agreement between Bolivia and Chile to negotiate a sovereign access to the sea for Bolivia" and that they "constitute a treaty under international law".³²⁴
- 6.2 The correct position is as follows. Following an extended period of silence, Bolivia raised the issue of sovereign access to the sea in the late 1940s. It made a proposal for formal negotiations on 1 June 1950, and a counter-proposal was made by Chile on 20 June 1950. Bolivia did not accept that counter-proposal. The content of the notes became public in late August 1950, leading to adverse political and public reaction in both States. There was then a change of regime and a change of priorities in Bolivia in May 1951. The two States therefore did not commence any negotiations. Whether the notes are taken together or Chile's note is viewed on its own, there is no basis to impute a legal obligation to negotiate sovereign access to the Pacific Ocean. Chile's note of 20 June 1950 is cast and caveated in language that is classically part of diplomatic exchanges that signal only political willingness, not legal obligation.³²⁵ The note shows that:
- (a) Chile regarded the legal situation established by the 1904 Peace Treaty as crucial and to be safeguarded in any negotiations;

³²³ Bolivia's Memorial, paras 358 and following. The two notes are: Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Chile, No 529/21, 1 June 1950, **CCM Annex 143**; and Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 9, 20 June 1950, **CCM Annex 144**.

³²⁴ Bolivia's Memorial, para 358.

³²⁵ See paras 4.2 and following above.

- (b) while it did not accept the proposal that was being made by Bolivia, Chile was however open to entering into a negotiation aimed at finding a formula that could make it possible to give to Bolivia a sovereign access to the Pacific Ocean, in return for compensation of a non-territorial character; and
- (c) Chile recognized that in accordance with the Supplementary Protocol to the 1929 Treaty, Peru's consent would be necessary.

6.3 This “episode” of negotiation on sovereign access was limited to a short period of time, and the attention of the two States moved onto other matters as Bolivia's interest in access to the sea shifted to ways of improving its non-sovereign access.

6.4 In this chapter, Chile examines briefly the exaggerated claims that Bolivia makes in relation to the exchanges that took place in the late 1940s (**Section A**), before turning to the text of the notes of June 1950 on which Bolivia now places such weight (**Section B**), and the ensuing events (**Section C**).

A. Exchanges in the late 1940s

6.5 Bolivia relies on a limited number of its internal reports from the 1940s that it says “leave no doubt” that the 1950 notes “constitute an agreement to negotiate a sovereign access to the sea for Bolivia”,³²⁶ while Bolivia also says that the correspondence of the late 1940s “continued to record Chile's commitment to negotiate sovereign access to the sea”.³²⁷ It will be important for the Court to read carefully the documentary record, which merely shows that on various occasions Chile is recorded as stating that it

³²⁶ Bolivia's Memorial, para 364.

³²⁷ Bolivia's Memorial, para 125.

was open to consider³²⁸ and study³²⁹ Bolivia's proposals, and indeed that it was open to negotiation.³³⁰ The documents do not suggest in any way that Chile was under any legal obligation to negotiate, and they do not suggest that Chile was in any way willing to accept such an obligation. Bolivia's characterization of the relevant documents in its Memorial cannot be relied upon. For example:

- (a) Bolivia relies on a report by its Ambassador Ostria of 18 July 1947 in which there is a brief reference to a meeting with Chile's President.³³¹ The Chilean President is recorded as having "referred to his idea of gradually facilitating the outlet of [Bolivia] through Arica" and declaring "his intention to have Bolivia operate the railway from Arica to La Paz and a sector of the wharf in that port, transferring also the respective warehouses".³³² Yet this is now put forward by Bolivia as a record of "Chile's commitment to negotiate sovereign access to the sea".³³³
- (b) Bolivia also relies on a similar report by its Ambassador Ostria of 6 January 1948.³³⁴ It contends that this report records that the Chilean President "gave a commitment to 'reaching an agreement that gradually pleased the Bolivian aspirations'".³³⁵ The document

³²⁸ Note from the Embassy of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, No 242/44, 29 December 1944, **CCM Annex 135**.

³²⁹ Note from the Embassy of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, No 211 MRE/47, 4 April 1947, **CCM Annex 137**.

³³⁰ Note from the Embassy of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, No 211 MRE/47, 4 April 1947, **CCM Annex 137**.

³³¹ Note from the Embassy of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, No 725/526, 18 July 1947, **CCM Annex 138**.

³³² Note from the Embassy of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, No 725/526, 18 July 1947, **CCM Annex 138**.

³³³ Bolivia's Memorial, para 125.

³³⁴ Note from the Embassy of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, No 22/13, 6 January 1948, **CCM Annex 139**.

³³⁵ Bolivia's Memorial, para 124.

in fact refers to the President's "*desire* to reach an agreement that would gradually please Bolivia's aspirations".³³⁶ The words "desire" and "commitment" are not synonymous. Nothing in the report suggests that Chile was about to enter into a binding obligation to negotiate, or indeed considered itself able to do so.³³⁷

- (c) As to Bolivia's reliance on the report by Ambassador Ostria of a meeting held on 1 June 1948 with Chile's President,³³⁸ reference must be made to Chile's contemporaneous note of this meeting.³³⁹ This records Bolivia's suggestion that Chile cede the city of Arica to it, and that Chile's President "replied that he had dismissed outright the idea of ceding Arica to Bolivia during such informal talks, but that he had *not refused to consider* the *possibility* to reach an agreement with that country to cede to Bolivia, in exchange for compensation, a strip of land north of Arica that would allow Bolivia's outlet to the sea."³⁴⁰ He "added that under no circumstance could these informal talks be relied on as bases for

³³⁶ Note from the Embassy of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, No 22/13, 6 January 1948, **CCM Annex 139** (emphasis added).

³³⁷ The specific matters that the note refers to are "the transfer of the Chilean section of the Arica-La Paz railway as well as of a section of the wharf of Arica", not sovereign access. Even so, the Chilean President is recorded as having been concerned over criticism with respect to compromising Chile's sovereignty. See Note from the Embassy of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, No 22/13, 6 January 1948, **CCM Annex 139**.

³³⁸ Bolivia's Memorial, para 125.

³³⁹ Minutes of Meeting between the Chilean President and the Bolivian Ambassador to Chile, 1 June 1948, **CCM Annex 140**. Cf. Cable from the Bolivian Ambassador to Chile to the Ministry of Foreign Affairs of Bolivia, No 116, 1 June 1948, **CCM Annex 141**; and Note from the Embassy of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, No 455/325, 2 June 1948, **CCM Annex 142**.

³⁴⁰ Minutes of Meeting between the Chilean President and the Bolivian Ambassador to Chile, 1 June 1948, **CCM Annex 140**.

any discussion since the very idea of granting a strip of land north of Arica had merely been the subject of a conversation”.³⁴¹

6.6 The most that may credibly be said about these intermittent discussions of the late 1940s is that a desire was crystallising on Bolivia’s part to seek a formal negotiation on sovereign access to the sea, and that Chile was open to considering the proposals of Bolivia and to the prospect of a negotiation. Openness to negotiation does not reflect an objective intention to be legally bound.

B. The notes of June 1950

6.7 In the note of 1 June 1950, Bolivia (through Ambassador Ostria) referred to the 1895 Transfer Treaty and to statements by Chile to the effect that Chile had not rejected the idea of granting a strip of territory and a port to Bolivia, and that Chile accepted to consider in principle a Bolivian proposal in this respect. The note went on to make a formal proposal of negotiations as follows:

“With such an important background that reveals a clear orientation in the international policy followed by the Chilean Republic, I have the honour of proposing to Your Excellency that the governments of Bolivia and Chile formally enter into a direct negotiation to satisfy the fundamental need of Bolivia to obtain its own sovereign access to the Pacific Ocean, thus solving the problem of the landlocked situation of Bolivia on bases that take into account the mutual benefits and genuine interests of both peoples.”³⁴²

6.8 There are two immediate points. First, the wording of this note is inconsistent with there being any prior obligation to negotiate. Had Bolivia

³⁴¹ Minutes of Meeting between the Chilean President and the Bolivian Ambassador to Chile, 1 June 1948, **CCM Annex 140**.

³⁴² Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Chile, No 529/21, 1 June 1950, **CCM Annex 143**.

considered that there was any such obligation, it would certainly have said so, i.e. it would have sought negotiations in implementation of a past agreement. It did not do so.³⁴³ Bolivia's assertion that the notes of June 1950 confirmed the existence of past agreements to negotiate is untenable.³⁴⁴ Second, the note refers to "the fundamental *need* of Bolivia to obtain its own sovereign access" to the Pacific Ocean. Had Bolivia considered that it had a right to negotiate on such sovereign access, again, it would have said so.

- 6.9 In its note of 20 June 1950, Chile (through Minister Walker) made its own proposal. The Chilean note set out Bolivia's proposal quoted above, and continued:

"From the quotes contained in the note I answer, it flows that the Government of Chile, *together with safeguarding the de jure situation established in the Treaty of Peace of 1904, has been willing to study through direct efforts with Bolivia the possibility of satisfying the aspirations of the Government of Your Excellency and the interests of Chile.*

At the present opportunity, I have the honour of expressing to Your Excellency that my Government *will be consistent with that position and that, motivated by a fraternal spirit of friendship towards Bolivia, is open formally to enter into a direct negotiation aimed at searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests.*

I am fully confident that in this way our respective governments will be able to unite more tightly the destinies of our two Republics and give a high example of true American spirit in the Continent.

³⁴³ Cf. paras 4.11-4.12 above.

³⁴⁴ Cf. Bolivia's Memorial, para 363. The correct position is all the more clear when the two notes, which are short, are read in full.

Finally, I have to add that, opportunely, *my Government will have to consult Peru*, in compliance with the Treaties celebrated with this country.”³⁴⁵

6.10 It follows from this carefully worded note that:

- (a) For Chile, safeguarding the 1904 Peace Treaty was of fundamental importance. The 1904 Peace Treaty had not even been mentioned in Bolivia’s note of 1 June 1950.
- (b) Chile’s understanding was—correctly—that its past statements merely showed a *willingness* to studying Bolivia’s proposals in a negotiation, not any *obligation* to do so as Bolivia now contends.³⁴⁶
- (c) In stating that it would act consistently with its prior position, Chile was confirming that it would study Bolivia’s proposals in a negotiation, nothing more. It was expressly acting in a “*fraternal spirit of friendship towards Bolivia*”, not pursuant to or in creation of any legal obligation.
- (d) Chile in no sense agreed to or “endorsed” Bolivia’s proposed negotiations to “satisfy the fundamental need of Bolivia to obtain its own sovereign access” to the Pacific Ocean.³⁴⁷ The wording used “*open formally to enter into a direct negotiation aimed at searching for a formula that would make it possible to . . .*” is at most a statement of openness to entering into a negotiation with a more modest aim than Bolivia had proposed. The language used, including in the formulation of the aim of the putative negotiation,

³⁴⁵ Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 9, 20 June 1950, **CCM Annex 144** (emphasis added).

³⁴⁶ Cf. Bolivia’s Memorial, para 363.

³⁴⁷ Cf. Bolivia’s Memorial, para 363.

does not suggest any objective intention to establish an enforceable obligation.³⁴⁸

- (e) Chile would expect to receive non-territorial compensation.
- (f) Peru's position under the Supplementary Protocol to the 1929 Treaty had to be respected.

6.11 As noted in Chapter 4 above, there is an important distinction to be drawn between an intention to create a legal obligation, on the one hand, and a political expression of willingness to act in a particular way, on the other.³⁴⁹ The language employed in Chile's note of 20 June 1950 points only to a political expression of willingness.³⁵⁰ It is not possible to discern from that language any intention to create legal rights and obligations, whether by way of establishing an international agreement in conjunction with the different terms of Bolivia's note of 1 June 1950, or by way of a unilateral declaration. The same applies concerning the context of the two notes.³⁵¹ The notes were made in the context of a series of statements of willingness to negotiate, none of which had been binding in nature. The aim of Chile's note of 20 June 1950 was to stand by and give effect to those prior statements of policy, i.e. by way of proposing formal negotiations. It is correctly seen as one in a series of non-binding documents.

6.12 Nowhere in its Memorial does Bolivia suggest that it responded to Chile's note of 20 June 1950, accepting the form of negotiation that Chile had said it was open to. In such circumstances, it is puzzling that it can even be suggested that an international agreement (a "treaty") was agreed. If State

³⁴⁸ See paras 4.4-4.14 above.

³⁴⁹ See paras 4.3 and 4.6 above.

³⁵⁰ See paras 4.3 and cf. 4.9 above.

³⁵¹ See paras 6.7-6.9 above.

A proposes X, and State B proposes Y, it is self-evident that no international agreement has been reached.

- 6.13 It is likewise puzzling that Bolivia should seek to rely on the statement of Chile's Foreign Minister as reported on 11 July 1950, set out in Bolivia's Memorial as follows:

“Chile has expressed on different occasions, and even at the meeting of the League of Nations, *its willingness to give an ear, in direct contacts with Bolivia*, to proposals from this country aimed at satisfying its aspiration to have its own outlet to the Pacific Ocean.

This traditional policy of our Foreign Ministry in no way diminishes the rights conferred on Chile by the treaties in force.

The current government is consistent with the recalled diplomatic background and, therefore, is *open to enter into conversations with Bolivia* about the referred problem.”³⁵²

- 6.14 A statement that the “policy” of Chile has been “willingness to give an ear” to Bolivia in direct contacts and that, consistent with the past practice, Chile is “open to enter into conversations with Bolivia” can in no sense be interpreted as reflecting a sense of legal obligation.³⁵³ Nor does it

³⁵² Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 645/432, 11 July 1950, **CCM Annex 145** (emphasis added); and see Bolivia's Memorial, para 132.

³⁵³ See para 4.3 above. See to similar effect the statements of Chilean representatives of 19 July and 3 August 1950 reported in the Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 668/444, 19 July 1950, **CCM Annex 146**; and the Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 737/472, 3 August 1950, **CCM Annex 147**, referred to at Bolivia's Memorial, paras 133-134. In the former, Chile's President said “I have never refused to hold conversations on Bolivia's port aspirations”, and later refers to President Herzog of Bolivia reminding him of this “promise”. It may be that Bolivia is seeking to derive something from the use of the word “promise”. If so, it is quite unclear how because there is no sense of legal obligation implied.

somehow reflect an understanding on Chile's part that Chile had made previous commitments in "instruments that were indisputably formal, legally-binding, agreements, namely the 1895 Treaty and the 1920 Act", as is now alleged by Bolivia.³⁵⁴ These instruments were manifestly not "formal, legally-binding, agreements",³⁵⁵ and there is nothing in Chile's note that suggests otherwise.

6.15 The correct position is that, as of June 1950, the potential for negotiations was of importance to the Governments of both States, albeit also a very sensitive matter so far as public opinion was concerned. The two notes had a corresponding importance at the diplomatic level. That does not, however, turn the differing statements of a willingness to negotiate into an international agreement.

6.16 In this respect, there are four further factors:

(a) Bolivia's case that the 1950 notes established a binding agreement is constructed on the misconceived proposition that Chile had prior obligations to negotiate by virtue of the 1895 Transfer Treaty and the 1920 Minutes.³⁵⁶ Once that proposition is recognized as untenable, a central part of Bolivia's legal reasoning falls away i.e. that the notes were allegedly made in the "context of prior agreements to negotiate a sovereign access" (the first of the points on the notes that Bolivia in its Memorial says "bear emphasis"³⁵⁷). Context is important, as discussed in Chapter 4 above, but it points in precisely the opposite direction to that contended for by Bolivia.

³⁵⁴ Cf. Bolivia's Memorial, para 368.

³⁵⁵ As to which see paras 2.4-2.9 and 5.4-5.11 above.

³⁵⁶ Cf. Bolivia's Memorial, paras 364-365 and 367-368.

³⁵⁷ Bolivia's Memorial, para 365; and see also Bolivia's third and fourth points said to "bear emphasis" at paras 367-368.

- (b) According to the Constitution of Bolivia then in force (the 1947 Constitution), one of the functions of Congress was to approve treaties and international agreements of any kind.³⁵⁸ Bolivia did not submit the 1950 notes for such approval, consistently with the absence of any understanding on its part that the notes constituted an agreement.³⁵⁹
- (c) Had there been an obligation to negotiate, Bolivia would have insisted on performance. It did not do so, and never at the time suggested that there was an obligation on Chile. In fact, negotiations never got underway. Had Bolivia considered that there had been a breach of any obligation, it would of course have said so in clear terms in the early 1950s.
- (d) To Chile's surprise, Bolivia did suddenly contend more than a decade later—in 1963—that the notes constituted a “commitment” and suggested that these established “legal rules”.³⁶⁰ That new contention reflected the position of a new Foreign Minister in Bolivia (José Fellman Velarde). It was rejected by Chile in clear terms.³⁶¹ Bolivia's new position was nonetheless reiterated by its

³⁵⁸ See Republic of Bolivia, Political Constitution of 1947, 26 November 1947, **CCM Annex 136**, Article 58(13).

³⁵⁹ Cf. Bolivia's Memorial, para 368, where Bolivia makes the point that the notes “were carefully drafted and published”. That is correct on both counts, but it is not indicative of any intention to establish binding obligations.

³⁶⁰ Speech of the Minister of Foreign Affairs of Bolivia, 3 April 1963, **CCM Annex 165**, pp 60-61. See Letter from the Minister of Foreign Affairs of Bolivia to Conrado Ríos Gallardo, former Minister of Foreign Affairs of Chile, 4 November 1963, **CCM Annex 166**. As recorded in a footnote comment to that letter that Conrado Ríos Gallardo made in 1966: “Mr. Fellman Velarde is the only Minister of Foreign Affairs of his country that has magnified the importance of such documents and attempted to give them the exaggerated rank of diplomatic commitments. His predecessors archived them without comments” (p 51, footnote 7).

³⁶¹ See, for example, Letter from Conrado Ríos Gallardo, former Minister of Foreign Affairs of Chile, to the Minister of Foreign Affairs of Bolivia, 17 November 1963, **CCM Annex 167**, p 54. Also, on 6 February 1964, Conrado Ríos Gallardo, former Chilean Minister of Foreign Affairs, wrote to the Bolivian Minister of Foreign Affairs

President in 1967, in a statement of 8 April 1967 relating to Bolivia's decision not to attend a meeting of Ministers of Foreign Affairs of Latin America to be held at Punta del Este in Uruguay.³⁶² On 29 May 1967, Chile's Minister of Foreign Affairs wrote to the Ministers of Foreign Affairs of Latin America contesting Bolivia's position, and noting that the actual authors of the exchange of notes had clarified that there was no commitment. He stated:

“Negotiations did not even start. Bolivian and Chilean public opinion reacted so violently that Ambassador Ostria and Minister Walker were forced to explain that there had been no commitment and that negotiations had never been opened. This is what President Barrientos calls Chile's ‘commitment’.”³⁶³

expressing surprise at Bolivia's novel position that the exchange of notes of June 1950 constituted an “international pact”. He also noted that Bolivia had not previously attributed that status to the 1950 exchange. See Letter from Conrado Ríos Gallardo, former Minister of Foreign Affairs of Chile, to the Minister of Foreign Affairs of Bolivia, 6 February 1964, **CCM Annex 168**, p 73.

³⁶² Note from the President of Bolivia to the President of the Oriental Republic of Uruguay entitled “Why is Bolivia not present in Punta del Este?”, 8 April 1967, **CCM Annex 170**. This note explained that Bolivia's absence at a summit meeting heads of American States was due to the rejection of Bolivia's proposed agenda item on the issue of Bolivia's landlocked status. As to the 1950 notes, the Bolivian President said (at p 5):

“Finally, in the year 1950, in direct negotiations and through an exchange of notes, Bolivia and Chile sealed an express commitment to ‘searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean, and [for] Chile to obtain compensation of a non-territorial character which effectively takes into account its interests.’ In 1961, the Embassy of Chile in La Paz, through a memorandum addressed to the government of Bolivia, reiterated the 1950 commitment.”

³⁶³ Letter from the Minister of Foreign Affairs of Chile to all Ministers of Foreign Affairs in Latin America, 29 May 1967, **CCM Annex 171**, p 16. See also the footnote comment that Conrado Ríos Gallardo made in 1966 to the Letter from the Minister of Foreign Affairs of Bolivia to Conrado Ríos Gallardo, former Minister of Foreign Affairs of Chile, 4 November 1963, **CCM Annex 166**, p 52, footnote 7: “The extraordinary thing about this case is that this simple exchange of notes was later elevated to a sort of commitment of governments in circumstances where Ambassador

Bolivia did not refute this point, and its failure to do so has probative value. Had Bolivia truly considered there to be an obligation to negotiate, it would have responded accordingly. This was precisely a communication “such as called for some reaction, within a reasonable period, on the part of the [Bolivian] authorities”, to borrow the well-known formulation from the *Temple of Preah Vihear* case.³⁶⁴ In its Memorial, Bolivia says nothing about this 1967 episode.

C. Events subsequent to the June 1950 notes

- 6.17 Bolivia asserts in its Memorial that after the diplomatic correspondence of 1950, and in particular after the end of Chilean President Gonzalez Videla’s term in office in 1952, “no further progress was made in the negotiations”.³⁶⁵ The implication is that failure in the negotiations is to be attributed to a change in Government in Chile. However, the true position is that there were never any negotiations, in part due to hostile political and public opinion to the notes, and in part due to a change of regime in Bolivia in May 1951. Both this new regime and the subsequent Government led by President Víctor Paz Estenssoro that followed in 1952 had different priorities.
- 6.18 In a letter dated 25 September 1950 from Víctor Paz Estenssoro (who became President of Bolivia in 1952) to Siles Suazo (also a future Bolivian President), it was noted:

“As far as we are concerned, the port problem is not among the priority issues Bolivia is facing. The frequent statement that our underdevelopment results from our lack of an outlet to the sea is not just infantile but biased as well, as it seeks

Ostria Gutiérrez himself declared to his country’s press that everything that had happened ‘had not gone beyond the preliminary diplomatic stage’. See also Bolivia’s Memorial, para 135.

³⁶⁴ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Merits)*, I.C.J. Reports 1962, p 23.

³⁶⁵ Bolivia’s Memorial, para 135.

to divert the public attention from the true causes of Bolivia's stagnation. From a national-interest perspective, it is more urgent and convenient for us to focus our capacity, energy and resources on developing the major potential elements, both at the economic and human levels, that Bolivia contains. Thus, over the course of some fifteen or twenty years, we will have turned our Homeland into a nation much more powerful than it is today. . . . We will then be able to approach negotiations with Chile in a peaceful and cordial manner but on an equal footing and for our mutual benefit. Paradoxically, it is not in our best interest to have the port issue immediately resolved but, rather, postpone it to some future point in time."³⁶⁶

- 6.19 In a statement given to the press in January 1953, the Bolivian Minister of Foreign Affairs made clear that consistent with Bolivia's change in position, Bolivia's focus was on obtaining further practical benefits concerning non-sovereign access to the sea:

“Asked if he would raise the claim of the port in his conversations with Olavarría, the Minister Mr. Guevara declared that his Government had no intention to do it as long as the principle of free transit was conveniently solved in favour of Bolivia, as this was of vital importance for his country. He added that it was undoubted that all Bolivians kept the latent aspiration of having a port of their own, but that now there were many and very important problems to be solved within their borders, especially those related to the nationalisation of the mines and the internal economy, which had inflicted severe hardship.”³⁶⁷

- 6.20 As later summarised by Chile in an internal memorandum of March 1964—

³⁶⁶ Letter from Victor Paz Estenssoro to Siles Suazo dated 25 September 1950, published in *El Diario* (Bolivia), 19 June 1964, **CCM Annex 148**.

³⁶⁷ “Bolivia does not wish to raise the problem of the port, but to ensure the free transit of goods to La Paz”, *El Mercurio* (Chile), 25 January 1953, **CCM Annex 149**.

“. . . the Chilean Minister of Foreign Affairs, Mr. Arturo Olavarría, upon his return from a meeting in Arica with the Bolivian Foreign Minister, in late January 1953, stated ‘*that Bolivia had tacitly abandoned its pretensions over a Bolivian port on the coast of Chile*’.

Moreover, during the meeting between Paz Estenssoro and Ibáñez in Arica, in 1955, not even the slightest mention was made of the Bolivian port problem. On top of that, Paz Estenssoro’s private secretary told the Chilean press that he had no interest in bringing up the issue of the sea. (All these statements appear in the Santiago newspapers from that time.) Furthermore, the Minister of the Interior in President Ibáñez’s administration stated: ‘The Bolivian Government has no interest in obtaining a Chilean port, and this is what President Paz Estenssoro himself told me in Arica, adding that Bolivia was solely interested in good relations with Chile’ (‘*La Tercera de la Hora*’, 19 August 1955).

During the entire subsequent administration of the Revolutionary Nationalist Movement, presided over by Hernán Siles Zuazo, the port problem was hardly raised at all.”³⁶⁸

- 6.21 In its Memorial, Bolivia makes no reference at all to its change in position, and instead moves directly from the events of 1950 to the so-called Trucco memorandum of 10 July 1961, discussed below at paragraphs 6.23-6.24.³⁶⁹ It is to be emphasized, however, that the communication of the notes in 1950 constitutes a discrete episode, and there is no basis for any suggestion that, throughout the 1950s, Bolivia was seeking unsuccessfully to negotiate on sovereign access to the sea. It was not.
- 6.22 Instead, Bolivia’s focus shifted to improvements in the regime of access to the sea to which it had agreed in the 1904 Peace Treaty. Between 1951 and 1957, the two States concluded a number of agreements improving the

³⁶⁸ Memorandum by the Ministry of Foreign Affairs of Chile, 20 March 1964, **CCM Annex 169**, pp 5-6 (emphasis added). See also “There is no case on the topic of the port to Bolivia, opines Koch”, *La Tercera de la Hora* (Chile), 19 August 1955, **CCM Annex 152**.

³⁶⁹ Bolivia’s Memorial, paras 135-136.

practical implementation of Bolivia's access to the Pacific. The entitlements granted by Chile to Bolivia concerning Bolivia's access to the sea during this period are described in detail above in Chapter 3, Section B, in particular at paragraphs 3.24, 3.26, 3.28 and 3.34.

- 6.23 In the early 1960s, the Bolivian position shifted again. In 1961, Bolivia was looking to raise the issue of sovereign access to the Pacific in the context of an Inter-American Conference focusing on arms limitation.³⁷⁰ Chile considered that the issue of sovereign access to the sea was being “used again for demagogic purposes”.³⁷¹ In anticipation of the issue being raised at this Inter-American Conference, Chile's Embassy in La Paz drafted in April 1961 an internal memorandum for Chile's Foreign Minister that summarised Chile's position (the *Trucco memorandum*). Ultimately the Conference did not take place, but Chile provided this internal memorandum to Bolivia at a bilateral meeting in July 1961.³⁷²
- 6.24 In the Trucco memorandum, it was recorded that “Chile has always been open, together with safeguarding the de jure situation established in the Treaty of Peace of 1904, to study, in direct dealings with Bolivia, the possibility of satisfying its aspirations and the interests of Chile.”³⁷³ The memorandum emphasized, however, that “Chile will always reject the resort, by Bolivia, to organizations which are not competent to resolve a matter which is already settled by [the 1904] Treaty and could only be

³⁷⁰ Memorandum by the Ministry of Foreign Affairs of Chile, 20 March 1964, **CCM Annex 169**, p 6. See also Bolivia's Memorial, para 136.

³⁷¹ Memorandum by the Ministry of Foreign Affairs of Chile, 20 March 1964, **CCM Annex 169**, p 7.

³⁷² Memorandum of the Chilean Embassy in Bolivia, 10 July 1961, **CCM Annex 158**; and Note from the Chilean Ambassador to Bolivia to the Minister of Foreign Affairs of Chile, 15 February 1962, **CCM Annex 160**, pp 33-35.

³⁷³ Memorandum of the Chilean Embassy in Bolivia, 10 July 1961, **CCM Annex 158**, para 1.

modified by direct agreement of the parties.”³⁷⁴ The memorandum continued:

“Note number 9 of our Ministry of Foreign Affairs, dated in Santiago on 20 June 1950, is a clear testimony of those purposes. Through it, Chile states that it is ‘open formally to enter into a direct negotiation aimed at searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests.’”³⁷⁵

6.25 Bolivia states in its Memorial that documents entitled “memorandum”, “can be legally binding on those that make them if that is the intention that flows from the way in which they have been drafted”,³⁷⁶ but it does not explain how this internal document could create rights for Bolivia. Like Chile’s 1950 note, the formulation used in the 1961 memorandum did not reflect any sense of legal obligation,³⁷⁷ and Bolivia does not even attempt to explain how a stated willingness to engage with it on these issues created a legal obligation to negotiate. Consistent with the principles set out in Chapter 4 above, the memorandum did not create or confirm any legal obligation. Further, while it is correct that Chile handed its internal memorandum to Bolivia, it is likewise correct that it was not an official note, that it was unsigned, and that it only contained an exposition of Chile’s views at that time.³⁷⁸

³⁷⁴ Memorandum of the Chilean Embassy in Bolivia, 10 July 1961, **CCM Annex 158**, para 1.

³⁷⁵ Memorandum of the Chilean Embassy in Bolivia, 10 July 1961, **CCM Annex 158**, para 2.

³⁷⁶ Bolivia’s Memorial, para 372.

³⁷⁷ A reaffirmation of a non-binding document cannot have the effect of creating a legal obligation or any “independent commitment”: see paras 4.10 and 4.13; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, Case No 16, p 38, para 98.

³⁷⁸ See Speech of the Minister of Foreign Affairs of Chile, 27 March 1963, **CCM Annex 164**, p 30-34. Cf. Bolivia’s Memorial, para 138.

6.26 It was more than six months before Bolivia even responded to receipt of the Trucco memorandum. In its note of 9 February 1962, Bolivia understood the memorandum as a reiteration of what had been said by Chile in 1950. It did not then say that Chile's note of 20 June 1950 had established a legally binding obligation to negotiate, and nor did it suggest that the Trucco memorandum had operated to that effect. Bolivia also failed to address the fact that it had not expressed agreement to the proposal of Chile made in June 1950. Nor did it seek to explain the years of silence that had passed. Bolivia merely expressed its consent to "initiate, as soon as possible, direct negotiations aimed at satisfying the fundamental need of the nation for its own and sovereign outlet to the Pacific Ocean",³⁷⁹ appearing somehow to assume that a proposal to that effect (i.e. in essence the proposal made by Bolivia on 1 June 1950) had been made by Chile and was open to be accepted.

6.27 Two months later, on 15 April 1962, Bolivia announced the rupture of diplomatic relations between the two States, citing Chile's use of waters of the River Lauca as the justification.³⁸⁰ It was again the position adopted by Bolivia that brought to an end the possibility of negotiations. Bolivia says in its Memorial that it "conditioned resumption of diplomatic relations upon Chile's compliance [with] its promise to negotiate sovereign access to the sea."³⁸¹ Bolivia did condition resumption of diplomatic relations on whether Chile would "engage in talks" on what Bolivia termed its "port problem",³⁸² but Chile had not made any "promise" to negotiate on sovereign access. Chile's note of 20 June 1950 did not constitute such a

³⁷⁹ Memorandum of the Ministry of Foreign Affairs of Bolivia, No G.M. 9-62/127, 9 February 1962, **CCM Annex 159**, para 4.

³⁸⁰ Minutes of Secret Session 68 of the Chilean Senate, 18 April 1962, **CCM Annex 162**, p 68; and Press release by the Minister of Foreign Affairs of Bolivia, 14 April 1962, in Cable from the Embassy of Chile in Bolivia to the Ministry of Foreign Affairs of Chile, No 133, 15 April 1962, **CCM Annex 161**, p 1.

³⁸¹ Bolivia's Memorial, para 138.

³⁸² Speech of the Minister of Foreign Affairs of Chile, 27 March 1963, **CCM Annex 164**, p 28.

promise, still less a promise to negotiate regardless of Bolivia's changes of position or decision to rupture diplomatic relations.

- 6.28 Consistently with the absence of any obligation to negotiate on sovereign access, Chile's Foreign Minister indicated in a speech of 27 March 1963 that Chile was "not willing to enter into discussions that could affect national sovereignty or involve a cession of territory of any kind" although, as he explained, Chile would "always be willing to consider with Bolivia incidental means to facilitate even more its systems of communication across Chile, not in violation of the Treaty of 1904, but pursuant to that treaty, and all the subsequent agreements that Bolivia has signed with our country."³⁸³
- 6.29 As noted in Section B above, Bolivia much later adopted the position that the 1950 notes constituted a "commitment" and suggested that these established "legal rules".³⁸⁴ Chile refuted Bolivia's subsequent re-characterization of the 1950 notes, and likewise refuted this again when it resurfaced in 1967. As noted in Section B above, Bolivia did not seek to challenge the very public refutation made by Chile in 1967.
- 6.30 Indeed, in its Memorial, Bolivia says nothing at all about the period from 1963 to 1974, although it is an important period as it shows a new

³⁸³ Speech of the Minister of Foreign Affairs of Chile, 27 March 1963, **CCM Annex 164**, pp 28-30. He also recalled (at p 39) that: "Since 1961 we have invited Bolivia to study, jointly, the following measures: 1. Installation of Bolivian customs warehouses and a customs agency in Arica. 2. Construction of the roads from Iquique to Oruro and from Arica to Oruro. 3. Eliminate intermediaries in the dispatch of goods originating in or destined to Bolivia. 4. Establishment of a port tariff that is broadly favourable to Bolivian goods. 5. Facilities for the operation of air navigation companies from both countries." See also Letter from the Acting Ambassador of Chile to the OAS to the Ambassador of Costa Rica to the OAS, 4 March 1963, **CCM Annex 163**, p 2, fifth point.

³⁸⁴ Speech of the Minister of Foreign Affairs of Bolivia, 3 April 1963, **CCM Annex 165**, pp 60-61. See also Letter from the Minister of Foreign Affairs of Bolivia to Conrado Ríos Gallardo, former Minister of Foreign Affairs of Chile, 4 November 1963, **CCM Annex 166**, pp 51-52.

characterization of the 1950 notes being refuted by Chile, followed by a lengthy period of notable silence on the part of Bolivia. Instead, Bolivia skips forward in time to the next alleged “key episode”, the Charaña process.

CHAPTER 7. THE CHARAÑA PROCESS OF 1975 TO 1978

- 7.1 Although in its Memorial Bolivia places great emphasis on the negotiations that took place in 1975-1978 within the Charaña process, this “key episode” merely demonstrates (i) Chile’s negotiation in good faith within what at that time under that Government it considered to be an acceptable political framework, and (ii) Bolivia’s unilateral withdrawal from a political process based on guidelines it had accepted. The Charaña process neither gave rise to, nor confirmed, the existence of any legal obligation.
- 7.2 The relevant facts, in summary, are as follows. Between 1975 and 1978, during the period when both Bolivia and Chile were under military dictatorships, the two States discussed the possibility of an exchange of territories that would allow the grant to Bolivia of sovereignty over territory on the shore of the Pacific Ocean. These discussions followed the Joint Declaration of Charaña of February 1975. They proceeded on the basis of negotiation guidelines proposed by Chile, which indicated that a cession of territory from Chile to Bolivia between the border with Peru and Arica “would be considered”, subject always to Bolivia agreeing to an exchange of territories. The negotiation guidelines, including the requirement of territorial exchange, were expressly accepted by Bolivia, and Bolivia subsequently affirmed, on multiple occasions between 1975 and 1978, that it had done so.
- 7.3 Since the territory that Bolivia might receive as part of this exchange would be at Chile’s northern extremity, it would have been necessary for Peru to agree under the 1929 Supplementary Protocol to the Treaty of Lima. On the basis of Bolivia’s acceptance of the negotiation guidelines, Chile proceeded to consult in good faith with Peru. Peru refused to consent to the proposal made to it and, instead, made its own counter-proposal, which was in turn rejected by both Bolivia and Chile. Chile requested Peru to reconsider, but Peru refused, making clear that acceptance of its own

proposal was a non-negotiable condition for its consent under the 1929 Supplementary Protocol.

7.4 More than a year after the negotiations commenced, Bolivia abruptly changed position and sought to reject the basis of negotiations that it had earlier accepted, namely that in return for receiving territory from Chile, Bolivia would transfer a part of its territory to Chile. Chile reiterated that an exchange of territory remained an essential point. In full understanding of Chile's position, Bolivia continued to negotiate with Chile for more than another year on that basis. However, in March 1978, Bolivia brought the negotiations to an abrupt halt, suspending diplomatic relations. Despite Chile's offers to resume dialogue, Bolivia refused.

7.5 In brief, the Charaña guidelines within which Chile and Bolivia negotiated in the period 1975-1978 did not constitute or reflect any legal obligation to negotiate while, in any event, it was Bolivia, not Chile, that brought the negotiations to an end.

7.6 Bolivia has three central contentions to the contrary.

(a) First, Bolivia says that, "Chile systematically reduced the scope and ambit of what it was prepared to consider during negotiations, contrary to prior agreements that it had made."³⁸⁵ Bolivia contends that this "degradation of the negotiation terms" culminated in the requirement of territorial exchange in the Charaña negotiations.³⁸⁶ The crux of this argument is that the guidelines for negotiation freely adopted by both States were somehow a breach of an alleged prior agreement to negotiate.

³⁸⁵ Bolivia's Memorial, para 409.

³⁸⁶ Bolivia's Memorial, paras 382 and 399. See also paras 425 and 427.

- (b) Second, Bolivia contends that there was a “lack of efforts to obtain Peru’s consent to the territorial cession”,³⁸⁷ and it complains of Chile’s “rejection of the Peruvian proposal of an area under tripartite sovereignty”.³⁸⁸
- (c) Third, it is said that “Chile would not modify its position, including its demand for territorial compensation by Bolivia”,³⁸⁹ and that this resulted in Bolivia terminating the negotiations and severing diplomatic relations in March 1978.

7.7 Chile’s primary answer to these contentions is that there was no legal obligation on Chile before 1975 to negotiate concerning the cession of its territory, and no such obligation was created as a result of the exchanges in the Charaña process. This answer defeats all of Bolivia’s contentions, and is developed in Sections A-B below. In addition, as appears from Sections B-C:

- (a) As to Bolivia’s first contention summarised above, even if there had been a prior and extant obligation to negotiate without territorial exchange as is now alleged, this was superseded by, and therefore cannot have been breached by, the new guidelines for negotiation that were expressly accepted by Bolivia in the Charaña process.
- (b) As to the second contention, there is no evidence of any lack of effort on Chile’s part to secure Peru’s consent, while the proposal that Peru made was rejected *both* by Chile *and* by Bolivia.

³⁸⁷ Bolivia’s Memorial, para 160. See also para 162.

³⁸⁸ Bolivia’s Memorial, para 154.

³⁸⁹ Bolivia’s Memorial, para 427.

- (c) As to the third contention, it is clear that Chile's willingness to engage in negotiations in this period was always conditioned on territorial exchange. Chile was in no sense required to change the basis for negotiation that Bolivia had already accepted simply because Bolivia changed its position.

A. The Joint Declaration of Charaña

- 7.8 On 8 February 1975, General Banzer of Bolivia and General Pinochet of Chile signed a joint declaration in Charaña (the *Joint Declaration of Charaña*), by which they recorded the decision to restore diplomatic relations between Bolivia and Chile.³⁹⁰ They also recorded that they had “resolved to continue the dialogue at various levels, to seek formulae for solving the vital matters that both countries face, such as the landlocked situation that affects Bolivia, taking into account their reciprocal interests and addressing the aspirations of the Bolivian and Chilean peoples.”³⁹¹
- 7.9 Some months later, on 6 August 1975, the Permanent Council of the OAS adopted a resolution on the occasion of the 150th anniversary of Bolivia's independence, which referred *inter alia* to the Joint Declaration of Charaña.³⁹² It noted that Bolivia's landlocked situation was “reason for concern” and stated that “all the American States offer to cooperate in seeking solutions which, in accordance with the principles of International

³⁹⁰ Joint Declaration of Charaña between Chile and Bolivia, 8 February 1975, **CCM Annex 174**, para 6. On 9 December 1974, Bolivia and Chile had participated (with Colombia, Ecuador, Panama, Peru and Venezuela) in the Declaration of Ayacucho. This had referred to “the landlocked situation affecting Bolivia, a situation that must demand the most attentive consideration toward constructive understandings.” See Declaration of Ayacucho, signed at Lima on 9 December 1974, **CCM Annex 173**, p 5.

³⁹¹ Joint Declaration of Charaña between Chile and Bolivia, 8 February 1975, **CCM Annex 174**, para 4.

³⁹² OAS, General Assembly, resolution CP/RES. 157 (169/75), 6 August 1975, **CCM Annex 175**. A partial and unofficial translation of this resolution is included as **BM Annex 190**. The document exhibited to Chile's Counter-Memorial is the full translation issued by the OAS.

Law and, particularly, of the Charter of the [OAS], may help Bolivia to remove the difficulties faced in its economic and social development as a result of its landlocked situation”.³⁹³ On the same day, the Chilean representative to the OAS reiterated “the spirit of the Joint Declaration of Charaña”.³⁹⁴

7.10 Bolivia seeks to found an agreement establishing a legal obligation to negotiate sovereign access to the sea on the Joint Declaration of Charaña, the resolution of the Permanent Council of the OAS and the statement of the Chilean delegate before the OAS. Even from a cursory review of their terms, it is apparent that none of these instruments or statements created or confirmed the existence of a legal obligation to negotiate.

7.11 First, Bolivia claims that by the Joint Declaration of Charaña, “Chile agreed . . . to negotiate a solution to Bolivia’s confinement from the Pacific Ocean.”³⁹⁵ It claims that the Declaration “is binding upon Chile as an international agreement”,³⁹⁶ and that its “binding legal character . . . is evidenced by the fact that it was included in the Treaty Series of the Ministry for Foreign Affairs of Chile”.³⁹⁷

(a) As explained in Chapter 4 above, an agreement or statement may impose a legal obligation only if the parties intend to create rights and obligations governed by international law. Their objective intention to do so is to be gauged from the terms of the instrument.³⁹⁸ By its terms, the Joint Declaration of Charaña

³⁹³ OAS, General Assembly, resolution CP/RES. 157 (169/75), 6 August 1975, **CCM Annex 175**, p 2.

³⁹⁴ Statement of the Chilean Delegate to the OAS, 6 August 1975, reproduced in J. Gumucio Granier, *Bolivia’s maritime confinement in the world’s fora* (1993), **CCM Annex 176**, p 158.

³⁹⁵ Bolivia’s Memorial, para 140. See also para 377.

³⁹⁶ Bolivia’s Memorial, para 376.

³⁹⁷ Bolivia’s Memorial, para 378. See also para 141.

³⁹⁸ See paras 4.6-4.10 and 4.17-4.18 above.

recorded that the two States had “resolved to continue the dialogue at various levels, to seek formulae for solving the vital matters that both countries face, such as the landlocked situation that affects Bolivia, taking into account their reciprocal interests and addressing the aspirations of the Bolivian and Chilean peoples.”³⁹⁹

A record of a decision to continue discussions shows no intention to create a legal obligation to negotiate. Moreover, Bolivia’s “landlocked situation” is one which could be addressed by a variety of means, including by augmentation of Bolivia’s right of access to the sea as established in the 1904 Peace Treaty.

- (b) The inclusion of the Joint Declaration of Charaña in a published collection of Chile’s Ministry of Foreign Affairs does not somehow establish that it was legally binding.⁴⁰⁰ Indeed, that series contains a variety of documents, including Chilean internal documents which are not treaties and do not contain any legal obligations. In any event, the Joint Declaration of Charaña was not ratified or otherwise treated by Chile as a treaty under its domestic law, and there is no evidence that it was ratified or so treated by Bolivia either.

³⁹⁹ Joint Declaration of Charaña between Chile and Bolivia, 8 February 1975, **CCM Annex 174**, para 4.

⁴⁰⁰ See D.P. Myers, “The Names and Scope of Treaties” (1957) 51 *American Journal of International Law*, p 597: “The editing of national collections of treaties is not conclusive evidence that all instruments contained in them are treaties.” See also *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, *I.C.J. Reports 1978*, p 39, para 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 1994*, pp 119-121, paras 20, 23 and 25; and *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, Case No 16, p 36, paras 89-90. This point of principle is confirmed by Bolivia: see Bolivia’s Memorial, para 296, noting that “the question whether an instrument sets forth binding obligations is one of substance, not form”.

(c) Although subsequent unilateral statements given by signatories to an instrument are of limited significance,⁴⁰¹ General Banzer's statement in December 1975 that "the Act of Charaña does not include a categorical commitment by Chile to resolve Bolivia's landlocked situation"⁴⁰² is indicative of the absence of the legal obligation that Bolivia now asserts.

7.12 Second, Bolivia contends that Chile's "commitment to negotiate sovereign access to the sea was further confirmed before the OAS",⁴⁰³ referring to the resolution of 6 August 1975 and to the statement of Chile's delegate to the OAS, described at paragraph 7.9 above.⁴⁰⁴

(a) For the reasons explained in Chapter 8 below,⁴⁰⁵ resolutions of the OAS do not impose legal obligations on member States. In any event the resolution on which Bolivia relies did not refer to, let

⁴⁰¹ See para 4.7 above. As to the particular probative value of statements unfavourable to the State represented by the person making them, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p 41, para 64; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p 201, para 61; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, pp 130-131, para 213 and p 135, para 227. As to the special value of evidence which is contemporaneous with the events concerned, see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p 731, para 244; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, p 71, para 197.

⁴⁰² "Negotiations will be held with Chile on the basis of territorial compensation", *Presencia* (Bolivia), 29 December 1975, **CCM Annex 184**. See also Telex from the Embassy of Chile in Bolivia to the Ministry of Foreign Affairs of Chile, No 416, 21 December 1975, **CCM Annex 182**, reproducing a statement of General Banzer that the Charaña meeting was "a practical way to foster dialogue and direct negotiation".

⁴⁰³ Bolivia's Memorial, para 142.

⁴⁰⁴ Bolivia's Memorial, paras 142-143.

⁴⁰⁵ See paras 8.18-8.22 below. See also Charter of the Organization of American States (as amended), signed at Bogotá on 30 April 1948 (entry into force 13 December 1951), 119 *UNTS* 3, Articles 80-92.

alone confirm, any “commitment to negotiate sovereign access to the sea”.⁴⁰⁶ Instead, its terms refer to cooperating in “seeking solutions” that “may help Bolivia to remove the difficulties faced in its economic and social development as a result of its landlocked situation” in the context of reciprocal interests.⁴⁰⁷

(b) Bolivia’s additional assertion that the resolution establishes that the OAS, and Chile, “understood . . . that Bolivia’s right of sovereign access to the sea was ‘in accordance with the principles of international law’”⁴⁰⁸ is not supported by the terms of the resolution. The resolution nowhere mentions any Bolivian “right”, much less asserts that such a “right” is “in accordance with the principles of international law”.

7.13 Finally, the Chilean delegate’s statement that he “reiterates the spirit of the Joint Declaration of Charaña”⁴⁰⁹ is not a reaffirmation of a legal obligation to negotiate. The reiteration of a statement that is not legally binding does not by repetition make it binding.⁴¹⁰ Nor did the Chilean delegate express any understanding that Bolivia had a right to negotiate on sovereign access to the sea.⁴¹¹ The statement also fails to meet the stringent test applied by the Court to establish binding legal obligations through unilateral declarations.⁴¹² At most it was a political statement, reflecting a general

⁴⁰⁶ Cf. Bolivia’s Memorial, para 142.

⁴⁰⁷ Statement of the Chilean Delegate to the OAS, 6 August 1975, reproduced in J. Gumucio Granier, *Bolivia’s maritime confinement in the world’s fora* (1993), **CCM Annex 176**, p 158.

⁴⁰⁸ Bolivia’s Memorial, para 143.

⁴⁰⁹ Statement of the Chilean Delegate to the OAS, 6 August 1975, reproduced in J. Gumucio Granier, *Bolivia’s maritime confinement in the world’s fora* (1993), **CCM Annex 176**, p 158.

⁴¹⁰ See also *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, *Judgment*, *ITLOS Reports 2012*, Case No 16, discussed at paras 4.10 and 4.13 above.

⁴¹¹ Cf. Bolivia’s Memorial, para 143.

⁴¹² See para 4.20 above.

concern to aid Bolivia's development and address the particular obstacles it faced on account of being landlocked.

B. Adoption of guidelines for negotiation, August-December 1975

7.14 In pursuance of the "dialogue" referred to in the Joint Declaration of Charaña, Bolivia and Chile settled on "guidelines for a negotiation". Bolivia first proposed such guidelines on 26 August 1975.⁴¹³

(a) These proposed guidelines provided for: "[c]ession to Bolivia of a sovereign maritime coast" between Concordia (i.e. the border with Peru) and Arica,⁴¹⁴ together with the cession of "sovereign territory of 50 kilometres in extension along the coast and 15 kilometres of depth", in an area to be determined,⁴¹⁵ and to be connected to Bolivia's existing territory.⁴¹⁶ Bolivia's proposed guidelines expressly stated that: "The Government of Bolivia will be willing to consider, as a fundamental matter of the negotiation, the contributions that may correspond, as an integral part of an understanding that takes into account reciprocal interests."⁴¹⁷ Bolivia left open what form that compensation would take.

(b) The proposed guidelines made no reference to the 1950 notes. There was no hint of the existence of, or any breach of, a prior legal obligation to negotiate. Had Bolivia considered there to be

⁴¹³ Aide Mémoire from the Bolivian Embassy in Chile to the Ministry of Foreign Affairs of Chile, 26 August 1975, **CCM Annex 177**.

⁴¹⁴ Aide Mémoire from the Bolivian Embassy in Chile to the Ministry of Foreign Affairs of Chile, 26 August 1975, **CCM Annex 177**, para 2.

⁴¹⁵ Aide Mémoire from the Bolivian Embassy in Chile to the Ministry of Foreign Affairs of Chile, 26 August 1975, **CCM Annex 177**, para 4.

⁴¹⁶ Aide Mémoire from the Bolivian Embassy in Chile to the Ministry of Foreign Affairs of Chile, 26 August 1975, **CCM Annex 177**, para 5.

⁴¹⁷ Aide Mémoire from the Bolivian Embassy in Chile to the Ministry of Foreign Affairs of Chile, 26 August 1975, **CCM Annex 177**, para 7.

such an obligation, it would of course have stated this in some form.

7.15 Chile's counter-proposal for guidelines for the negotiations was conveyed to Bolivia in writing on 19 December 1975.⁴¹⁸ The content of this counter-proposal had been conveyed orally in early December, and was accepted by Bolivia at that time, as Bolivia confirmed on 16 December 1975.⁴¹⁹

7.16 The Chilean counter-proposal is of central importance to the exchanges that followed because it was accepted by Bolivia as the basis for the negotiations. Like Bolivia's proposal, Chile's counter-proposal made no reference to the 1950 notes. Again, there was no hint of any obligation to negotiate arising from the 1950 notes (or any earlier event) or of any breach thereof. The key elements of Chile's proposed guidelines for a "mutually convenient solution" were as follows:

"4. As Your Excellency has requested, I reiterate in the present note the terms on which my Government desires to respond to the guidelines for a negotiation aimed at reaching a mutually convenient solution, subject to the following:

- a) This response expresses what His Excellency President Banzer stated in order to consider the current reality without reviving historical antecedents.
- b) On this basis, the Chilean response is based on a mutually convenient arrangement that would take into account the interests of both countries and that would not contain any innovation to the provisions of the Treaty of Peace, Amity, and Commerce signed between Chile and Bolivia on 20 October 1904.

⁴¹⁸ Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**.

⁴¹⁹ Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Chile, No 681/108/75, 16 December 1975, **CCM Annex 178**.

- c) As His Excellency President Banzer stated, the cession to Bolivia of a sovereign maritime coastline, linked to Bolivian territory through an equally sovereign territorial strip, would be considered.
- d) Chile would be willing to negotiate with Bolivia the cession of a strip of territory north of Arica up to the Concordia Line based on the following delimitations:
- North Boundary: Chile's current boundary with Peru.
 - South Boundary: Gallinazos ravine and the upper edge of the ravine north of the River Lluta, (so that the A-15 highway from Arica to Tambo Quemado would in its entirety be part of Chilean territory) up until a point to the South of Puquios Station, and then an approximately straight line passing through contour 5370 of Cerra Nasahuento and extending to the current international boundary between Chile and Bolivia.
 - Area: the cession would include the land territory described above and the maritime territory comprised between the parallels of the end points of the coast that would be ceded (territorial sea, economical zone, and submarine shelf).
- e) The Government of Chile rejects, for being unacceptable, the cession of territory to the south of the indicated limit, that could affect in any way the territorial continuity of the country.
- f) The cession to Bolivia described in section d) would be subject to a simultaneous exchange of territories, that is to say, Chile would at the same time receive in exchange for what it hands over a compensatory area at least equal to the area of land and sea ceded to Bolivia.

...

...

- l) Once the final agreement has been reached, a solemn testimony will be made mentioning that the territorial cession that permits the sovereign access to the sea represents the full and definite solution to the landlocked situation of Bolivia.
- m) Bolivia shall commit to respect the easements in favor of Peru established in the Chilean-Peruvian Treaty of 3 June 1929.
- n) The force of this agreement shall be conditioned upon Peru's prior agreement in accordance with Article 1° of the Supplementary Protocol to the aforementioned Treaty.⁴²⁰

7.17 The core of the proposal was thus at paragraph 4(c) —a cession of coastal territory from Chile to Bolivia “would be considered”. That the Chilean territory subject to this proposal would be in the province of Arica meant that the consent of Peru under the 1929 Supplementary Protocol to the Treaty of Lima was potentially relevant, and this was stated in clear terms.⁴²¹

7.18 By reference to the legal principles outlined in Chapter 4 above, the guidelines did not confirm or create any legal obligation.

⁴²⁰ Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**, para 4.

⁴²¹ Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**, para 5.

In its Memorial, Bolivia produces a sketch of the Chilean proposal for illustrative purposes (see Bolivia's Memorial, Figure VI). For the avoidance of doubt, Chile does not accept that the new Bolivian sketch, which is on a very small scale, depicts Chile's proposal accurately. For example, it is inaccurate in that the segment shown between the Lluta River and the Chile-Bolivia boundary does not reflect the description in Chile's proposal, and at the coast the location of the Gallinazos Ravine is not identified correctly.

- (a) For the reasons already explained,⁴²² none of the Joint Declaration of Charaña,⁴²³ the resolution of the Permanent Council of the OAS,⁴²⁴ or the statement of the Chilean representative to the OAS upon the adoption of that resolution⁴²⁵ created or confirmed any obligation to negotiate a sovereign access to the sea for Bolivia. It follows that there is no basis to contend that the guidelines “reconfirmed” any legal obligation to negotiate that was created during the process commencing with the Joint Declaration of Charaña.⁴²⁶
- (b) The actual terms of the guidelines, and the circumstances in which they were drawn up, do not indicate that Bolivia and Chile intended to assume any legal obligation. To the contrary, they indicate that the two States intended to make political expressions of willingness, in the context of diplomatic discussions, without assuming any legal obligation.⁴²⁷
- (i) The guidelines stated that cession of territory to Bolivia “would be considered”.⁴²⁸ That is a political statement, as one would expect in the context of bilateral diplomatic negotiations involving a multitude of considerations, and the sensitive matter of sovereignty over territory, and

⁴²² See paras 7.11-7.13 above.

⁴²³ Joint Declaration of Charaña between Chile and Bolivia, 8 February 1975, **CCM Annex 174**.

⁴²⁴ Organization of American States, General Assembly, resolution CP/RES. 157 (169/75), 6 August 1975, **CCM Annex 175**.

⁴²⁵ Statement of the Chilean Delegate to the OAS, 6 August 1975, reproduced in J. Gumucio Granier, *Bolivia's maritime confinement in the world's fora* (1993), **CCM Annex 176**.

⁴²⁶ Cf. Bolivia's Memorial, para 379.

⁴²⁷ See para 7.16 above.

⁴²⁸ Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**, para 4(c).

where there was express concern to preserve each State's interests.⁴²⁹

- (ii) As to the circumstances in which the guidelines were drawn up,⁴³⁰ their immediate context was a bilateral discussion contemplating diplomatic negotiations between States involving issues of sovereignty over territory. Absent precise language denoting a legal obligation (and here there is none), that context does not suggest that Bolivia and Chile assumed any legal obligation.

7.19 Even if it were somehow possible to discern a legal obligation to negotiate in these guidelines, it would not be the entirely open-ended and enduring obligation on which Bolivia's case relies. Chile was seeking to establish "guidelines for a negotiation",⁴³¹ i.e. a negotiation to be carried out at a specific point in time by reference to specific guidelines. If that negotiation were to fail, there could be no continuing obligation to negotiate, and no language was used in the guidelines that could be interpreted as establishing any intention to the contrary.

7.20 Bolivia immediately confirmed that it accepted Chile's guidelines for the negotiation as constituting "an acceptable global basis for negotiations."⁴³²

⁴²⁹ Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**, para 4(b). See also paras 7.16-7.17 above.

⁴³⁰ See paras 7.14-7.17 above.

⁴³¹ Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**, para 4.

⁴³² Message of President Banzer announcing that Chile's Reply (19 December 1975) constitutes a globally acceptable basis for negotiations, 21 December 1975, reproduced in L.F. Guachalla, *Bolivia-Chile: The Maritime Negotiation, 1975-1978* (1982), **CCM Annex 181**, p 85. See also Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Chile, No 681/108/75, 16 December 1975, **CCM Annex 178**.

Over the following months, Bolivia repeatedly reaffirmed its acceptance of these guidelines, including the condition of territorial exchange.

- (a) On 21 December 1975, General Banzer of Bolivia stated that the Chilean counter-proposal “constitutes an acceptable global basis for negotiations.”⁴³³ He said further that the condition of territorial exchange was “expected” and that Bolivia was “responsibly considering this proposal”.⁴³⁴
- (b) On 28 December 1975, General Banzer stated that the requirement of territorial exchange was part of the “fundamental basis” of the negotiations, that “any government will request an exchange of territories” and, to similar effect, that “the most logical thing is that it requests an exchange of territories”.⁴³⁵
- (c) On 31 December 1975, the Bolivian Foreign Minister indicated that Bolivia considered territorial compensation to be suitable and

⁴³³ Message of President Banzer announcing that Chile’s Reply (19 December 1975) constitutes a globally acceptable basis for negotiations, 21 December 1975, reproduced in L.F. Guachalla, *Bolivia-Chile: The Maritime Negotiation, 1975-1978* (1982), **CCM Annex 181**, p 85.

⁴³⁴ Message of President Banzer announcing that Chile’s Reply (19 December 1975) constitutes a globally acceptable basis for negotiations, 21 December 1975, reproduced in L.F. Guachalla, *Bolivia-Chile: The Maritime Negotiation, 1975-1978* (1982), **CCM Annex 181**, p 85. See also Message of President Banzer, 21 December 1975, in “Government ‘globally’ accepts Chilean response”, *Los Tiempos* (Bolivia), 22 December 1975, **CCM Annex 183**.

⁴³⁵ “Negotiations will be held with Chile on the basis of territorial compensation”, *Presencia* (Bolivia), 29 December 1975, **CCM Annex 184**, paras 6 and 9. He also stated that “if I put myself in the Chilean government’s position, I can only emphasize that no government would accept as a basis” non-territorial compensation (para 6). The following day, President Banzer affirmed that non-territorial compensation “would not be appropriate”: “Banzer: It will be the people who decide on the agreement with Chile”, *Presencia* (Bolivia), 30 December 1975, **CCM Annex 185**, para 6.

would propose the area to be exchanged, based on “studies by technical committees that are already underway”.⁴³⁶

- (d) On 5 January 1976, in its instruction to the Bolivian mission in Chile (published by Bolivia as a press release), Bolivia confirmed that the Chilean counter-proposal “constitutes an acceptable global basis for negotiations”. Bolivia’s “acceptance” of the condition of territorial exchange was said to be subject only “to a clarification of the maritime area, in view of the fact that the extension of internal waters, territorial sea and patrimonial sea has not yet been defined by the International Community.” It also stated that it “reserves the right to negotiate the areas that might be potentially exchanged.”⁴³⁷
- (e) In early March 1976, after a meeting of the Bolivian National Maritime Council,⁴³⁸ Bolivia’s Foreign Minister said that: “We have categorically declared that we accept global bases of negotiation that take into account the reciprocal interests of our two

⁴³⁶ “Foreign Minister Guzmán Soriano: We will give compensation that does not compromise our development”, *Presencia* (Bolivia), 1 January 1976, **CCM Annex 187**, p 2. As to the relevant studies, see Aerogram from the Chilean Embassy in Bolivia to the Ministry of Foreign Affairs of Chile, No 35, 5 April 1976, **CCM Annex 199**, paras 1-4.

⁴³⁷ Communiqué from the Bolivian Ministry of Foreign Affairs on the Charaña Negotiations, 5 January 1976, **CPO Annex 54**, paras 3, 5 and 10. The same statements were reproduced in instructions published on 16 January 1976: see Instructions from the Bolivian Ministry of Foreign Affairs to the Bolivian Ambassador to Chile, published in *Presencia* (Bolivia) on 16 January 1976, and reproduced in Ministry of Foreign Affairs of Chile, *History of the Chilean-Bolivian Negotiations 1975-1978* (1978), **CCM Annex 189**, p 13, paras 3 and 4.

⁴³⁸ The Bolivian National Maritime Council was the agency charged with analysing Chile’s proposal of December 1975 “having regard to its fundamental aspects and to all other respects, in order to count on a suitable baseline opinion in subsequent negotiations with Chile”: Bolivian Supreme Decree No 13301, 7 January 1976, **CCM Annex 188**, Preamble; and see also Article 3. The Council commissioned studies to identify the areas to be exchanged with Chile: see Aerogram from the Chilean Embassy in Bolivia to the Ministry of Foreign Affairs of Chile, No 35, 5 April 1976, **CCM Annex 199**, paras 1-3.

countries”, while noting that “our Government has not accepted” three points: (i) whether the maritime zone to be generated by the coastline to be ceded to Bolivia would be counted for the purpose of determining the size of the territory to be ceded by Bolivia to Chile in exchange; (ii) the proposed demilitarization of the territory to be ceded by Chile to Bolivia; and (iii) Chile’s use of the waters of the Lauca River.⁴³⁹

7.21 In its Memorial, Bolivia acknowledges that it “accepted the ‘general terms’” of Chile’s counter-proposal as the basis for negotiations,⁴⁴⁰ but it omits to mention that it specifically accepted the particular condition of territorial exchange. That is a telling attempt to change history. As soon as it becomes clear that Bolivia accepted negotiation on the basis of a territorial exchange, Bolivia’s case on degradation of the negotiation terms⁴⁴¹ falls away.

7.22 In this respect, Bolivia contends that the 1950 notes and the Charaña process *each* gave rise to an obligation to negotiate. If Bolivia were correct on both points (it is not correct on either), then any later obligation undertaken in the Charaña process would have necessarily replaced and terminated any earlier obligation arising out of the 1950 exchange of notes. This is because the two obligations would concern the same subject

⁴³⁹ “Bolivia has not assumed definitive commitments with the Chilean Government”, *El Diario* (Bolivia), 11 March 1976, **CCM Annex 195**. See also “Chile’s Ministry of Foreign Affairs: There is no deterioration in the negotiations over Bolivia’s outlet to the sea”, *Presencia* (Bolivia), 13 March 1976, **CCM Annex 196**. The statement of the Bolivian Minister for Foreign Affairs was reproduced in Telex from the Embassy of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 11 March 1976, **CCM Annex 194**. It was also subsequently confirmed by the former Bolivian Ambassador, Guillermo Gutiérrez Veá Murguía: see extract of G. Gutiérrez Veá Murguía, *Diplomatic Negotiations with Chile (1975)*, quoted in R. Prudencio Lizón, *History of the Charaña Negotiation* (2011), **CCM Annex 350**, p 360.

⁴⁴⁰ Bolivia’s Memorial, para 149.

⁴⁴¹ Bolivia’s Memorial, para 382. See also paras 425 and 427.

matter and would be inconsistent.⁴⁴² The proposal for potential negotiations suggested in Chile's 1950 note was on the basis that Chile would "obtain compensation of a non-territorial character",⁴⁴³ whereas the Charaña process was conditioned on compensation for Chile in the form of an exchange of territories.⁴⁴⁴

7.23 There is also an obvious flaw in Bolivia's position that the two States entered into an "agreement"⁴⁴⁵ and "reconfirmed their commitment to negotiate a sovereign access to the sea for Bolivia",⁴⁴⁶ whilst contending at the same time that the actual terms of the Charaña guidelines breached a pre-existing obligation to negotiate on different terms.⁴⁴⁷ Those are logically inconsistent positions and serve only to highlight the artificiality of Bolivia's claim that Chile was or is subject to any legal obligation to negotiate.

⁴⁴² This is consistent with the principle reflected in Article 59 of the Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969 (entry into force 27 January 1980), 1155 *UNTS* 331 ("Termination or suspension of the operation of a treaty implied by conclusion of a later treaty"). See, for example, Separate Opinion of Judge Anzilotti, *The Electricity Company of Sofia and Bulgaria, Preliminary Objection, Judgment, 1939, P.C.I.J., Series A/B, No 77*, pp 91-92 ("The Treaty being of later date than the Declarations, it is in the text of the former that we must seek the intention of the Parties in regard to rules previously in force. . . . [I]t is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions"); and *Mavrommatis Palestine Concessions, Judgment No 2, 1924, PCIJ, Series A, No 2*, p 31 ("in cases of doubt, the Protocol, being a special and more recent agreement, should prevail").

⁴⁴³ Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 9, 20 June 1950, **CCM Annex 144**, p 2.

⁴⁴⁴ Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**, para 4(f). See also paras 7.20 above and 7.26 below.

⁴⁴⁵ Bolivia's Memorial, para 379.

⁴⁴⁶ Bolivia's Memorial, para 379. See also para 391, where Bolivia asserts that the two States "reiterated" the commitment to negotiate from 1950 in the 1975 Joint Declaration of Charaña.

⁴⁴⁷ Bolivia's Memorial, para 382.

7.24 As part of its claim that “Chile systematically reduced the scope and ambit of what it was prepared to consider during negotiations, contrary to prior agreements that it had made”,⁴⁴⁸ Bolivia also argues that the 1929 Supplementary Protocol “resulted in the creation of a new condition” and that “Chile deliberately impeded its own ability to fulfil the promises made to Bolivia.”⁴⁴⁹ This contention is thus premised on the existence of a “prior agreement” at the time when the 1929 Supplementary Protocol was concluded. There was no such agreement. The 1895 Transfer Treaty never entered into force;⁴⁵⁰ the 1920 Minutes stated in terms that they did “not contain provisions that create rights or obligations for the States whose representatives make them”;⁴⁵¹ and the Matte memorandum did not create or confirm any legal obligation.⁴⁵² Moreover, in 1950 as well as in the Charaña process, Chile specifically identified Peru’s role as a relevant consideration,⁴⁵³ and met with no objection from Bolivia.

7.25 Against this backdrop, Chile now turns to the relevant facts concerning the negotiations that took place subsequent to formulation of the guidelines.

C. Negotiations between Bolivia and Chile, and consultation with Peru

1. Bolivia confirmed its acceptance of the condition of an exchange of territories

7.26 Consistently with the guidelines, throughout 1976, Bolivia repeatedly affirmed that it accepted that its transferring territory to Chile was a condition of any transfer from Chile to Bolivia. In order to identify areas that could be exchanged, in early 1976 Chile proposed to Bolivia that the

⁴⁴⁸ Bolivia’s Memorial, para 409.

⁴⁴⁹ Bolivia’s Memorial, para 419. See also para 154.

⁴⁵⁰ See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 24 September 2015, I.C.J. General List No. 153, p 9, para 16; and paras 2.4-2.9 above.

⁴⁵¹ Minutes of 10 January 1920, CCM Annex 118, p 9. See para 5.5 above.

⁴⁵² See paras 5.34-5.36 above.

⁴⁵³ See paras 6.9 and 7.16 above.

two States grant relevant powers to a bilateral commission,⁴⁵⁴ and the two States agreed in August 1976 to establish a mixed permanent commission.⁴⁵⁵ That commission was established on 18 November 1976,⁴⁵⁶ and Bolivia's Ambassador to Chile recorded that: "In the short term, this commission was expected to identify the area that Bolivia would transfer to Chile in exchange for the corridor at the north of Arica."⁴⁵⁷ Throughout the period in which the bilateral commission was being established and tasked, Bolivia continued to confirm that it accepted the condition of territorial exchange. For example:

- (a) In August 1976, Bolivia's Ambassador to Chile stated that Bolivia "is prepared for kilometre-for-kilometre exchange" (without including the maritime space in the area to be exchanged).⁴⁵⁸

⁴⁵⁴ Chile proposed to revive a joint commission established in 1942: see Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 4086, 11 March 1976, **CCM Annex 193**.

⁴⁵⁵ Agreement establishing a Permanent Mixed Commission, agreed by exchange of Notes No 12683 of 28 July 1976 and No 669/72/76 of 11 August 1976, **CCM Annex 202**.

⁴⁵⁶ Final Minutes of the Inaugural Meeting of the Bolivian-Chilean Permanent Mixed Commission, 19 November 1976, **CCM Annex 208**.

⁴⁵⁷ A. Violand Alcázar, *Sovereign Return to the Sea: A Frustrated Negotiation* (2004), **CCM Annex 328**, p 211. Bolivia subsequently requested that the meeting of the mixed permanent commission be postponed indefinitely: see Letter from the Chilean Ambassador to Bolivia to the Minister of Foreign Affairs of Chile, No 187/40, 14 April 1977, **CCM Annex 219**. See also Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**, para 4(f).

⁴⁵⁸ Memorandum of Meeting between the Minister of Foreign Affairs of Chile and the Bolivian Ambassador to Chile, 16 August 1976, attached to a Note from the Chilean Minister of Foreign Affairs to the Chilean Ambassador to Bolivia, No 59, 19 August 1976, **CCM Annex 203**, para VI. See also the statement of the Commander in Chief of the Armed Force of Bolivia, 15 September 1976, reproduced in Letter from the Chilean Ambassador to Bolivia to the Minister of Foreign Affairs of Chile, No 571/148, 28 September 1977, **CCM Annex 228**, para 7; and referred to in "Bolivia will offer Chile a strip of land in the Department of La Paz", *El Mercurio* (Chile), 26 September 1976, **CCM Annex 205**.

(b) In September 1976, Bolivia's Foreign Minister confirmed that "Bolivia would be willing if the arrangement is satisfactory to transfer certain areas to receive other equivalent ones that allow our country to return with sovereignty to the sea",⁴⁵⁹ and confirmed that the Bolivian National Maritime Council was studying the areas to be proposed to Chile for the exchange.⁴⁶⁰

7.27 In parallel, and on the basis that Bolivia had accepted the condition of territorial exchange, Chile was consulting with Peru pursuant to the 1929 Treaty of Lima and its Supplementary Protocol.

2. Consultations with Peru pursuant to the 1929 Treaty of Lima

7.28 As was foreseen in Chile's counter-proposal for guidelines for negotiation,⁴⁶¹ on 19 December 1975, Chile wrote to Peru and asked if it agreed with "the cession requested by Bolivia".⁴⁶²

⁴⁵⁹ Published in *El Diario* (Bolivia) on 19 September 1976 and transcribed in Telex from the Chilean Embassy in Bolivia to the Ministry of Foreign Affairs of Chile, No 500, 20 September 1976, **CCM Annex 204**.

⁴⁶⁰ Statement of the Foreign Minister of Bolivia, 19 September 1976, published in *El Diario* (Bolivia) and transcribed in Letter from the Chilean Ambassador to Bolivia to the Minister of Foreign Affairs of Chile, No 571/148, 28 September 1977, **CCM Annex 228**, para 8. See also "Bolivia will offer Chile a strip of land in the Department of La Paz", *El Mercurio* (Chile), 26 September 1976, **CCM Annex 205**; and "Declaration of the National Maritime Council (Official Agency Created by Supreme Decree of 7 February 1976) expressing its full support for the plans for a corridor north of Arica and an exchange of equivalent territory", *Presencia* (Bolivia), 31 October 1976, **CCM Annex 206**, especially paras 7-9.

⁴⁶¹ See Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**, para 5.

⁴⁶² Note from the Minister of Foreign Affairs of Chile to the Minister of Foreign Affairs of Peru, No 685, 19 December 1975, **CCM Annex 179**. On 31 December, Peru requested copies of the two States' exchanges and Chile provided these: see Note from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile, No 6-Y/120, 31 December 1975, **CCM Annex 186**; and Note from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile, No 6-Y/1, 29 January 1976, **CCM Annex 190**.

- 7.29 In January 1976 Peru proposed talks with Chile to address issues that might arise from such a cession.⁴⁶³ Chile agreed,⁴⁶⁴ and a first round of discussions was held in Lima in April,⁴⁶⁵ with a second round in Santiago in early July.⁴⁶⁶
- 7.30 On 18 November 1976, Peru made its own proposal to Chile, which was fundamentally different from that contemplated by the guidelines for negotiations adopted by Bolivia and Chile.⁴⁶⁷ On the same day, Peru also provided its proposal to Bolivia.⁴⁶⁸ Peru sought to acquire rights of its own in areas that were agreed in the 1929 Treaty of Lima to be Chilean. Peru proposed to place part of Chile's coastal territory under the shared sovereignty of Chile, Bolivia and Peru,⁴⁶⁹ and sought to place the Chilean

⁴⁶³ Note from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile, No 6-Y/1, 29 January 1976, **CCM Annex 190**.

⁴⁶⁴ See Note from the Minister of Foreign Affairs of Chile to the Minister of Foreign Affairs of Peru, No 88, 17 February 1976, **CCM Annex 191**; Note from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile, No 6-Y/2, 3 March 1976, **CCM Annex 192**; Note from the Minister of Foreign Affairs of Chile to the Minister of Foreign Affairs of Peru, No 4378, 18 March 1976, **CCM Annex 197**; and Note from the Minister of Foreign Affairs of Peru to the Minister of Foreign Affairs of Chile, No 6-Y/3, 31 March 1976, **CCM Annex 198**.

⁴⁶⁵ Joint Peruvian-Chilean Press Release, 23 April 1976, **CCM Annex 200**.

⁴⁶⁶ Joint Peruvian-Chilean Press Release, 9 July 1976, **CCM Annex 201**. In those two rounds of discussions, Chile's representatives provided additional information to Peru and the two States discussed legal and technical aspects of the proposal: see Report of Enrique Bernstein Carabantes and Julio Philippi Izquierdo, Representatives of Chile, to the Minister of Foreign Affairs of Chile, 24 November 1976, **CCM Annex 210**, para 4.

⁴⁶⁷ Official Communiqué of the Ministry of Foreign Affairs of Peru, No 30-76, 18 November 1976, **CCM Annex 207**. Peru gave no prior indication to Chile of its proposal and confirmed that it had not discussed it during the two rounds of bilateral talks that were held in April and July 1976: see "Complete version of the Explanations by the Peruvian Minister of Foreign Affairs José de la Puente", *El Mercurio* (Chile), 26 November 1976, **CCM Annex 213** ("Journalist: Did the possibility of this international zone you are now proposing come up in the round of talks? Minister: No. No formula was discussed during the talks. The formula was conceived later").

⁴⁶⁸ See "Complete version of the Explanations by the Peruvian Minister of Foreign Affairs José de la Puente", *El Mercurio* (Chile), 26 November 1976, **CCM Annex 213**.

⁴⁶⁹ Official Communiqué of the Ministry of Foreign Affairs of Peru, No 30-76, 18 November 1976, **CCM Annex 207**, para 6(b). Peru proposed that Bolivia have

port of Arica under joint administration by the three States.⁴⁷⁰ Under Peru's proposal, Bolivia would not have had its own territorial connection to the coast, because the coastal territory would have been shared between the three States.⁴⁷¹

- 7.31 On 22 November 1976, the Special Envoy of Chile and General Banzer of Bolivia met to discuss Peru's proposal and to agree on a response. At that meeting, General Banzer said that "he rejected the Peruvian proposal and understood perfectly Chile's position against the Peruvian proposal."⁴⁷² General Banzer further confirmed that Chile had acted in good faith, indicating that "if negotiations failed, he would publicly acknowledge

exclusive sovereignty in the maritime area adjacent to the area under shared sovereignty: Official Communiqué of the Ministry of Foreign Affairs of Peru, No 30-76, 18 November 1976, **CCM Annex 207**, para 7(c).

⁴⁷⁰ Official Communiqué of the Ministry of Foreign Affairs of Peru, No 30-76, 18 November 1976, **CCM Annex 207**, para 7(a). The Communiqué as published in a Peruvian report included an illustrative sketch of Peru's proposal. This sketch appears to have been created for the purposes of the published report and not to have been provided by Peru to either Chile or Bolivia with its Communiqué.

In its Memorial, Bolivia produces a new sketch purporting to show the Peruvian proposal for illustrative purposes (see Bolivia's Memorial, Figure VII). For the avoidance of doubt, Chile does not accept that the new Bolivian sketch, which is on a very small scale, depicts Peru's proposal accurately. For example, the depiction of the proposed "territory under shared sovereignty Peru-Bolivia-Chile" is inaccurate because it is shown as extending to the east of the Pan-American Highway and its southern limit does not correspond to the northern limit of the city of Arica in 1976. In addition, the width of the proposed "Bolivian corridor" was not specified in Peru's proposal and the basis upon which Bolivia has depicted it in its new sketch is not explained.

⁴⁷¹ See further explanation in Report of Enrique Bernstein Carabantes and Julio Philippi Izquierdo, Representatives of Chile, to the Minister of Foreign Affairs of Chile, 24 November 1976, **CCM Annex 210**, paras 6-9.

⁴⁷² Report of Ministry of Foreign Affairs of Chile on the meetings held by G. Amunategui, Special Envoy of the President of the Republic of Chile, and President Banzer of Bolivia, 22 November 1976, **CCM Annex 209**.

Chile's positive attitude" and "would start discussing alternative options with Chile with a realistic approach."⁴⁷³

- 7.32 On 26 November 1976, Chile responded to Peru's proposal, noting that it did not correspond to the guidelines for negotiation adopted by Chile and Bolivia, and that it was inconsistent with the 1929 Treaty of Lima.⁴⁷⁴ Consistently with what had been discussed and agreed with Bolivia on 22 November, Chile rejected Peru's proposal and asked that Peru respond to the proposal that Chile had sent to Peru on 19 December 1975.⁴⁷⁵
- 7.33 Peru never sent an official reply to Chile's letter of 26 November 1976, although its Foreign Minister publicly defended its proposal as one that "protects the high interests of the Peruvian nation",⁴⁷⁶ arguing that Peru had responded to Chile's letter⁴⁷⁷ by making its own proposal "to protect its legitimate interests",⁴⁷⁸ and emphasizing that its consent to the cession

⁴⁷³ Report of Ministry of Foreign Affairs of Chile on the meetings held by G. Amunategui, Special Envoy of the President of the Republic of Chile, and President Banzer of Bolivia, 22 November 1976, **CCM Annex 209**.

⁴⁷⁴ Memorandum of the Ministry of Foreign Affairs of Chile, 26 November 1976, **CCM Annex 212**. See also Report of Enrique Bernstein Carabantes and Julio Philippi Izquierdo, Representatives of Chile, to the Minister of Foreign Affairs of Chile, 24 November 1976, **CCM Annex 210**, paras 6-11.

⁴⁷⁵ Memorandum of the Ministry of Foreign Affairs of Chile, 26 November 1976, **CCM Annex 212**.

⁴⁷⁶ Statement of the Foreign Minister of Peru in "Response by the Peruvian Foreign Ministry to information provided to the Ambassador of Peru by the Undersecretary of Foreign Affairs of Chile", *El Diario* (Bolivia), 26 November 1976, reproduced in L.F. Guachalla, *Bolivia-Chile: The Maritime Negotiation, 1975-1978* (1982), **CCM Annex 211**, para 3.

⁴⁷⁷ Statement of the Foreign Minister of Peru in "Response by the Peruvian Foreign Ministry to information provided to the Ambassador of Peru by the Undersecretary of Foreign Affairs of Chile", *El Diario* (Bolivia), 26 November 1976, reproduced in L.F. Guachalla, *Bolivia-Chile: The Maritime Negotiation, 1975-1978* (1982), **CCM Annex 211**, para 7.

⁴⁷⁸ Statement of the Foreign Minister of Peru in "Response by the Peruvian Foreign Ministry to information provided to the Ambassador of Peru by the Undersecretary of Foreign Affairs of Chile", *El Diario* (Bolivia), 26 November 1976, reproduced in L.F. Guachalla, *Bolivia-Chile: The Maritime Negotiation, 1975-1978* (1982), **CCM Annex 211**, para 5.

of a corridor from Chile to Bolivia was conditioned on the establishment of an area of shared sovereignty in Peru's favour.⁴⁷⁹ It also made clear its position that its proposal was not negotiable. Peru's Foreign Minister publicly stated:

“Peru is telling [Chile]: we could give you this consent [as required under the 1929 Supplementary Protocol] provided that you comply with these conditions, and we are offering positive elements so that these conditions could be complied with. Accordingly, it is no longer a negotiation.”⁴⁸⁰

7.34 Bolivia seeks to rely on this consultation process with Peru to claim that Chile breached an obligation to negotiate. In particular, it alleges that there was a “lack of efforts” on Chile's part to obtain Peru's consent to the guidelines for negotiation adopted by Chile and Bolivia,⁴⁸¹ and it complains that Chile rejected “the Peruvian proposal of an area under tripartite sovereignty”.⁴⁸² Like Bolivia's first claim of breach, concerning an alleged degradation in the negotiating terms, this claim is entirely inconsistent with the factual record.

(a) It is evident from the documentary record, referred to above, that Chile made prompt and appropriate efforts to procure Peru's consent to the guidelines adopted by Bolivia and Chile. Peru refused and made its own proposal, by which it sought to acquire for itself new rights in Chilean territory. Chile immediately

⁴⁷⁹ Statement of the Foreign Minister of Peru in “Response by the Peruvian Foreign Ministry to information provided to the Ambassador of Peru by the Undersecretary of Foreign Affairs of Chile”, *El Diario* (Bolivia), 26 November 1976, reproduced in L.F. Guachalla, *Bolivia-Chile: The Maritime Negotiation, 1975-1978* (1982), **CCM Annex 211**, para 6.

⁴⁸⁰ “Complete version of the Explanations by the Peruvian Minister of Foreign Affairs José de la Puente”, *El Mercurio* (Chile), 26 November 1976, **CCM Annex 213**. The Foreign Minister also said that if Chile and Bolivia rejected its proposal “there would be nothing more we could do.”

⁴⁸¹ Bolivia's Memorial, para 160. See also para 162.

⁴⁸² Bolivia's Memorial, para 154.

discussed Peru's proposal with Bolivia, and Bolivia agreed with Chile to reject it, explicitly acknowledging that Chile had acted in good faith. There was no suggestion of any kind that Chile had not made adequate efforts to procure Peru's consent. Peru subsequently refused to reconsider the guidelines adopted by Bolivia and Chile, making clear that its proposal was non-negotiable.

(b) As explained below, in the negotiations that continued with Chile for over a year after Peru's proposal, Bolivia never requested that Chile accept that proposal, nor did Bolivia make concrete suggestions to promote or engage in further dialogue with Peru. Peru's proposal did not even feature in the tripartite discussions held in late 1977, discussed at paragraphs 7.42-7.44 below. Had Bolivia considered at the time that Chile ought to have made further efforts with Peru, or that it ought not to have rejected Peru's proposal, those views would have been communicated in any one of the many discussions that followed it. Their absence from the contemporaneous record strongly undermines the credibility of Bolivia's new complaints.

3. *Bolivia rejected the adopted guidelines for negotiations in December 1976*

7.35 Less than a month after Chile's response to Peru, Bolivia abruptly and unilaterally announced, through a public message delivered by General Banzer on Christmas Eve 1976, that it was rejecting the negotiation guidelines, which had formed the basis on which negotiations had taken place over the preceding year. General Banzer asked Chile to withdraw its

condition of territorial exchange.⁴⁸³ This radical change in position was motivated by a change in public opinion in Bolivia.⁴⁸⁴

4. *Chile maintained the essential condition of an exchange of territories and the two States continued negotiating on that basis throughout 1977 and early 1978*

7.36 Following Bolivia's abrupt change of position, the Chilean Foreign Minister met with Bolivia's Ambassador on 6 January 1977. In that meeting, Bolivia's Ambassador confirmed that his instructions were "to continue negotiating without delay",⁴⁸⁵ and that the primary reason for General Banzer's Christmas statement was "Bolivian internal politics".⁴⁸⁶ The Chilean Minister emphasized that Chile remained willing to negotiate on the basis of the guidelines, including the exchange of territories as an "indispensable" condition.⁴⁸⁷ Bolivia's Ambassador said that he understood that Chile maintained the adopted guidelines for negotiations, and the two representatives agreed to continue discussions, with Bolivia's Ambassador expressing his "satisfaction with the fact that negotiations were continuing".⁴⁸⁸ Chile's position was affirmed in a further meeting on

⁴⁸³ Message from the President of Bolivia, 24 December 1976, **CCM Annex 214**, p 19.

⁴⁸⁴ See Letter from the Chilean Ambassador to Bolivia to the Minister of Foreign Affairs of Chile, No 571/148, 28 September 1977, **CCM Annex 228**, para 11. See also, for example, the statement of five former presidents of Bolivia asking "to substantially change the orientation of [the negotiations with Chile]": Statement of 6 March 1976, in A. Crespo Rodas, *Banzer and the sea* (1993), **CCM Annex 308**, pp 5-6.

⁴⁸⁵ This is recorded in a contemporaneous memorandum: Memorandum by the Ministry of Foreign Affairs of Chile on the audience granted by the Chilean Minister of Foreign Affairs to the Bolivian Ambassador to Chile, 7 January 1977, **CCM Annex 215**, para 3.

⁴⁸⁶ Memorandum by the Ministry of Foreign Affairs of Chile on the audience granted by the Chilean Minister of Foreign Affairs to the Bolivian Ambassador to Chile, 7 January 1977, **CCM Annex 215**, para 5.

⁴⁸⁷ Memorandum by the Ministry of Foreign Affairs of Chile on the audience granted by the Chilean Minister of Foreign Affairs to the Bolivian Ambassador to Chile, 7 January 1977, **CCM Annex 215**, para 6.

⁴⁸⁸ Memorandum by the Ministry of Foreign Affairs of Chile on the audience granted by the Chilean Minister of Foreign Affairs to the Bolivian Ambassador to Chile, 7 January 1977, **CCM Annex 215**, para 13. See also paras 6-9.

27 January 1977, in which Chile's Foreign Minister repeated that territorial exchange "is the basis for the entire negotiation."⁴⁸⁹

7.37 In this context, and in particular having made clear that territorial exchange was an essential condition for negotiations, Chile expressed its willingness to continue with the negotiations.⁴⁹⁰ In response, General Banzer also expressed Bolivia's willingness.⁴⁹¹ Talks between the two States then continued.

7.38 On 1 April 1977, Bolivia's Ambassador met Chile's Minister of Foreign Affairs. Chile again made clear that the condition of territorial exchange was a "fundamental provision" in the guidelines for negotiations and that: "Any other term of negotiation would be unacceptable".⁴⁹² Bolivia's Ambassador repeated that this was a sensitive issue in Bolivian domestic politics.⁴⁹³ The idea of putting a fresh proposal to Peru was discussed, with Chile's Minister reiterating that "exchange is a condition sine qua non" and would remain so for any new proposal.⁴⁹⁴ Three weeks later, Chile's Foreign Minister and Bolivia's Ambassador met again, and Chile's Minister repeated that negotiations were based on the December 1975 guidelines, including territorial exchange as a condition.⁴⁹⁵

⁴⁸⁹ Note from the Minister of Foreign Affairs of Chile on the conversation held with the Bolivian Ambassador to Chile and his Minister Counsellor, 27 January 1977, **CCM Annex 216**, p 5.

⁴⁹⁰ Letter from the President of Chile to the President of Bolivia, 8 February 1977, **CCM Annex 217**.

⁴⁹¹ Letter from the President of Bolivia to the President of Chile, 8 February 1977, **CCM Annex 218**.

⁴⁹² Letter from the Minister of Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, No 22, 15 April 1977, **CCM Annex 220**, para V.

⁴⁹³ Letter from the Minister of Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, No 22, 15 April 1977, **CCM Annex 220**, para VI.

⁴⁹⁴ Letter from the Minister of Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, No 22, 15 April 1977, **CCM Annex 220**, para XI.

⁴⁹⁵ Letter from the Minister of Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, No 24, 21 April 1977, **CCM Annex 221**, p 1.

7.39 Following three days of bilateral discussions in Santiago, on 10 June 1977 the Foreign Ministers of Bolivia and Chile issued a joint declaration noting that negotiations had followed a “constructive . . . course” and they “resolve[d] to deepen and activate their dialogue, committing to do their part to bring this negotiation to a happy end as soon as possible.”⁴⁹⁶ They reaffirmed “the need to pursue the negotiations from their current status, seeking to reach their proposed objective, in order to consolidate peaceful coexistence and broad comprehension that promotes understanding, as well as coordinated development in the zone.”⁴⁹⁷

7.40 Bolivia relies on the joint declaration of 10 June 1977 as an example of what it says are subsequent confirmations of the obligation to negotiate on sovereign access to the sea for Bolivia.⁴⁹⁸ Bolivia seeks to draw an analogy between the 1977 joint declaration and Article VI of the Non-Proliferation Treaty, examined by the Court in its *Nuclear Weapons* Advisory Opinion,⁴⁹⁹ and on that basis Bolivia seeks to infer that the joint declaration gives rise to an obligation of result.⁵⁰⁰ The analogy upon which Bolivia bases its claim of an obligation of result is obviously flawed.

(a) As outlined in Chapter 1, Section B, the Court has not taken jurisdiction over a claim based on an alleged obligation of result. In any event, in contrast to the 1977 joint declaration, Article VI of the Non-Proliferation Treaty is contained in a treaty. Moreover,

⁴⁹⁶ Joint Declaration of the Foreign Ministers of Chile and Bolivia, signed at Santiago on 10 June 1977, **CCM Annex 222**.

⁴⁹⁷ Joint Declaration of the Foreign Ministers of Chile and Bolivia, signed at Santiago on 10 June 1977, **CCM Annex 222**.

⁴⁹⁸ Bolivia’s Memorial, para 381.

⁴⁹⁹ Treaty on the Non-Proliferation of Nuclear Weapons, signed at London, Moscow and Washington on 1 July 1968 (entry into force 5 March 1970), 729 *UNTS* 161, Article VI, quoted in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p 263, para 99.

⁵⁰⁰ See Bolivia’s Memorial, paras 381-382.

there are material differences between the text of the 1977 joint declaration and Article VI, which provides:

“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”⁵⁰¹

The 1977 joint declaration does not include any equivalent undertaking, and nor does it refer to the anticipated conclusion of any treaty. It does not impose either an obligation to pursue or to conclude negotiations.⁵⁰² The 1977 joint declaration contains merely an expression of political willingness “to deepen and activate their dialogue” on negotiations relating to “Bolivia’s landlocked situation.”⁵⁰³

- (b) This conclusion is confirmed by the immediate context of the 1977 joint declaration. Its other paragraphs, in aspirational language, express concerns and make suggestions about issues such as access of developing States to international markets, terrorism and protection of human rights, reforms of the OAS to improve security and cooperation, and stimulation of bilateral trade.⁵⁰⁴ These generalised statements do not suggest that the two States had

⁵⁰¹ Treaty on the Non-Proliferation of Nuclear Weapons, signed at London, Moscow and Washington on 1 July 1968 (entry into force 5 March 1970), 729 *UNTS* 161, Article VI, quoted in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p 263, para 99.

⁵⁰² Cf. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p 264, para 100.

⁵⁰³ Joint Declaration of the Foreign Ministers of Chile and Bolivia, signed at Santiago on 10 June 1977, **CCM Annex 222**.

⁵⁰⁴ Joint Declaration of the Foreign Ministers of Chile and Bolivia, signed at Santiago on 10 June 1977, **CCM Annex 222**.

any intention to create or confirm any legal obligation in respect of any of the subjects covered.

- 7.41 Discussions between the two States then continued throughout 1977. In early August 1977 General Banzer affirmed that negotiations between the two States were continuing on the basis of the guidelines adopted in 1975. He said that Bolivia and Chile were “not looking for a new proposal, we have ratified what we have done and what we have proposed and we will maintain those terms.”⁵⁰⁵
- 7.42 On 9 September 1977, the Heads of State of Chile, Bolivia and Peru met in Washington DC and issued a joint press communiqué, confirming that they would instruct their Foreign Ministers to continue negotiations.⁵⁰⁶ Two days later General Banzer explained to representatives of the Bolivian press that it would be for Bolivia to select the territories to be exchanged with Chile.⁵⁰⁷ A week later Bolivia’s Foreign Minister confirmed that Bolivia was committed to a territorial exchange. On that point he said that Bolivia’s “offer remains valid”.⁵⁰⁸ Later in September 1977 General Banzer affirmed that the negotiations remained subject to the condition of territorial exchange when he declared that the final

⁵⁰⁵ Statement of President Banzer, reported in *Hoy* (Bolivia) in early August 1977, reproduced in Letter from the Chilean Embassy in Bolivia to the Chilean Minister of Foreign Affairs, No 480/114, 19 August 1977, **CCM Annex 223**.

⁵⁰⁶ Joint Declaration of the Presidents of Bolivia, Chile and Peru, reproduced in “Meeting held among Pinochet, Morales and Banzer”, *El Mercurio* (Chile), 9 September 1977, **CCM Annex 224**.

⁵⁰⁷ Telex from the Chilean Embassy in Bolivia to the Ministry of Foreign Affairs of Chile, No 301, 14 September 1977, **CCM Annex 225**, para 4. See also Confidential Memorandum by the Ministry of Foreign Affairs of Chile to the General Directorate for Foreign Policy, No 424, 20 October 1977, **CCM Annex 233**, para II.

⁵⁰⁸ “Foreign Minister Patricio Carvajal, ‘Our territory won’t be sold or given away’”, *La Segunda* (Chile), 17 September 1977, **CCM Annex 226**.

decision on exchange would be entrusted to a “popularly chosen Parliament”.⁵⁰⁹

7.43 During the 1977 session of the United Nations General Assembly, Chile’s representative confirmed that—

“we have maintained our offer, accepted basically in December 1975, the terms of which are well known to the international community, and we shall continue our efforts to find ways and means which will enable these negotiations to come to a successful conclusion.”⁵¹⁰

7.44 During this session of the General Assembly, the Foreign Ministers of Chile, Bolivia and Peru met for discussions and, on 29 September 1977, they issued a press release recording the “plan to appoint Special Representatives” to progress the discussions.⁵¹¹ When, on 23 November 1977, General Pinochet sent a note to General Banzer, reiterating his Government’s appreciation of “the special importance” of the negotiations, he also emphasized that Special Representatives should be appointed to “activate the negotiations”, as had been agreed.⁵¹² It was not until nearly a month later that Bolivia replied, complaining about the lack

⁵⁰⁹ See Letter from the Second Secretary of the British Embassy in Bolivia to a Desk Officer at the FCO South America Department, No 021/5, 30 September 1977, **CCM Annex 231**, para 4.

⁵¹⁰ Verbatim Record of the Twenty-First Plenary Meeting of the Thirty-Second Session of the United Nations General Assembly, UN Doc A/32/PV.21, 5 October 1977, **CCM Annex 232**, para 101. See also statements of Bolivia: Verbatim Record of the Seventh Plenary Meeting of the Thirty-Second Session of the United Nations General Assembly, UN Doc A/32/PV.7, 26 September 1977, **CCM Annex 227**, paras 258-265; and of Peru: Verbatim Record of the Thirteenth Plenary Meeting of the Thirty-Second Session of the United Nations General Assembly, UN Doc A/32/PV.13, 29 September 1977, **CCM Annex 230**, paras 145-148.

⁵¹¹ Joint Press Release of the Foreign Ministers of Bolivia, Chile and Peru, 29 September 1977, recorded in an Aide Mémoire of the Ministry of Foreign Affairs of Chile, 1977, **CCM Annex 229**, p 89.

⁵¹² Letter from the President of Chile to the President of Bolivia, 23 November 1977, **CCM Annex 234**. See also R. Prudencio Lizón, *History of the Charaña Negotiation* (2011), **CCM Annex 350**, p 330, noting Bolivia’s failure to appoint its special representative.

of progress in negotiations but simultaneously refusing to advance them. This was a marked change of position on Bolivia's part, signalling its retreat from the long-accepted basis for the negotiation.⁵¹³

- (a) Bolivia noted that the "general terms" were established in 1975, but suggested that Chile's counter-proposal "hindered 'ab initio' the negotiating process."⁵¹⁴
- (b) Bolivia said that Peru "took approximately eleven months to answer" Chile's proposal. Further, Bolivia complained that Chile "decline[d] to consider the Peruvian proposal" and did not "make subsequent efforts" to clarify the situation with Peru.⁵¹⁵
- (c) Bolivia argued that new conditions must be established to achieve the objectives of the Joint Declaration of Charaña, notably that Chile abandon any requirement of territorial exchange, and that Peru withdraw its proposal for a zone of shared sovereignty. In the absence of Chile's agreement to those conditions, Bolivia considered that there was no purpose in continuing discussions.⁵¹⁶

⁵¹³ See generally R. Prudencio Lizón, *History of the Charaña Negotiation* (2011), **CCM Annex 350**, pp 336-341, noting the state of public opinion in Bolivia was opposed to continuing negotiations, although General Banzer had proposed to reactivate the negotiations (by appointing special representatives) only a few months before.

⁵¹⁴ Letter from the President of Bolivia to the President of Chile, 21 December 1977, **CCM Annex 235**, pp 60-61.

⁵¹⁵ Letter from the President of Bolivia to the President of Chile, 21 December 1977, **CCM Annex 235**, p 61.

⁵¹⁶ Letter from the President of Bolivia to the President of Chile, 21 December 1977, **CCM Annex 235**, p 62. On the inconsistency of this with Bolivia's position during the negotiations, see R. Prudencio Lizón, *History of the Charaña Negotiation* (2011), **CCM Annex 350**, pp 357 and 374.

7.45 On 18 January 1978, Chile replied, recalling that Chile’s proposal of December 1975 had been “accepted in general terms and without objections by Bolivia”.⁵¹⁷ Chile’s reply further noted that:

- (a) During the eleven-month period starting when Peru received the adopted guidelines for the Bolivia-Chile negotiations in January 1976, there were two rounds of discussions between Chile and Peru, as well as continuing discussions between Bolivia and Chile.⁵¹⁸ Following Chile’s rejection of Peru’s proposal (which, as explained in paragraph 7.31 above, followed consultation with Bolivia, in which Bolivia also rejected Peru’s proposal), Bolivia did not make “any initiative”, nor did Chile “receive[] any suggestion of [Bolivia] to promote” a dialogue with Peru.⁵¹⁹
- (b) Negotiations had then continued, and in all the discussions, including most recently in September 1977 in New York, there was a consensus to continue negotiations.⁵²⁰
- (c) The December 1975 negotiation guidelines remained “the only viable and realistic way to satisfy the longing” of Bolivia and therefore Chile could not propose an alternative.⁵²¹
- (d) Special Representatives should be instructed to review any issues affecting the negotiations, to avoid “obstructing” them.⁵²²

⁵¹⁷ Letter from the President of Chile to the President of Bolivia, 18 January 1978, **CCM Annex 236**, p 63. Bolivia annexed a partial translation of this document as **BM Annex 78**.

⁵¹⁸ Letter from the President of Chile to the President of Bolivia, 18 January 1978, **CCM Annex 236**, pp 63-64.

⁵¹⁹ Letter from the President of Chile to the President of Bolivia, 18 January 1978, **CCM Annex 236**, p 64.

⁵²⁰ Letter from the President of Chile to the President of Bolivia, 18 January 1978, **CCM Annex 236**, p 64.

⁵²¹ Letter from the President of Chile to the President of Bolivia, 18 January 1978, **CCM Annex 236**, p 64.

- 7.46 Therefore, as at January 1978, Chile remained open to discussing Bolivia’s aspirations, but was firm that the existing guidelines—including the requirement of territorial exchange—remained the foundation for any negotiations between the two States.
- 7.47 In its Memorial, Bolivia claims that Chile “would not modify . . . its demand for territorial compensation by Bolivia.”⁵²³ Insofar as Bolivia relies on this to establish that Chile breached an obligation to negotiate, that must fail. It is clear that Chile’s willingness to engage in negotiations was conditioned on territorial exchange and therefore the content of any obligation to negotiate would have been restricted by reference to that condition.⁵²⁴ Chile’s lack of willingness to negotiate on the basis of other terms, which did not form part of the guidelines accepted by both States, cannot have been a breach of any obligation. Moreover, as explained in Chapter 4 above, an obligation to negotiate does not require either side to act contrary to its own interests. It follows that Chile was not “bound to make an agreement unsatisfactory to itself”⁵²⁵ by withdrawing the condition of territorial exchange.
- 7.48 Bolivia never asserted at the time that Chile’s failure to modify its position was a breach of any obligation. As noted in paragraph 7.35 above, in December 1976, Bolivia asked Chile to withdraw the condition of territorial exchange.⁵²⁶ In response, Chile made it clear that it was willing to continue negotiating, but that territorial exchange was an “indispensable” condition.⁵²⁷ Had Chile’s conduct in maintaining the

⁵²² Letter from the President of Chile to the President of Bolivia, 18 January 1978, **CCM Annex 236**, p 64.

⁵²³ Bolivia’s Memorial, para 427.

⁵²⁴ See above at para 4.26.

⁵²⁵ See *Tacna-Arica question (Chile, Peru)*, 4 March 1925, II *RIAA*, p 929.

⁵²⁶ See Message of the President of Bolivia, 24 December 1976, **CCM Annex 214**, p 19.

⁵²⁷ See Memorandum by the Ministry of Foreign Affairs of Chile on the audience granted by the Chilean Minister of Foreign Affairs to the Bolivian Ambassador to Chile, 7 January 1977, **CCM Annex 215**, paras 6, 7-9 and 13.

condition of territorial exchange been in breach of “agreed terms”, or indeed of any legally binding obligation, Bolivia would have said so. Instead, over the course of the following year, Bolivia continued to negotiate on the basis of the guidelines, including territorial exchange—and to express satisfaction with those negotiations.⁵²⁸ The contemporaneous position is thus impossible to reconcile with Bolivia’s new argument before the Court.

7.49 On 10 March 1978, Chile’s Foreign Minister received a confidential emissary of Bolivia, Mr. Willy Vargas. At this meeting:

- (a) Bolivia’s emissary stated that Bolivia’s change in position had been motivated by a “complex change in the image of the situation among the Bolivian public” and asked Chile to consider changing the adopted guidelines.⁵²⁹ Chile’s Foreign Minister reiterated that Chile’s position on territorial exchange could not change, but indicated that the size of the area to be exchanged could be discussed (i.e. potentially excluding the “patrimonial sea” from the calculation).⁵³⁰

- (b) Chile’s Minister noted that Chile had continued to discuss possible solutions with Peru, but insisted that Bolivia should appoint a Special Representative, as agreed in September 1977.⁵³¹

⁵²⁸ See paras 7.36-7.46 above, and references therein.

⁵²⁹ Confidential Memorandum from the Ministry of Foreign Affairs of Chile to Chile’s Directorate General for Foreign Policy, No 116, 15 March 1978, **CCM Annex 238**, pp 5-6.

⁵³⁰ Confidential Memorandum from the Ministry of Foreign Affairs of Chile to Chile’s Directorate General for Foreign Policy, No 116, 15 March 1978, **CCM Annex 238**, p 6. See also Confidential Report to the Minister of Foreign Affairs of Bolivia by Bolivia’s Extraordinary Ambassador, 13 March 1978, **CCM Annex 237**, pp 2-3.

⁵³¹ Confidential Memorandum from the Ministry of Foreign Affairs of Chile to Chile’s Directorate General for Foreign Policy, No 116, 15 March 1978, **CCM Annex 238**,

(c) Bolivia's emissary suggested that the two States could explore interim solutions, such as (i) a grant of authority to Bolivia for the use of the Arica-La Paz railway, and (ii) a grant of autonomy in the strip of land along the Chile-Peru boundary, which would not involve the transfer of sovereignty, with an exchange of territories to follow "at a better political point in time".⁵³² These possible arrangements were discussed, and Chile's Minister asked whether it was agreed to move ahead with these "exploratory discussions to find a new formula". Bolivia's emissary responded that he needed to seek instructions, and the meeting concluded with him stating that he would "emphasize to his Government Chile's interest in continuing to negotiate".⁵³³

5. *Bolivia suspended diplomatic relations with Chile in March 1978 and has not resumed them since*

7.50 On 17 March 1978, just one week after the meeting between Bolivia's emissary and Chile's Foreign Minister, Bolivia notified Chile that it was suspending diplomatic relations.⁵³⁴ Bolivia has never since resumed diplomatic relations with Chile. In an official declaration of its Foreign Minister, Bolivia asserted that Chile had been inflexible in maintaining "all its initial conditions" as set out in the December 1975 guidelines,⁵³⁵

p 10. See also Confidential Report to the Minister of Foreign Affairs of Bolivia by Bolivia's Extraordinary Ambassador, 13 March 1978, **CCM Annex 237**, p 5.

⁵³² Confidential Memorandum from the Ministry of Foreign Affairs of Chile to Chile's Directorate General for Foreign Policy, No 116, 15 March 1978, **CCM Annex 238**, pp 12-13. See also Confidential Report to the Minister of Foreign Affairs of Bolivia by Bolivia's Extraordinary Ambassador, 13 March 1978, **CCM Annex 237**, p 7.

⁵³³ Confidential Memorandum from the Ministry of Foreign Affairs of Chile to Chile's Directorate General for Foreign Policy, No 116, 15 March 1978, **CCM Annex 238**, p 15.

⁵³⁴ Letter from the President of Bolivia to the President of Chile, 17 March 1978, **CCM Annex 239**.

⁵³⁵ Official Declaration of the Minister of Foreign Affairs of Bolivia breaking-off diplomatic relations with Chile, 17 March 1978, **CCM Annex 241**.

and that Chile had not made any effort to obtain Peru's consent under the 1929 Supplementary Protocol.⁵³⁶

7.51 Chile responded the same day, noting that the negotiation guidelines set out in Chile's counter-proposal in 1975 had been accepted by Bolivia,⁵³⁷ and that General Banzer had recently acknowledged that negotiations were progressing.⁵³⁸ Emphasizing that Chile, Bolivia and Peru had agreed in September 1977 to appoint Special Representatives to advance negotiations, Chile noted that it had consistently insisted on carrying out that process.⁵³⁹ Chile further noted that, only a week earlier, Chile had expressed willingness to discuss interim solutions,⁵⁴⁰ as had been requested by Bolivia.

7.52 In a subsequent statement on 23 March 1978, Chile stressed that, in its negotiations with Bolivia, it had "proceeded with the seriousness that characterizes the management of its international relations" and repeated that the key condition, namely territorial exchange, "has been reiterated personally from President to President, from Foreign Minister to Foreign

⁵³⁶ Official Declaration of the Minister of Foreign Affairs of Bolivia breaking-off diplomatic relations with Chile, 17 March 1978, **CCM Annex 241**.

⁵³⁷ Declaration of the Ministry of Foreign Affairs of Chile, 17 March 1978, **CCM Annex 240**, para 2.

⁵³⁸ Declaration of the Ministry of Foreign Affairs of Chile, 17 March 1978, **CCM Annex 240**, para 5.

⁵³⁹ Declaration of the Ministry of Foreign Affairs of Chile, 17 March 1978, **CCM Annex 240**, paras 4 and 6. See also R. Prudencio Lizón, *History of the Charaña Negotiation* (2011), **CCM Annex 350**, p 19 (prologue by A. Loaiza Mariaca (former Minister of Foreign Affairs of Bolivia)), noting that in March 1978 "the Government of Bolivia abruptly decided to end the negotiation"). Prudencio Lizón himself, the First Secretary to the Embassy of Bolivia in Chile during the Charaña negotiations, concludes that the "failure of the most important negotiation of the XX Century, which was the Charaña one, is evidently attributable to the government of general Banzer" and to "the blunt opposition of the Bolivian people to the exchange of territories": see R. Prudencio Lizón, *History of the Charaña Negotiation* (2011), **CCM Annex 350**, pp 359 and 374.

⁵⁴⁰ Declaration of the Ministry of Foreign Affairs of Chile, 17 March 1978, **CCM Annex 240**, para 7.

Minister, and to the two Ambassadors that Bolivia had in Santiago in the past three years.”⁵⁴¹

- 7.53 Two months later, Bolivia sought to justify its rupturing of diplomatic relations before the United Nations General Assembly.⁵⁴² In response Chile repeated that it remained open to resuming dialogue with Bolivia,⁵⁴³ but Bolivia did not accept Chile’s invitation to do so.

* * *

- 7.54 The picture that emerges from the historical record significantly diverges from the account provided in Bolivia’s Memorial. It is on the basis of mischaracterizing relevant facts and ignoring others that Bolivia makes its claims that Chile was (i) under a legal obligation to negotiate during the process following the Joint Declaration of Charaña, and (ii) breached that obligation.

- 7.55 This fuller account of the historical record, in its context, demonstrates that in the Charaña process of 1975 to 1978 Chile at no time created or confirmed any legal obligation to negotiate. While the two States expressed political willingness to “consider” a territorial exchange

⁵⁴¹ Declaration of the Government of Chile of 23 March 1978, **CCM Annex 242**.

⁵⁴² Verbatim Record of the Fifth Plenary Meeting of the Tenth Special Session of the United Nations General Assembly, UN Doc A/S-10/PV.5, 26 May 1978, **CCM Annex 243**, paras 33-34.

⁵⁴³ Verbatim Record of the Sixth Plenary Meeting of the Tenth Special Session of the United Nations General Assembly, UN Doc A/S-10/PV.6, 26 May 1978, **CCM Annex 244**, para 328. See also Verbatim Record of the Ninth Plenary Meeting of the Tenth Special Session of the United Nations General Assembly, UN Doc A/S-10/PV.9, 30 May 1978, **CCM Annex 245**, paras 275-287. In subsequent correspondence, Chile also noted that Bolivia terminated negotiations by suspending diplomatic relations: Letter dated 5 June 1978 from the Permanent Representative of Chile to the United Nations addressed to the Secretary-General of the United Nations, UN Doc A/S-10/19, 6 June 1978, **CCM Annex 247**, responding to Letter dated 1 June 1978 from the Permanent Representative of Bolivia to the United Nations addressed to the Secretary-General of the United Nations, UN Doc A/S-10/18, 2 June 1978, **CCM Annex 246**.

involving territory at Chile's northern extremity, this willingness did not create or confirm any legal obligation.

7.56 The discussions from 1975 to 1978 demonstrate Chile's willingness to negotiate in good faith within what at that time under that Government it considered to be an acceptable political framework. The discussions ultimately failed because Peru was unwilling to consent to the proposal and Bolivia changed its position on the condition of territorial exchange and then brought the negotiations to an abrupt halt, suspending diplomatic relations with Chile. Far from demonstrating that Chile breached an obligation to negotiate, the episode once again demonstrates Chile's good faith, and Bolivia's unilateral withdrawal from a diplomatic process in which it had initially engaged on the basis of guidelines adopted by both States. Any legal obligation that could be said to have arisen for Chile through the Charaña process would have been discharged by the fact that over a sustained period the two States engaged in meaningful negotiations.⁵⁴⁴ No obligation would have survived the termination of discussions by Bolivia, much less continued to bind the two States for more than half a century into the future to negotiate again on a topic on which they had already negotiated until the point that Bolivia terminated negotiations.

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See para 4.39 above.

CHAPTER 8. THE OAS GENERAL ASSEMBLY RESOLUTIONS

- 8.1 Having terminated bilateral negotiations and ruptured diplomatic relations with Chile in 1978, Bolivia sought political support for its aspirations concerning sovereign access to the sea from the General Assembly of the Organization of American States. From 1979 to 1989, while Chile was diplomatically isolated under General Pinochet, the General Assembly of the OAS adopted eleven resolutions on the “maritime problem” of Bolivia, one each year.⁵⁴⁵
- 8.2 Bolivia now presents these OAS General Assembly resolutions as a “subsequent confirmation by Chile of its agreement”,⁵⁴⁶ and alleges that, through them, “Chile began once again to affirm its commitment to negotiate with Bolivia.”⁵⁴⁷ Bolivia alleges that these OAS resolutions “evidence specific legal and binding significance”,⁵⁴⁸ and asserts that they

⁵⁴⁵ OAS, General Assembly, resolution AG/RES. 426 (IX–O/79), Access by Bolivia to the Pacific Ocean, 31 October 1979, **CCM Annex 250**; OAS, General Assembly, resolution AG/RES. 481 (X–O/80), The Bolivian Maritime Problem, 27 November 1980, **CCM Annex 254**; OAS, General Assembly, resolution AG/RES. 560 (XI–O/81), Report on the Maritime Problem of Bolivia, 10 December 1981, **CCM Annex 257**; OAS, General Assembly, resolution AG/RES. 602 (XII–O/82), Report on the Maritime Problem of Bolivia, 20 November 1982, **CCM Annex 259**; OAS, General Assembly, resolution AG/RES. 686 (XIII–O/83), Report on the Maritime Problem of Bolivia, 18 November 1983, **CCM Annex 266**; OAS, General Assembly, resolution AG/RES. 701 (XIV–O/84), Report on the Maritime Problem of Bolivia, 17 November 1984, **CCM Annex 272**; OAS, General Assembly, resolution AG/RES. 766 (XV–O/85), Report on the Maritime Problem of Bolivia, 9 December 1985, **CCM Annex 282**; OAS, General Assembly, resolution AG/RES. 816 (XVI–O/86), Report on the Maritime Problem of Bolivia, 15 November 1986, **CCM Annex 287**; OAS, General Assembly, resolution AG/RES. 873 (XVII–O/87), Report on the Maritime Problem of Bolivia, 14 November 1987, **CCM Annex 300**; OAS, General Assembly, resolution AG/RES. 930 (XVIII–O/88), Report on the Maritime Problem of Bolivia, 19 November 1988, **CCM Annex 304**; and OAS, General Assembly, resolution AG/RES. 989 (XIX–O/89), Report on the Maritime Problem of Bolivia, 18 November 1989, **CCM Annex 306**.

⁵⁴⁶ Bolivia’s Memorial, p 55, Ch II, Section III.B.h. heading.

⁵⁴⁷ Bolivia’s Memorial, para 164.

⁵⁴⁸ Bolivia’s Memorial, para 384.

are part of an “accumulation of successive acts by Chile”⁵⁴⁹ which are said by Bolivia simultaneously to have confirmed an existing obligation to negotiate, and created new ones.⁵⁵⁰

8.3 In this chapter, Chile demonstrates that these OAS resolutions neither confirmed any existing obligation nor created any new one, and, like all OAS resolutions, would have been incapable of doing so. Since the re-establishment of democracy in Chile in 1990, the OAS General Assembly has not adopted any resolution on Bolivia’s access to the sea. The issue was political, not legal.

A. The OAS resolutions did not confirm or create any obligation to negotiate

8.4 None of the resolutions refers to any pre-existing obligation on Chile to negotiate with Bolivia. The first of them, Resolution 426 of 1979, did not even expressly mention Chile. Its preamble referred not to any existing legal obligation, but rather to a “continuing hemispheric interest”, a “spirit of fraternity” and the “integration of the Americas”.⁵⁵¹

8.5 Neither Bolivia nor any other Member State suggested that Chile had previously assumed any legal obligation to negotiate with Bolivia. On the contrary, the sponsor of Resolution 426 insisted that the problem was

⁵⁴⁹ Bolivia’s Memorial, para 337.

⁵⁵⁰ Bolivia’s Memorial, para 337; and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/21, 8 May 2015, pp 33-34, para 9. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/19, 6 May 2015, p 19, para 16.

⁵⁵¹ OAS, General Assembly, resolution AG/RES. 426 (IX–O/79), Access by Bolivia to the Pacific Ocean, 31 October 1979, **CCM Annex 250**.

“political in its origins and political in its consequences . . . and political must be the resolution”.⁵⁵²

8.6 Bolivia is equally incorrect in alleging that the eleven relevant OAS General Assembly resolutions created any new legal obligation.⁵⁵³ This is because (i) the terms of the resolutions never purported to create binding legal obligations, and (ii) resolutions of the OAS General Assembly are in any event incapable of imposing legal obligations on Member States.

1. The text of the resolutions and the circumstances of their adoption

8.7 The resolutions simply issued recommendations to Chile and Bolivia. Neither their text nor the circumstances of their adoption demonstrated any intention to create or confirm any legal obligation.

8.8 In Resolution 426 of 1979 the OAS General Assembly resolved:

“To *recommend* to the states most directly concerned with this problem that they open negotiations for the purpose of providing Bolivia with a free and sovereign territorial connection with the Pacific Ocean. These negotiations shall take into account the rights and interests of the parties involved, and might consider, among other things, the inclusion of a port area for integrated multinational development, as well as the Bolivian proposal that no territorial compensation be included.”⁵⁵⁴

⁵⁵² Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**, pp 369–370.

⁵⁵³ Bolivia’s Memorial, paras 383-387.

⁵⁵⁴ OAS, General Assembly, resolution AG/RES. 426 (IX–O/79), Access by Bolivia to the Pacific Ocean, 31 October 1979, **CCM Annex 250**, operative para 1 (emphasis added).

8.9 Chile protested against the draft resolution, contested the jurisdiction of the OAS General Assembly to adopt it,⁵⁵⁵ and put on record that—

“in accordance with the legal rules indicated, this resolution does not obstruct it or bind it or obligate it in any way.”⁵⁵⁶

8.10 Bolivia also acknowledged that the intention was merely “to exhort, encourage, and push nations to resolve their differences.”⁵⁵⁷ Indeed Bolivia emphasized that Resolution 426 was only an exhortation and did not create any legal obligation:

“I truly admire the specious attempt by the Representative of Chile to turn an exhortation by the General Assembly into a command that does not exist.”⁵⁵⁸

8.11 Resolutions 481⁵⁵⁹ and 560⁵⁶⁰ adopted in 1980 and 1981 respectively—over Chile’s express objection⁵⁶¹—resolved to “urge those states most

⁵⁵⁵ Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**, p 357; and Minutes of the Twelfth Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, p 278.

⁵⁵⁶ Minutes of the Twelfth Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, p 279.

⁵⁵⁷ Minutes of the Twelfth Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, p 281.

⁵⁵⁸ Minutes of the Twelfth Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, p 281. Third States also considered that the resolutions did not concern any legal obligation; the representative of Argentina referring to the resolution’s “political and moral value”: see Minutes of the Twelfth Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, p 282. See also Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**, pp 369-370 (Venezuela).

⁵⁵⁹ OAS, General Assembly, resolution AG/RES. 481 (X-O/80), The Bolivian Maritime Problem, 27 November 1980, **CCM Annex 254**.

⁵⁶⁰ OAS, General Assembly, resolution AG/RES. 560 (XI-O/81), Report on the Maritime Problem of Bolivia, 10 December 1981, **CCM Annex 257**.

⁵⁶¹ Official Message from the Chilean Delegation to the OAS to the Minister of Foreign Affairs of Chile, No 401, 24 November 1980, **CCM Annex 252**; and Minutes of the Fourth Meeting of the General Committee of the OAS General Assembly, 7 December 1981, **CCM Annex 255**, pp 486-487.

directly concerned with the problem of Bolivia's access to the sea to initiate a dialogue, through the appropriate channels, to find the most satisfactory solution.”⁵⁶² This was even more general language than the language used in the 1979 resolution, including because it made no mention of sovereignty.

- 8.12 In Resolution 602 of 1982, the OAS resolved to “*recommend* once again to the parties directly concerned with the problem that they set in motion negotiations to provide Bolivia with a free and sovereign territorial link with the Pacific Ocean.”⁵⁶³ The Chilean delegation put on record that “Resolution AG/RES. 602 (XII–O/82) . . . is not binding on Chile”.⁵⁶⁴ When submitting this resolution as Annex 194 to its Memorial, Bolivia omitted to include the annexure to the resolution containing this statement of the Chilean delegation (from both its translation filed as an annex and the original deposited with the Registry). The Court will find the complete resolution, including the annexure, at Annex 259 to this Counter-Memorial.
- 8.13 Resolution 686 of 1983, on which Bolivia places particular emphasis,⁵⁶⁵ was equally not intended by anyone to create any legal obligation. It was simply urging a “process of rapprochement” to be “directed toward normalizing” bilateral relations and “a formula” for sovereign access that

⁵⁶² OAS, General Assembly, resolution AG/RES. 481 (X–O/80), The Bolivian Maritime Problem, 27 November 1980, **CCM Annex 254**, operative para. See also OAS, General Assembly, resolution AG/RES. 560 (XI–O/81), Report on the Maritime Problem of Bolivia, 10 December 1981, **CCM Annex 257**, operative para 2.

⁵⁶³ OAS, General Assembly, resolution AG/RES. 602 (XII–O/82), Report on the Maritime Problem of Bolivia, 20 November 1982, **CCM Annex 259**, operative para 2 (emphasis added).

⁵⁶⁴ OAS, General Assembly, resolution AG/RES. 602 (XII–O/82), Report on the Maritime Problem of Bolivia, 20 November 1982, **CCM Annex 259**, Statement by the Delegation of Chile.

⁵⁶⁵ Bolivia's Memorial, paras 385-386. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/19, 6 May 2015, p 19, para 16.

would take into account the rights and interests of all parties.⁵⁶⁶ Neither Chile⁵⁶⁷ nor Bolivia⁵⁶⁸ understood Resolution 686 to create any legal obligation. Chile expressed its support for the draft resolution (with some reservations)⁵⁶⁹ and chose not to oppose consensus in the OAS General Assembly,⁵⁷⁰ precisely because it understood the aim and effect of the resolution to be circumscribed.⁵⁷¹

⁵⁶⁶ OAS, General Assembly, resolution AG/RES. 686 (XIII–O/83), Report on the Maritime Problem of Bolivia, 18 November 1983, **CCM Annex 266**, operative para 2.

⁵⁶⁷ Report of Jorge Gumucio Granier, Permanent Representative of Bolivia to the United Nations, regarding the meeting between the Ministers of Foreign Affairs of Bolivia and Chile, 1 October 1983, **CCM Annex 262**, p 2; Cable from General Augusto Pinochet to President Belisario Betancur of Columbia, 30 November 1983, **CCM Annex 268**; Official Message from the Embassy of Chile in Colombia to the General Directorate for Foreign Policy of the Ministry of Foreign Affairs of Chile, No 267/268, 22 December 1983, **CCM Annex 269**; Statement by the Undersecretary of Foreign Affairs of Chile, 22 December 1983, **CCM Annex 270**; and Communiqué of the Minister of Foreign Affairs of Chile, 14 January 1985, **CCM Annex 274**.

⁵⁶⁸ Minutes of the Fourth Meeting of the General Committee of the OAS General Assembly, 18 November 1983, **CCM Annex 264**, p 372. See also Report of the Ministry of Foreign Affairs of Chile, Attitude of the Most Important Bolivian Officials (from Government and Parliament) During the Administration of President Siles, that Evidences an Anti-Chilean Climate, 15 September 1983, **CCM Annex 261**, Annex A, Summary of Chilean-Bolivian Discussions; and Official Message from the Chilean Delegation to the OAS to the Directorate for Multilateral Policy of the Ministry of Foreign Affairs of Chile, No 297/298, 14 September 1983, **CCM Annex 260**.

⁵⁶⁹ Minutes of the Fourth Meeting of the General Committee of the OAS General Assembly, 18 November 1983, **CCM Annex 264**, p 372 (“... the proposed resolution submitted to us by our distinguished friend, the Foreign Minister of Colombia, has the support [*el apoyo*] of my Government, although we must state our objection to the preamble, because of the principles that we have repeated in these Assemblies, as we find that it alludes to resolutions that my Government has never accepted”).

⁵⁷⁰ Minutes of the Seventh Plenary Meeting of the OAS General Assembly, 18 November 1983, **CCM Annex 265**, p 268.

⁵⁷¹ See Official Message from the Directorate for Multilateral Policy of the Ministry of Foreign Affairs of Chile to the Chilean Delegation to the OAS, No 270/271, 27 October 1983, **CCM Annex 263**; and Official Message from the General Directorate for Foreign Policy of the Ministry of Foreign Affairs of Chile to the Consulate General of Chile in Bolivia, No 531/532, 21 November 1983, **CCM Annex 267**, p 2.

- 8.14 The three resolutions adopted from 1984 to 1986⁵⁷² also did not purport to recall or impose any obligation to negotiate.⁵⁷³ They constituted, in Bolivia's words at the time, a series of "recommendations encouraging dialogue".⁵⁷⁴ By its Resolution 816 of 1986, the Assembly noted that Bolivia and Chile had "begun a process of rapprochement with a view to creating an environment conducive to dialogue and understanding between the two nations, in an effort to resolve the substantive issues that are in their interests". Then it resolved merely to "voice its hopes for the success of this process of *rapprochement* and its noble objectives."⁵⁷⁵ This political language did not seek to confirm or create any legal obligation. What Bolivia contemporaneously and accurately described as "recommendations encouraging dialogue" it seeks now to present to the Court as a source of legal obligation.
- 8.15 Resolutions 873 and 930 adopted in 1987 and 1988⁵⁷⁶ again contained no indication of the existence or creation of any legal obligation, nor that any such obligation had been breached. It is apparent from the language of the resolutions that there was no suggestion that Chile was obliged to

⁵⁷² OAS, General Assembly, resolution AG/RES. 701 (XIV-O/84), Report on the Maritime Problem of Bolivia, 17 November 1984, **CCM Annex 272**; OAS, General Assembly, resolution AG/RES. 766 (XV-O/85), Report on the Maritime Problem of Bolivia, 9 December 1985, **CCM Annex 282**; and OAS, General Assembly, resolution AG/RES. 816 (XVI-O/86), Report on the Maritime Problem of Bolivia, 15 November 1986, **CCM Annex 287**.

⁵⁷³ See Minutes of the Eighth Plenary Meeting of the OAS General Assembly, 17 November 1984, **CCM Annex 271**, p 247 (Peru) and pp 247-248 (Paraguay); and Minutes of the Third Meeting of the General Committee of the OAS General Assembly, 6 December 1985, **CCM Annex 280**, p 162 (Argentina).

⁵⁷⁴ Minutes of the Third Meeting of the General Committee of the OAS General Assembly, 12 November 1986, **CCM Annex 285**, p 318.

⁵⁷⁵ OAS, General Assembly, resolution AG/RES. 816 (XVI-O/86), Report on the Maritime Problem of Bolivia, 15 November 1986, **CCM Annex 287**, operative para 2 (emphasis in the original).

⁵⁷⁶ OAS, General Assembly, resolution AG/RES. 873 (XVII-O/87), Report on the Maritime Problem of Bolivia, 14 November 1987, **CCM Annex 300**; and OAS, General Assembly, resolution AG/RES. 930 (XVIII-O/88), Report on the Maritime Problem of Bolivia, 19 November 1988, **CCM Annex 304**.

negotiate with Bolivia, and OAS Member States confirmed that these resolutions neither created nor reflected legal obligations for Chile.⁵⁷⁷

8.16 The last resolution adopted by the OAS in this matter was in 1989, the year before the restoration of democracy in Chile.⁵⁷⁸ That resolution did not even refer to sovereign access, but simply to the desirability of a “solution” that was “mutually advantageous”.⁵⁷⁹ Concerning earlier resolutions, some of which had referred to “sovereign access”, Resolution 989 of 1989 simply recorded that the General Assembly had seen them, but did not reaffirm them or their content. It described them only as having “declared that it was of permanent interest to the hemisphere that a solution be found to the maritime problem of Bolivia”.⁵⁸⁰ It said—

“the objectives indicated in the aforementioned resolutions must be accomplished *in a spirit of American brotherhood and integration* in order to achieve a harmonious solution that will promote economic and social progress in the area of the Americas directly affected by the consequences of Bolivia’s land-locked status”.⁵⁸¹

⁵⁷⁷ Minutes of the Third Meeting of the General Committee of the OAS General Assembly, 16 November 1988 in OAS, General Assembly, Eighteenth Regular Session, 1988, *Proceedings*, Vol. II, Part I, OEA/Ser.P/XVIII.O2 (1989), p 394 (Barbados) (regretting that the “annual adoption of resolutions *which have no binding force* seems to be the principal action on this question” (emphasis added)) and p 404 (Haiti) (confirming that the resolution expressed simply “*le vœu que le Chili et la Bolivie puissent arriver à une solution juste et durable qui tienne compte des intérêts et des droits de ces deux pays*”) (“the wish that Chile and Bolivia could reach a just and durable solution that takes into account the interests and rights of those two countries”).

⁵⁷⁸ OAS, General Assembly, resolution AG/RES. 989 (XIX–O/89), Report on the Maritime Problem of Bolivia, 18 November 1989, **CCM Annex 306**.

⁵⁷⁹ OAS, General Assembly, resolution AG/RES. 989 (XIX–O/89), Report on the Maritime Problem of Bolivia, 18 November 1989, **CCM Annex 306**, operative para.

⁵⁸⁰ OAS, General Assembly, resolution AG/RES. 989 (XIX–O/89), Report on the Maritime Problem of Bolivia, 18 November 1989, **CCM Annex 306**.

⁵⁸¹ OAS, General Assembly, resolution AG/RES. 989 (XIX–O/89), Report on the Maritime Problem of Bolivia, 18 November 1989, **CCM Annex 306** (emphasis added).

On that basis, and still nowhere mentioning sovereign access as part of any eventual “solution”, the General Assembly resolved:

“To reaffirm the importance of finding a solution to the maritime problem of Bolivia on the basis of what is mutually advantageous to the parties involved and their rights and interests, for better understanding, solidarity, and integration in the hemisphere, urging the parties to engage in dialogue”.⁵⁸²

8.17 In 1990, Bolivia recognized that Resolution 989 of 1989, and indeed all eleven resolutions adopted by the OAS General Assembly, had been “limited to *recommending* negotiations between the Parties involved”.⁵⁸³ That this did not create or reflect any legal obligation is consistent with the meaning of the term “recommendation”. As indicated by Professor Virally, recommendations include—

*“les résolutions d’un organe international adressées à un ou plusieurs destinataires qui lui sont extérieurs et impliquant une invitation à adopter un comportement déterminé, action ou abstention.”*⁵⁸⁴

Bolivia and Chile acted upon the invitations of the OAS General Assembly, as discussed in Sections B and C below, but there was no legal obligation requiring them to do so.

⁵⁸² OAS, General Assembly, resolution AG/RES. 989 (XIX–O/89), Report on the Maritime Problem of Bolivia, 18 November 1989, **CCM Annex 306**, operative para.

⁵⁸³ Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 6 June 1990, **CCM Annex 307**, p 305 (emphasis added).

⁵⁸⁴ M. Virally, “La valeur juridique des recommandations des organisations internationales”, *Annuaire français de droit international, Vol. 2* (1956), p 68 (italics in the original) (“the resolutions of an international body addressed to one or several recipients who are external to it and which imply an invitation to adopt a specific behaviour, action or abstention”).

2. *The non-binding character of OAS General Assembly resolutions*

- 8.18 Irrespective of their content, resolutions of the OAS General Assembly are incapable of imposing any legal obligation.⁵⁸⁵ Bolivia accepts that “multilateral resolutions . . . are in principle non-binding”.⁵⁸⁶ Resolutions of the OAS General Assembly are non-binding more than just “in principle”. They are non-binding.
- 8.19 According to Article 54 of the OAS Charter,⁵⁸⁷ the General Assembly can only *consider* matters relating to friendly relations between its Members and, as a matter of practice, makes *recommendations* concerning them. The Assembly has no competence to declare or create legal obligations concerning such matters. Whereas under Article 54 the General Assembly can *decide* the general action and policy of the OAS, and can *determine* matters relating to its internal structure, the OAS Member States did not grant comparable powers to the General Assembly in respect of other matters, not least matters of sovereignty.
- 8.20 The Department of International Law of the OAS General Secretariat explained in 2011 that:

“The practice has been to regard General Assembly resolutions as expressions of a decision of a political nature that do not, in and of themselves, generate international responsibility for the member states”.⁵⁸⁸

⁵⁸⁵ See C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, 2005), p 163.

⁵⁸⁶ Bolivia’s Memorial, para 386.

⁵⁸⁷ Charter of the OAS (as amended), signed at Bogotá on 30 April 1948, 119 *UNTS* 3, Article 54(a) (emphasis added).

⁵⁸⁸ OAS, Permanent Council, Legal Opinion of the Department of International Law Regarding the Value of General Assembly Resolutions and of Documents Arising out of the Summits of the Americas, CAJP/GT/RDI-169/11, 28 February 2011, **CCM Annex 357**, p 2.

The Department of International Law further noted that—

“there are different kinds of resolution. They may take the form of a recommendation, an invitation, or an exhortation to pursue a certain form of conduct, and they are addressed to very different actors. Some are directed at the member states themselves, in which case the above assertion (that they are not legally binding) applies”.⁵⁸⁹

8.21 Professor Jean-Michel Arrighi, Secretary for Legal Affairs of the OAS, explained that:

“L’Assemblée [de l’OEA] adopte des résolutions qui, comme c’est le cas en général pour toutes les résolutions d’organisations internationales de nature similaire, ont force obligatoire en ce qui concerne les organes de l’Organisation, mais ne sont que des recommandations adressées à ses États membres.”⁵⁹⁰

8.22 It is thus clear that the resolutions adopted by the OAS General Assembly on which Bolivia relies before the Court did not and could not have imposed any legal obligation on Chile or Bolivia.

3. *Chile did not accept any obligation to negotiate in connection with any of the OAS resolutions*

8.23 Bolivia also contends in its Memorial that “[i]nternational practice” supports the argument that non-binding resolutions can bind States by their

⁵⁸⁹ OAS, Permanent Council, Legal Opinion of the Department of International Law Regarding the Value of General Assembly Resolutions and of Documents Arising out of the Summits of the Americas, CAJP/GT/RDI-169/11, 28 February 2011, **CCM Annex 357**, p 2.

⁵⁹⁰ J.M. Arrighi, “L’Organisation des États américains et le droit international”, *Recueil des Cours*, Vol. 355 (2012), p 328 (“The Assembly [of the OAS] adopts resolutions that, as is the case in general for all resolutions of similar international organisations, are binding in so far as the bodies of the Organisation are concerned, but are only recommendations addressed to its Member States”). See also A.A. Cançado Trindade, *Direito das Organizações internacionais* (1990), pp 482-483; and J. Klabbers, *An Introduction to International Organizations Law* (3rd edn, 2015), p 174.

vote.⁵⁹¹ Voting in favour of the adoption of a resolution of an international organisation that has no authority to confirm or create legal obligations cannot transform that resolution into a legally binding instrument for States that vote in favour of it. As has been explained of resolutions of international organisations generally:

“En parlant de ‘recommandation’, la Charte constitutive de l’organisation implique que son contenu n’est pas obligatoire. Très légitimement, les États règlent leur conduite en fonction de cette considération : souvent, un État vote en faveur d’une recommandation *parce qu’il a conscience que son vote ne l’engage pas* : soutenir le contraire conduirait à une grave paralysie du fonctionnement des organisations internationales.”⁵⁹²

8.24 Resolutions of the OAS General Assembly on the range of topics that it addresses would not be possible if they were perceived to create or contribute to the existence of legal obligations. The resolutions on which Bolivia relies made political recommendations, and any support for them must be seen in that context. In any event, Bolivia is wrong to assert that Chile “voted in favour” of any of the OAS resolutions on which Bolivia relies,⁵⁹³ and wrong to describe them as “unanimous”.⁵⁹⁴ Chile never voted in favour of any of the eleven recommendatory resolutions that Bolivia now says constitute the source of a legal obligation to negotiate. Chile

⁵⁹¹ Bolivia’s Memorial, para 386.

⁵⁹² P. Daillier, M. Forteau and A. Pellet, *Droit international public (Ngyuen Quoc Dinh)* (8th edn, 2009), p 417 (emphasis in the original) (“In referring to ‘recommendations’, the organisation’s constitutive Charter suggests that their content is not obligatory. Quite legitimately, States adjust their conduct according to this consideration: often, a State votes in favour of a recommendation because it knows that its vote does not bind it: to support the contrary would lead to a grave paralysis of the functioning of international organisations”).

⁵⁹³ See, for example, Bolivia’s Memorial, para 384.

⁵⁹⁴ Bolivia’s Memorial, paras 15, 219, and 383; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/19, 6 May 2015, p 52, para 6 and p 59, para 27; and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/21, 8 May 2015, p 35, para 13.

voted against seven of the resolutions,⁵⁹⁵ refused to participate in the vote concerning Resolution 602 of 1982⁵⁹⁶ and, on three occasions, Chile did not oppose consensus within the OAS General Assembly, but joined declarations or explanations with respect to the content and the legal status of the resolutions adopted.⁵⁹⁷ Other Member States of the OAS also expressed reservations in respect of some of the resolutions adopted by the OAS,⁵⁹⁸ or abstained from voting.⁵⁹⁹

⁵⁹⁵ Minutes of the Twelfth Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, p 286 (one vote against); Minutes of the Eighth Plenary Meeting of the OAS General Assembly, 17 November 1984, **CCM Annex 271**, pp 246-247; Minutes of the Third Plenary Meeting of the OAS General Assembly, 9 December 1985, **CCM Annex 281**, p 49; Minutes of the Ninth Plenary Meeting of the OAS General Assembly, 15 November 1986, **CCM Annex 286**, p 256; Minutes of the Tenth Plenary Meeting of the OAS General Assembly, 14 November 1987, **CCM Annex 299**, pp 258-259; Minutes of the Thirteenth Plenary Meeting of the OAS General Assembly, 19 November 1988, **CCM Annex 303**, pp 277-278; and Minutes of the Ninth Plenary Meeting of the OAS General Assembly, 18 November 1989, **CCM Annex 305**, pp 289 (one vote against).

⁵⁹⁶ Minutes of the Eighth Plenary Meeting of the OAS General Assembly, 20 November 1982, **CCM Annex 258**, p 222.

⁵⁹⁷ Minutes of the Sixth Plenary Meeting of the OAS General Assembly, 27 November 1980, **CCM Annex 253**, p 197; Minutes of the Eighth Plenary Meeting of the OAS General Assembly, 10 December 1981, **CCM Annex 256**, p 292; and Minutes of the Seventh Plenary Meeting of the OAS General Assembly, 18 November 1983, **CCM Annex 265**, p 268.

⁵⁹⁸ See, for example, Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**, p 395 (Argentina); Minutes of the Twelfth Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, pp 282-283 (Argentina); and Minutes of the Eighth Plenary Meeting of the OAS General Assembly, 20 November 1982, **CCM Annex 258**, pp 222-223 (Paraguay).

⁵⁹⁹ Minutes of the Eighth Plenary Meeting of the OAS General Assembly, 17 November 1984, **CCM Annex 271**, pp 246-247 (six abstentions: Bahamas, Barbados, Grenada, Haiti, Saint Lucia, Trinidad and Tobago); Minutes of the Tenth Plenary Meeting of the OAS General Assembly, 14 November 1987, **CCM Annex 299**, pp 258-259 (five abstentions: Haiti, Saint Kitts and Nevis, Saint Lucia, Suriname, Trinidad and Tobago); Minutes of the Thirteenth Plenary Meeting of the OAS General Assembly, 19 November 1988, **CCM Annex 303**, pp 277-278 (two abstentions: Dominica, Suriname); and Minutes of the Ninth Plenary Meeting of the OAS General Assembly, 18 November 1989, **CCM Annex 305**, pp 289 (four abstentions).

B. The process of rapprochement of 1983–1985

- 8.25 After OAS General Assembly Resolution 686 of 1983, Bolivia and Chile began a process of rapprochement. In its Memorial, Bolivia refers to two Chilean communiqués issued on 14 and 18 January 1985, at the end of this process, to assert incorrectly that Chile “walked away from the diplomatic process.”⁶⁰⁰ Chile was willing to continue participating in a process of rapprochement, leading to normalization of relations and discussions concerning access to the sea. Although Bolivia originally accepted to participate on the same basis, it ultimately refused to entertain further rapprochement except if Chile first agreed to grant Bolivia sovereign access to the sea. When Chile indicated that it was not willing to engage on that basis, it was Bolivia that refused to attend the talks, leaving Chile no choice but to follow.
- 8.26 On 10 January 1985, just weeks before the two States were scheduled to meet, the Bolivian Minister of Foreign Affairs stated unilaterally that Bolivia and Chile had reached agreement on the following points: (i) negotiations had a multilateral character and were of hemispheric interest; (ii) any solution had to involve a sovereign outlet to the Pacific geographically connected to Bolivia without any territorial compensation for Chile; and (iii) the re-establishment of diplomatic relations between the two States was conditional upon the progress of these negotiations.⁶⁰¹
- 8.27 Chile promptly responded in a communiqué dated 14 January 1985, recalling that it “has not assumed any commitment with Bolivia on substantive aspects aimed at satisfying the maritime aspiration” of Bolivia.⁶⁰² Chile’s Minister of Foreign Affairs nonetheless indicated that

⁶⁰⁰ Bolivia’s Memorial, para 178.

⁶⁰¹ Official Message from the Directorate of Bilateral Affairs of the Ministry of Foreign Affairs of Chile to the Embassy of Chile in Colombia, No 9, 11 January 1985, **CCM Annex 273**.

⁶⁰² Communiqué of the Minister of Foreign Affairs of Chile, 14 January 1985, **CCM Annex 274**.

he was willing to meet with his Bolivian counterpart so long as “the new Bolivian authorities unequivocally express a constructive position which respects what has been agreed . . . regarding the actual objective of the planned meeting.”⁶⁰³

8.28 The next day, 15 January 1985, the Bolivian Senate unanimously adopted the following resolution:

“ . . . in light of the lack of willingness of Chile to resolve Bolivia’s landlocked situation in the framework of the resolutions adopted by the OAS, the National Senate considers it convenient to suggest to the Executive Power that it suspend the conversations planned.”⁶⁰⁴

8.29 Chile thus issued a second communiqué on 18 January 1985, stating that:

“In the present circumstances, given that the minimum conditions are not met for a fruitful understanding with Bolivia, the Minister of Foreign Affairs of Chile considers it imperative to refuse to attend the meeting in Bogotá.”⁶⁰⁵

8.30 Notwithstanding Bolivia’s change of position, Chile remained committed to initiating a process of rapprochement with Bolivia “once suitable and timely conditions emerge that render it practicable to achieve positive results”.⁶⁰⁶

⁶⁰³ Communiqué of the Minister of Foreign Affairs of Chile, 14 January 1985, **CCM Annex 274**.

⁶⁰⁴ Official Message from the Consulate General of Chile in Bolivia to the Directorate of Bilateral Affairs of the Ministry of Foreign Affairs of Chile, No 37, 16 January 1985, **CCM Annex 275**.

⁶⁰⁵ Communiqué from the Minister of Foreign Affairs of Chile, 18 January 1985, **CCM Annex 276**.

⁶⁰⁶ Official Press Release from the Minister of Foreign Affairs of Chile, 7 February 1985, **CCM Annex 277**.

8.31 Bolivia stated on 13 February 1985 that the circumstances “do not allow a closer rapprochement with Chile”.⁶⁰⁷ Bolivia did not suggest at the time that Chile was responsible for a breach of any legal obligation to negotiate, or that Chile was bound by such an obligation. This was all purely a matter of politics and diplomacy, not law, and both States acted accordingly.

C. The “Fresh Approach” of 1986–1987

8.32 After presidential elections took place in Bolivia in July 1985, the new Bolivian President, Víctor Paz Estenssoro, considered that Bolivia needed “a fresh approach” to the bilateral relationship.⁶⁰⁸ It was to focus on closer relations between the two countries, in particular at the economic level.⁶⁰⁹

8.33 Accordingly, in September 1986, Bolivia and Chile agreed to establish a Binational Rapprochement Committee and determined a list of issues to be discussed by that Committee.⁶¹⁰ The agenda included trade, technical cooperation, culture, sport and leisure.⁶¹¹ Although the Committee also discussed the integrated transit system as an important part of Bolivia’s access to the Chilean coast and Chilean ports,⁶¹² it was not mandated to discuss Bolivia’s maritime aspirations.

⁶⁰⁷ Official Message from the Consulate General of Chile in Bolivia to the Directorate of Bilateral Affairs of the Ministry of Foreign Affairs of Chile, No 78, 13 February 1985, **CCM Annex 278**, para 1. See also Official Message from the Consulate General of Chile in Bolivia to the Directorate of Bilateral Affairs of the Ministry of Foreign Affairs of Chile, No 80, 14 February 1985, **CCM Annex 279**, para 3.

⁶⁰⁸ “Foreign Minister Del Valle: ‘Chile and Bolivia Must Seek a Rapprochement’”, *El Mercurio* (Chile), 25 February 1986, **CCM Annex 283**.

⁶⁰⁹ “Foreign Minister Del Valle: ‘Chile and Bolivia Must Seek a Rapprochement’”, *El Mercurio* (Chile), 25 February 1986, **CCM Annex 283**.

⁶¹⁰ Minutes of the Binational Rapprochement Committee, 17 October 1986, **CCM Annex 284**, pp 1 and 2.

⁶¹¹ Minutes of the Binational Rapprochement Committee, 17 October 1986, **CCM Annex 284**.

⁶¹² Minutes of the Binational Rapprochement Committee, 17 October 1986, **CCM Annex 284**, pp 2-6.

8.34 In 1986, Bolivia reported to the OAS General Assembly that—

“by following the path of international exhortations, it has had promising contacts of rapprochement with Chile that would satisfy the sincere general intention of favouring an equitable solution to our landlocked status. We are pleased to point out, Mr. President, Chile’s willingness to strengthen the efforts that will lead the problem affecting my country to a positive end.”⁶¹³

8.35 The OAS General Assembly welcomed the process of rapprochement initiated by the two States “with a view to creating an environment conducive to dialogue and understanding between the two nations, in an effort to resolve the substantive issues that are in their interests.”⁶¹⁴ It furthermore expressed “hopes for the success of this process of *rapprochement* and its noble objectives”.⁶¹⁵

8.36 Bolivia’s statement to the OAS General Assembly, and the Assembly’s own statement, indicate that Bolivia’s complaint cannot now credibly be that Chile did not engage in negotiations in good faith. Bolivia’s real complaint is that those negotiations did not ultimately reach a result with which Bolivia is now satisfied. That is not a complaint that can lead to any legal liability for Chile.⁶¹⁶

⁶¹³ Minutes of the Third Meeting of the General Committee of the OAS General Assembly, 12 November 1986, **CCM Annex 285**, p 318. See also Bolivia’s Memorial, para 180; and Statement by the Foreign Minister of Bolivia at the Third Session of the General Commission General Assembly of the OAS, on 12 November 1986, **BM Annex 207**, p 318.

⁶¹⁴ OAS, General Assembly, resolution AG/RES. 816 (XXVI–O/86), Report on the Maritime Problem of Bolivia, 15 November 1986, **CCM Annex 287**, operative para 1.

⁶¹⁵ OAS, General Assembly, resolution AG/RES. 816 (XXVI–O/86), Report on the Maritime Problem of Bolivia, 15 November 1986, **CCM Annex 287**, operative para 2 (emphasis in the original).

⁶¹⁶ See paras 4.43–4.50 above.

- 8.37 In the context of the newly established “process of rapprochement”,⁶¹⁷ Bolivia and Chile agreed to meet between 21 and 23 April 1987 in Montevideo in order to “become familiar with the positions of both countries with respect to the basic issues that are of concern to the two nations.”⁶¹⁸
- 8.38 At those meetings, Bolivia advanced two proposals involving the transfer of Chilean territory to Bolivia as a way to resolve Bolivia’s “maritime problem”.⁶¹⁹ The first was for cession by Chile to Bolivia of a strip of land, bounded to the north by the boundary with Peru, and to the south by the River Lluta.⁶²⁰ The second was for cession by Chile to Bolivia of a territorial and maritime “enclave”.⁶²¹ In its proposal, Bolivia provided the locations of three possible enclaves that might be ceded to it by Chile.
- 8.39 Chile considered Bolivia’s proposals in good faith.⁶²² It requested additional information from Bolivia for the purpose of “specifying the content and scope of the Bolivian proposals . . . and thus facilitating a better understanding of them by the Chilean authorities”.⁶²³ Those questions concerned: (i) the precise boundaries of the proposed territory to be ceded; (ii) the port installations that would be required by Bolivia; and (iii) the compensation that Chile would receive. In formulating these questions, Chile specified that it did not consider itself bound to accept

⁶¹⁷ See Minutes of the Third Meeting of the General Committee of the OAS General Assembly, 12 November 1986, **CCM Annex 285**, p 319.

⁶¹⁸ Press Release from the Foreign Ministers of the Republics of Bolivia and Chile, 23 April 1987, **CCM Annex 294**, p 1.

⁶¹⁹ Bolivia’s Memorial, paras 183-188.

⁶²⁰ Bolivian Memorandum No 1 of 18 April 1987, **CCM Annex 289**.

⁶²¹ Bolivian Memorandum No 2 of 18 April 1987, **CCM Annex 290**.

⁶²² See Speech of the Minister of Foreign Affairs of Chile, 21 April 1987, **CCM Annex 291**.

⁶²³ Questions sent by Chile to Bolivia concerning the Bolivian proposals, 21 April 1987, **CCM Annex 292**.

any of Bolivia's proposals.⁶²⁴ On the following day, Bolivia delivered a memorandum providing its answers to Chile's questions.⁶²⁵

8.40 Both States agreed at the end of the meeting in Montevideo that the Bolivian proposals would be put to the Chilean Government for consideration.⁶²⁶ Chile set up a process of consultation involving representatives of various sectors in Chile⁶²⁷ and established a Permanent Commission for the Study of the Bolivian Proposals.⁶²⁸

8.41 After an "intense period of analysis, consultations and detailed briefings", Chile ultimately rejected the Bolivian proposals.⁶²⁹ In a speech given on 9 June 1987, Chile's Minister of Foreign Affairs stated that—

"the substance of the Bolivian proposal is not acceptable for Chile in either of its alternatives, *i.e.*, the cession of sovereign Chilean territory, whether through a corridor north of Arica or through enclaves along its littoral."⁶³⁰

8.42 Bolivia now contends that by rejecting these proposals, Chile "abruptly interrupted the negotiation process",⁶³¹ and was responsible for an "abrupt *volte face*".⁶³² On this basis, Bolivia alleges that there was a breach of the

⁶²⁴ Questions sent by Chile to Bolivia concerning the Bolivian proposals, 21 April 1987, **CCM Annex 292**.

⁶²⁵ Bolivian Memorandum No 3 of 22 April 1987, **CCM Annex 293**.

⁶²⁶ Press Release from the Foreign Ministers of the Republics of Bolivia and Chile, 23 April 1987, **CCM Annex 294**.

⁶²⁷ Aide Mémoire from the Ministry of Foreign Affairs of Chile, 10 June 1987, **CCM Annex 297**.

⁶²⁸ Minutes of the Meeting of the Permanent Commission for the Study of the Bolivian Proposal, 25 May 1987, **CCM Annex 295**, p 1.

⁶²⁹ Statement by the Minister of Foreign Affairs of Chile, 9 June 1987, **CCM Annex 296**, para 2.

⁶³⁰ Statement by the Minister of Foreign Affairs of Chile, 9 June 1987, **CCM Annex 296**, para 2.

⁶³¹ Bolivia's Memorial, para 189.

⁶³² Bolivia's Memorial, para 190.

obligation to negotiate it postulates due to “the refusal of Chile to negotiate the sovereign access”.⁶³³ Bolivia asserts that Chile’s “outright refusal to negotiate was first signalled in 1987.”⁶³⁴

8.43 Chile was subject to no legal obligation to negotiate, but it did engage in good faith with Bolivia on its proposals.⁶³⁵ Chile entered into a meaningful dialogue with Bolivia, while making clear that it was not bound to accept any pre-ordained result and that it would not accept any proposal that was contrary to Chile’s interests. As recalled in Chapter 4 above, an obligation to negotiate does not require a State to act contrary to its own interests.⁶³⁶ Chile’s objection in 1987 was to two proposals that involved the transfer of Chilean sovereign territory. In the same speech that Chile announced that the two proposals put forward by Bolivia were unacceptable, Chile also expressed its willingness to “collaborate with [Bolivia] in the search for solutions that, without altering the national territorial or maritime patrimony, would allow for a bilateral integration that would effectively serve the development and well-being of the respective countries.”⁶³⁷

8.44 At the OAS General Assembly held in June 1987, the Bolivian representative announced that Bolivia had decided to suspend bilateral negotiations with Chile as a result of Chile’s response to the two Bolivian proposals of April 1987.⁶³⁸ The OAS General Assembly never suggested that Chile had acted inconsistently with its resolutions or violated any

⁶³³ Bolivia’s Memorial, para 440 and following.

⁶³⁴ Bolivia’s Memorial, para 443.

⁶³⁵ As to the standard for which, see *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment, I.C.J. Reports 2011, pp 683-686, paras 127-138, in particular p 686, para 135; and paras 4.29-4.32 and 4.43-4.45 above.

⁶³⁶ See paras 4.28-4.32 above.

⁶³⁷ Statement by the Minister of Foreign Affairs of Chile, 9 June 1987, **CCM Annex 296**, para 3.

⁶³⁸ Minutes of the Special Meeting of the Permanent Council of the OAS, 17 June 1987, **CCM Annex 298**.

international obligation. The Assembly limited itself to resolving, in a neutral manner, to “regret that the talks recently held between Chile and Bolivia have broken off”.⁶³⁹ It acknowledged that the dialogue that had been occurring—

“had been taking place *consistent with resolutions* AG/RES. 426 (IX–O/79), AG/RES. 481 (X–O/80), AG/RES. 560 (XI–O/81), AG/RES. 602 (XII–O/82), AG/RES. 686 (XIII–O/83), AG/RES. 701 (XIV–O/84), AG/RES. 766 (XV–O/85), and AG/RES. 816 (XVI–O/86)”.⁶⁴⁰

8.45 Thus, there was no obligation to negotiate, but Chile engaged in a process of rapprochement with Bolivia, considered in good faith proposals that Bolivia made, and expressed a willingness to reach practical solutions improving Bolivia’s access to the sea. Ultimately, however, the two States were unable to reach agreement because Chile took the position that a transfer of its territory to Bolivia would be contrary to its interests, and Bolivia declined to continue discussions on any other basis.⁶⁴¹

⁶³⁹ OAS, General Assembly, resolution AG/RES. 873 (XVII–O/87), Report on the Maritime Problem of Bolivia, 14 November 1987, **CCM Annex 300**, operative para 1. See also OAS, General Assembly, resolution AG/RES. 930 (XVIII–O/88), Report on the Maritime Problem of Bolivia, 19 November 1988, **CCM Annex 304**, operative para 1.

⁶⁴⁰ OAS, General Assembly, resolution AG/RES. 930 (XVIII–O/88), Report on the Maritime Problem of Bolivia, 19 November 1988, **CCM Annex 304** (emphasis added). See also OAS, General Assembly, resolution AG/RES. 873 (XVII–O/87), Report on the Maritime Problem of Bolivia, 14 November 1987, **CCM Annex 300**.

⁶⁴¹ See also paras 4.39–4.42 above.

CHAPTER 9. CONSTRUCTIVE ENGAGEMENT AFTER THE RESTORATION OF DEMOCRACY IN CHILE

- 9.1 Bolivia does not assert in its Memorial that an obligation to negotiate was created by anything that occurred after 1990. No event after 1990 is discussed in the section of Bolivia’s Memorial addressing the “Process of Formation of the Chilean Obligation”.⁶⁴² Rather, Bolivia argues that, after 1990, Chile was “reiterating” an obligation to negotiate that had by then already been created.⁶⁴³ Bolivia also argues that Chile breached that pre-existing obligation through its “refusal” to negotiate on sovereign access after 1990.⁶⁴⁴
- 9.2 In this chapter, Chile describes the relevant events that occurred after 1990, and explains that there is no basis to say that they occurred because of, or reiterated, any pre-existing obligation to negotiate. Neither State mentioned or proceeded on the basis that Chile was subject to an obligation to negotiate regarding sovereign access.⁶⁴⁵
- 9.3 After democracy was restored in Chile in 1990, the bilateral relationship between Chile and Bolivia entered a new phase. The two States focused on building mutual trust and confidence, and grew closer. From 1990 onwards, as part of this process, Chile and Bolivia discussed practical ways to improve Bolivia’s access to the sea, and implemented a number of initiatives to that end. Chile accepted to prepare an agenda without exclusions in the 2000 Algarve Declaration; advanced negotiations and concluded a draft agreement on a Special Economic Zone in 2002, which Bolivia ultimately rejected; included the “maritime issue” in the 13-Point Agenda in 2006; engaged in discussions between 2007-2009 concerning a non-sovereign coastal area for Bolivia on Chilean territory; and continued

⁶⁴² See Bolivia’s Memorial, paras 291-396.

⁶⁴³ Bolivia’s Memorial, para 449.

⁶⁴⁴ See para 4.49 above.

⁶⁴⁵ See paras 4.11-4.12 above; and *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978, p 44, para 106.

discussions through 2010 and 2011. As this chapter concerning the most recent negotiations demonstrates, Bolivia has not, and cannot, establish a breach of any obligation to negotiate.

A. A process of trust building

9.4 At the first session of the OAS General Assembly after democracy was restored in Chile, the Bolivian Foreign Minister did not claim that Chile was subject to an obligation to negotiate. He referred to “support” shown for Bolivia in the resolutions adopted since 1979 concerning Bolivia’s “maritime problem” and considered that support to have—

“preserved the principles of non-intervention and respect for the sovereignty of States, because it has been limited to recommending negotiations between the Parties involved, respecting their rights and their self-determination.”⁶⁴⁶

9.5 Chile’s policy concerning Bolivia was then outlined by the Chilean Foreign Minister:

“Chile’s democratic Government, headed by President Patricio Aylwin, is firmly determined to undertake, together with its sister nation of Bolivia, a great project for understanding, cooperation, and political, economic, cultural, and commercial development, in keeping with the challenges of the emerging international reality.

...

The stance taken by the democratic Government is both constructive and pragmatic. We aspire to place the issue of our joint development at the center of our bilateral relations. We have the political will to do so, and furthermore, we are

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Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 6 June 1990, **CCM Annex 307**, p 305.

certain that the future prospects that would flow from this political will, for both countries, could be enormous.”⁶⁴⁷

9.6 Consistently with Chile’s long-standing position, the Foreign Minister noted that there was no pending issue concerning territorial sovereignty between Chile and Bolivia: “Chile, in its past as a democratic nation and again now, has held the position that the matter raised by Bolivia is already resolved by a Treaty that was validly concluded and is in full force and effect.”⁶⁴⁸ The Foreign Minister went on to state what Chile was open to discussing during the trust-building process:

“Chile is willing to seek ways to perfect the transit rights and amenities that Bolivia enjoys for its access to the sea. We are willing to move towards full bilateral rapprochement, and we are also willing to agree to realistic, strong, and lasting cooperation for the good of both of our nations. We would not like to become involved, once again, in a pointless controversy that would only result in skepticism and weariness. We would like to concentrate, instead, on the auspicious opportunities that are opening up for both of our countries and for our people at this new stage.”⁶⁴⁹

9.7 Without any suggestion of there being an obligation to negotiate, in the decade that followed, the two States engaged in fruitful talks and took concrete actions aimed at strengthening their relationship and building trust. These actions included:

⁶⁴⁷ Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 6 June 1990, **CCM Annex 307**, pp 306 and 308.

⁶⁴⁸ Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 6 June 1990, **CCM Annex 307**, p 306.

⁶⁴⁹ Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 6 June 1990, **CCM Annex 307**, p 308.

- (a) the establishment of the Political Consultations Mechanism (the *PCM*) in 1993 as a forum to manage issues on the bilateral agenda between Bolivia and Chile;⁶⁵⁰
- (b) the signing of the Economic Complementation Agreement in 1993, aimed at strengthening economic relations and trade between the two countries, and which created tariff-free access for most Bolivian goods to the Chilean market, while maintaining tariffs for Chilean goods sold in Bolivia;⁶⁵¹
- (c) the signing of the agreement for the use of the Sica Sica – Arica pipeline in both directions, thus enabling Bolivia to use the pipeline for imports as well as exports;⁶⁵²
- (d) the establishment of two frontier committees to streamline the movement of people and goods at border crossings and better connect the port of Arica with La Paz, and the port of Iquique with Oruro;⁶⁵³

⁶⁵⁰ The PCM was not established in 1995 as Bolivia suggests. See Bolivia’s Memorial, para 450. A joint press release issued on 16 July 1993 “specifically noted the importance of the creation of the Permanent Consultations Mechanism, handled at the level of the Undersecretaries of Foreign Affairs”: Joint Press Release issued by Bolivia and Chile, 16 July 1993, **CCM Annex 309**, para 7. The PCM met twenty-two times between 1994 and 2010 and created subsidiary working groups for the purpose of studying particular issues in detail, such as the Working Group on Free Transit.

⁶⁵¹ Agreement on Economic Complementation between Bolivia and Chile, signed at Santa Cruz de la Sierra on 6 April 1993, **CPO Annex 45(B)**.

⁶⁵² Agreement entered into for Yacimientos Petrolíferos Fiscales Bolivianos to perform works on the Sica Sica – Arica Oil Pipeline between Bolivia and Chile, signed at Santiago on 5 November 1992, **CPO Annex 47(G)**.

⁶⁵³ Minutes of the Fifth Meeting of the Political Consultations Mechanism, 21 March 1997, **CCM Annex 314**, pp 2 and 4-5. These frontier committees were unified in a single body in 1998.

- (e) the signing of the agreements on Cooperation in the Fight Against Drug Trafficking and International Air Transportation;⁶⁵⁴
- (f) the sealing of the highway between Arica and the Bolivian border;⁶⁵⁵
- (g) the exempting holders of diplomatic, official and special passports from the need to obtain visas for travel between the two States,⁶⁵⁶ and abolishing the need for Bolivian tourists in Chile and Chilean tourists in Bolivia to obtain visas and register their passports with the host Government;⁶⁵⁷ and
- (h) the lifting of restrictions on the ownership of property by Bolivians in the city of Arica and tourist and industrial areas surrounding it.⁶⁵⁸

B. The Algarve Declaration

9.8 On 22 February 2000, the Chilean and Bolivian Foreign Ministers issued a joint press release (the *Algarve Declaration*). It provided that:

“2. The Foreign Ministers resolved to prepare a work agenda, which will be formalized in the subsequent stages of the dialogue, that incorporates, without any exclusion,

⁶⁵⁴ Joint Press Release issued by Bolivia and Chile, 16 July 1993, **CCM Annex 309**, paras 4(b) and (d).

⁶⁵⁵ Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 6 June 1995, **CCM Annex 311**, p 226.

⁶⁵⁶ Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 6 June 1995, **CCM Annex 311**, p 226.

⁶⁵⁷ Joint Press Release issued by Bolivia and Chile, 16 July 1993, **CCM Annex 309**, para 4(f); Memorandum of Understanding between Bolivia and Chile, 24 November 1994, **CCM Annex 310**; and Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 6 June 1995, **CCM Annex 311**, p 226.

⁶⁵⁸ Minutes of the Third Plenary Meeting of the OAS General Assembly, 2 June 1998, **CCM Annex 316**, p 92.

the essential issues of the bilateral relationship, *in the spirit of contributing to the establishment of a climate of trust* that must preside over this dialogue . . .

. . .

5. The Foreign Ministers record the frank and friendly manner in which these meetings have been conducted, as well as *the good disposition of the parties*, which reaffirmed *their willingness for the dialogue* that has been launched.⁶⁵⁹

9.9 Nothing in this Declaration suggested that the parties believed they had an obligation to prepare such a work agenda. There was no reference to any existing obligation to negotiate, nor to the historical events that Bolivia now asserts gave rise to such an obligation. When Bolivia’s “maritime problem” was discussed at the OAS in 2002, Bolivia’s Foreign Minister referred to the Algarve Declaration and stated that Bolivia’s new President had “confirmed my country’s decision to keep that *option* of dialogue as a *State policy*.”⁶⁶⁰

C. Discussions regarding a potential Special Economic Zone

9.10 As Bolivia acknowledges in its Memorial, in the “spirit” of the Algarve Declaration, the parties undertook negotiations from 2000 to 2003 “on a project to export gas from Bolivia to the North American market”.⁶⁶¹ Bolivia notes that Chilean President Lagos “proposed to his Bolivian

⁶⁵⁹ Joint Press Release issued by Bolivia and Chile, 22 February 2000, **CCM Annex 318**, paras 2 and 5 (emphasis added).

⁶⁶⁰ Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 4 June 2002, **CCM Annex 324**, p 196 (emphasis added).

⁶⁶¹ Bolivia’s Memorial, paras 199-201. The possibility of exporting Bolivian gas through Chile was one of the early issues of bilateral integration discussed in meetings held following the Algarve Declaration. See Minutes of the Meeting of Experts from Chile and Bolivia on Issues of Integration and Development, 10 November 2000, **CCM Annex 320**, p 2; and Minutes of the Ministerial Meeting on Physical Integration and Development between Chile and Bolivia, 30 January 2001, **CCM Annex 321**, p 3.

counterpart a concession for a Special Economic Zone for an initial 50-year period”.⁶⁶² This was one of the many initiatives designed to improve Bolivia’s access to the sea that was discussed during this period. Bolivia states in its Memorial that the proposal for a Special Economic Zone involved the establishment of a zone “with the attributes of sovereignty, but without using this term”.⁶⁶³ No transfer of sovereign territory was discussed, nor was there any suggestion that Chile was under an obligation to negotiate regarding sovereign access.

9.11 Under the instruction of the Bolivian and Chilean Presidents,⁶⁶⁴ delegations from Bolivia and Chile held several confidential meetings, and the negotiations concerning a Special Economic Zone reached an advanced stage. At a confidential meeting on 22 August 2002, the two delegations agreed on the text of a draft agreement. It provided, *inter alia*, that:

“The Chilean State will grant the Bolivian State a concession for a period of 50 years, which may be extended on the basis of the technical requirements of the project, over an area of approximately 600 hectares, which may be expanded by mutual agreement depending on project needs, in order to establish a tax-free area—called “Special Economic Zone”—for the receipt, processing, industrialization and trade of oil, natural gas, their derivatives and by-products, as well as petrochemical activities and other industrial activities and related services. The Chilean State will grant the Bolivian State a concession over the tax-free areas available in the abovementioned

⁶⁶² Bolivia’s Memorial, para 201. Chile does not accept the accuracy of everything stated in Bolivia’s Memorial in relation to the discussions regarding a potential Special Economic Zone.

⁶⁶³ Bolivia’s Memorial, para 201.

⁶⁶⁴ Joint Press Release issued by Bolivia and Chile, 12 April 2002, **CCM Annex 323**. This joint press release records that the Presidents of Bolivia and Chile “resolved to examine the measures necessary to grant better facilities to enable the export of Bolivian gas and its derivatives to third countries, through a port on the coast of Chile. For this purpose, their technical teams will be meeting shortly.”

zone. The Bolivian State will be in charge of selecting the companies that will carry out the construction and operation of the project, including the company operating the maritime terminal.”⁶⁶⁵

The concession was to be registered with Chile’s Real Estate Registry under the name of the Republic of Bolivia.⁶⁶⁶ The draft agreement also provided that Bolivia would have powers of supervision and audit over companies operating in this tax-free area, and that Bolivian law would apply to employment and social security issues, except for Chilean employees.⁶⁶⁷ Public security in the Special Economic Zone would continue to be kept by Chilean police, and Chilean environmental laws would also apply.⁶⁶⁸

9.12 In its Memorial, Bolivia does not describe how these discussions ended. As explained by Chile at the OAS in June 2004, Bolivia chose not to proceed from the agreed draft to a final agreement:

“Unfortunately, this auspicious path taken by Bolivia and Chile together ended as of January 2004. Bolivia rejected a statute to give an outlet for Bolivian natural gas through Chilean territory through a free grant of land with total exemption from taxes, in a free trade zone and for a period of fifty years, renewable as necessary for the export of gas.”⁶⁶⁹

⁶⁶⁵ Draft agreement between Chile and Bolivia, 22 August 2002, **CCM Annex 325**, para 2. See also E. Pérez Yoma, *One Mission: The Traps in the Chile-Bolivia Relationship* (2004), **CCM Annex 327**, pp 94-96.

⁶⁶⁶ Draft agreement between Chile and Bolivia, 22 August 2002, **CCM Annex 325**, para 3.

⁶⁶⁷ Draft agreement between Chile and Bolivia, 22 August 2002, **CCM Annex 325**, paras 6 and 11.

⁶⁶⁸ Draft agreement between Chile and Bolivia, 22 August 2002, **CCM Annex 325**, para 7.

⁶⁶⁹ Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 8 June 2004, **CCM Annex 332**, p 165.

D. The 13-Point Agenda

9.13 In 2006, under the recently established Governments of President Bachelet of Chile and President Morales of Bolivia, the two States decided to adopt an agenda setting out the “essential issues” in the bilateral relationship, as foreshadowed in the Algarve Declaration. The agenda including thirteen points (the *13-Point Agenda*) was finalised in July 2006, and announced in a joint press release on 18 July 2006.⁶⁷⁰

“By mandate of Presidents Evo Morales and Michelle Bachelet, who have expressed their *intention to develop a comprehensive and constructive dialogue*, without exclusions, between Bolivia and Chile, *based on mutual trust, cooperation and understanding*, the Vice-Ministers of Foreign Affairs of both countries held a meeting in La Paz, on 18 July 2006, preceded by a meeting between the Technical Delegations.”⁶⁷¹

9.14 In this context, they agreed that the agenda comprised all issues relevant to the bilateral relationship, highlighting cross-border integration, free transit, physical integration, the maritime issue, economic cooperation, the Silala watercourse, and water resources, among other matters.⁶⁷² As highlighted in this press release, the dialogue needed to take place “based on mutual trust, cooperation and understanding”.⁶⁷³ For this reason, the very first point in the 13-Point Agenda was the “development of mutual trust”.⁶⁷⁴ As with the Algarve Declaration, nothing in this press release suggests that

⁶⁷⁰ Joint Press Release issued by Bolivia and Chile, 18 July 2006, **CCM Annex 336**.

⁶⁷¹ Joint Press Release issued by Bolivia and Chile, 18 July 2006, **CCM Annex 336**, p 1 (emphasis added).

⁶⁷² Joint Press Release issued by Bolivia and Chile, 18 July 2006, **CCM Annex 336**, p 1.

⁶⁷³ Joint Press Release issued by Bolivia and Chile, 18 July 2006, **CCM Annex 336**, p 1.

⁶⁷⁴ The list of the thirteen issues included in the Agenda was finalised during the second meeting of the Working Group on Bilateral Affairs. The joint minutes of that meeting contain thirteen headings, which formed the thirteen points of the Agenda. See Minutes of the Second Meeting of the Bolivia-Chile Working Group on Bilateral Affairs, 17 July 2006, **CCM Annex 335**. See also Bolivia’s Application, para 26, which cites the minutes of this meeting for the establishment of the 13-Point Agenda.

the two States were acknowledging any pre-existing obligation to negotiate in developing the 13-Point Agenda.

- 9.15 The sixth point in the 13-Point Agenda was the “maritime issue”.⁶⁷⁵ Bolivia and Chile deliberately described the topic extremely broadly, and did not include any reference to “sovereign access”.

E. The Political Consultations Mechanism

- 9.16 After being finalised in July 2006, the 13-Point Agenda informed the topics for discussion in the subsequent meetings of the PCM. The Agenda was discussed in meeting XV on 25 November 2006 and in each subsequent meeting until the last, meeting XXII held on 14 July 2010.⁶⁷⁶ The development of mutual trust—point 1 on the Agenda—was a key issue. It was emphasized at the first of the meetings in which the Agenda was discussed, meeting XV,⁶⁷⁷ and thereafter.⁶⁷⁸

⁶⁷⁵ See Minutes of the Second Meeting of the Bolivia-Chile Working Group on Bilateral Affairs, 17 July 2006, **CCM Annex 335**, p 7.

⁶⁷⁶ Minutes of the Fifteenth Meeting of the Political Consultations Mechanism, 25 November 2006, **CCM Annex 337**; Minutes of the Sixteenth Meeting of the Political Consultations Mechanism, 18 May 2007, **CCM Annex 338**; Minutes of the Seventeenth Meeting of the Political Consultations Mechanism, 19 October 2007, **CCM Annex 339**; Minutes of the Eighteenth Meeting of the Political Consultations Mechanism, 17 June 2008, **CCM Annex 341**; Minutes of the Nineteenth Meeting of the Political Consultations Mechanism, 21 November 2008, **CCM Annex 342**; Minutes of the Twentieth Meeting of the Political Consultations Mechanism, 30 June 2009, **CCM Annex 344**; Minutes of the Twenty-First Meeting of the Political Consultations Mechanism, 13 November 2009, **CCM Annex 346**; and Minutes of the Twenty-Second Meeting of the Political Consultations Mechanism, 14 July 2010, **CCM Annex 348**.

⁶⁷⁷ Minutes of the Fifteenth Meeting of the Political Consultations Mechanism, 25 November 2006, **CCM Annex 337**, p 1: The two States “concurred that the development of mutual trust is the cement upon which the discussion of the issues of bilateral relations rests.”

⁶⁷⁸ See, for example, Minutes of the Seventeenth Meeting of the Political Consultations Mechanism, 19 October 2007, **CCM Annex 339**, p 1, where the Bolivian Vice-Minister “concurred that it was important to continue working to develop mutual trust”. Before the OAS in 2008, the Chilean Foreign Minister noted that the Bolivian Foreign Minister “said that a climate of mutual trust has been created, which at first

9.17 The maritime issue was also discussed at meeting XV on 25 November 2006 and subsequently. In its Memorial, Bolivia submits that statements made by Chile recorded in the PCM minutes “indicate that the Chilean authorities, at the highest level, agreed that negotiations between the two Parties should deal with any pending issue between them, without exclusion or exception, and in particular with the maritime issue” and that these “statements were in full conformity with the commitments undertaken by Chile, which are legally binding on it”.⁶⁷⁹ Bolivia suggests that the identification of an agenda item titled “maritime issue”, and discussions occurring under it, evidence confirmation of a legal obligation regarding “sovereign access”. There is no language in the minutes of the PCM meetings which suggests the existence of a pre-existing obligation to negotiate regarding “sovereign access”. The Political Consultations Mechanism was, as its name indicates, political. Accordingly, before the OAS in 2010, Bolivia’s Foreign Minister described the 13-Point Agenda as “an expression of the *political will* of both countries”.⁶⁸⁰

F. Discussions under point 6, the “maritime issue”

9.18 The minutes of PCM meetings XV to XXII, from 2006 through 2010, make reference to progress being made on the “maritime issue”. Bolivia states in its Memorial that discussions “took a more specific form” in 2009 and concerned the “possibility of creating a Bolivian enclave on the Chilean coast”.⁶⁸¹ Bolivia states that the “position finally adopted by Chile, however, revealed that in reality it was not prepared to accept any

did not exist, . . . a statement with which we also agree”. Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 3 June 2008, **CCM Annex 340**, p 165. See also Minutes of the Nineteenth Meeting of the Political Consultations Mechanism, 21 November 2008, **CCM Annex 342**, p 3, where the two States agreed “to deepen even more the development of mutual trust, as it is the pillar that supports better treatment of all issues in the bilateral relationship.”

⁶⁷⁹ Bolivia’s Memorial, para 456.

⁶⁸⁰ Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 8 June 2010, **CCM Annex 347**, p 139 (emphasis added).

⁶⁸¹ Bolivia’s Memorial, para 457. See also para 213.

such solution.”⁶⁸² Bolivia suggests, by reference to an anonymous blog post, that Chile rejected outright the idea of a non-sovereign enclave.⁶⁸³ That allegation is inconsistent with the evidence.

9.19 The Vice-Ministers of both States exchanged ideas concerning the establishment of a non-sovereign coastal area for Bolivia in the zone of Tiviliche, north of the town of Pisagua and south of the Quebrada de Camarones, with a special status to be negotiated between both States. There was a joint visit to a potential site south of Arica in June 2009,⁶⁸⁴ and the contributions provided by the “technical teams” that made that visit are referred to in the minutes of a number of meetings of the PCM.⁶⁸⁵ In the various minutes, the two States expressed an intention to continue working on the basis of realistic and practical approaches.⁶⁸⁶ Bolivia did not then assert that there was any obligation underlying this diplomatic dialogue.

9.20 A new Government came to power in Chile in March 2010 and explicitly informed Bolivia that Chile remained willing to discuss ways to improve Bolivia’s access to the Pacific Ocean. Bolivia was satisfied with this and exchanges of views continued. At a meeting in December 2010, Chilean

⁶⁸² Bolivia’s Memorial, para 457.

⁶⁸³ Bolivia’s Memorial, paras 457-458; and “Minister of Foreign Affairs and the Bolivian enclave: ‘Any alternatives that divide the country are not beneficial’”, *chile-hoy.blogspot.com*, 6 December 2010, **CCM Annex 349**.

⁶⁸⁴ See Bolivia’s Memorial, footnote 517. “Minister of Foreign Affairs and the Bolivian enclave: ‘Any alternatives that divide the country are not beneficial’”, *chile-hoy.blogspot.com*, 6 December 2010, **CCM Annex 349**, p 1 (“In mid-2009, Bolivia sent a technical team to the area to check out the enclave’s conditions on site”).

⁶⁸⁵ See Minutes of the Eighteenth Meeting of the Political Consultations Mechanism, 17 June 2008, **CCM Annex 341**, p 6; Minutes of the Nineteenth Meeting of the Political Consultations Mechanism, 21 November 2008, **CCM Annex 342**, p 12; Minutes of the Twentieth Meeting of the Political Consultations Mechanism, 30 June 2009, **CCM Annex 344**, p 8; and Minutes of the Twenty-First Meeting of the Political Consultations Mechanism, 13 November 2009, **CCM Annex 346**, p 8.

⁶⁸⁶ See, for example, Minutes of the Twenty-First Meeting of the Political Consultations Mechanism, 13 November 2009, **CCM Annex 346**, p 8.

President Piñera made a “concrete proposal” to Bolivian President Morales.⁶⁸⁷ The Chilean President proposed two options. First a non-sovereign coastal enclave to the north of Arica and, second, an industrial development hub. To continue discussing these proposals the two States agreed to elevate the “maritime issue” to a more senior negotiation track, the Binational High-Level Commission, conducted at the ministerial level.⁶⁸⁸ This was announced in a joint press release issued on 17 January 2011. In that press release the two Foreign Ministers “expressed their interest in fostering and deepening the bilateral dialogue under the framework of the 13-point Agenda”, and continued:

“In this respect, and in furtherance of Presidents Sebastián Piñera’s and Evo Morales’ express instructions, the Ministers of Foreign Affairs of Chile and Bolivia confirmed the decision to establish a Binational High-Level Commission, which will be presided over by both of them, to deal with the matters on the ambitious bilateral agenda.”⁶⁸⁹

This Commission was to operate on a permanent basis.⁶⁹⁰

9.21 As the discussions between the two States were elevated to the ministerial level, the meetings of the PCM, as a mechanism to deal with bilateral issues at the vice-ministerial level, were suspended. As Chile’s Foreign Minister explained at the OAS in June 2011:

⁶⁸⁷ See Chilean Minutes of the Meeting between the Presidents of Chile and Bolivia, 28 July 2011, **CCM Annex 360**, para 4.

⁶⁸⁸ See Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**, p 165; and Chilean Minutes of the Meeting between the Presidents of Chile and Bolivia, 28 July 2011, **CCM Annex 360**, para 3.3.

⁶⁸⁹ Joint Press Release issued by Bolivia and Chile, 17 January 2011, **CCM Annex 351**, p 1. See also Joint Declaration of the Ministers of Foreign Affairs of Bolivia and Chile, 7 February 2011, **CCM Annex 355**.

⁶⁹⁰ Joint Press Release issued by Bolivia and Chile, 17 January 2011, **CCM Annex 351**, p 1.

“Last December the Presidents agreed to elevate the level of bilateral dialogue to a Special Commission headed by the Foreign Ministers accompanied by permanent technical teams. This agreement explains why, without any need for further explanation, the meetings at the level of Vice-Foreign Minister were not continued as they were replaced by a meeting at a higher level, by agreement of both Presidents.”⁶⁹¹

Bolivia’s statement in its Memorial that Chile “suddenly cancelled” the PCM meeting planned to take place in November 2010 and “pulled out of further negotiations”⁶⁹² is therefore misleading, since it does not acknowledge the continuation of negotiations between the Foreign Ministers in replacement of the PCM, and the numerous invitations from Chile for the existing working groups to hold their regular meetings.

G. Bolivia’s change in position

9.22 On 15 January 2011, two days before the announcement in the joint press release of the establishment of the Binational High-Level Commission, Bolivian President Morales was reported as stating that there were no

⁶⁹¹ Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**, p 165.

⁶⁹² Bolivia’s Memorial, para 215. Bolivia is also misleading when it states that it “repeatedly asked for the resumption of [PCM] meetings in order to move forward on the 13 Points Agenda.” See Bolivia’s Memorial, para 215. In support of this statement, Bolivia cites four notes verbales from February 2012, October 2012 and January 2013. In none of these notes did Bolivia request the continuation of PCM meetings in order to discuss the “maritime issue”. Rather, Bolivia raised concerns about port tariffs and boundary matters. For example, in the note from February 2012, Bolivia referred to “the tariff issue at the Port of Arica” and invited Chile to an “extraordinary meeting” of the PCM to “specifically address this issue”. See Note from the Ministry of Foreign Affairs of Bolivia to the Consulate General of Chile in Bolivia, No VRE-DGRB-UAM-002915/2012, 22 February 2012, **CCM Annex 362**. See also Note from the Ministry of Foreign Affairs of Bolivia to the Consulate General of Chile in Bolivia, No VRE-DGRB-UAM-019765/2012, 3 October 2012, **CCM Annex 365**; Note from the Ministry of Foreign Affairs of Bolivia to the Consulate General of Chile in Bolivia, No VRE-DGRB-UAM-019779/2012, 3 October 2012, **CCM Annex 366**; and Note from the Ministry of Foreign Affairs of Bolivia to the Consulate General of Chile in Bolivia, No VRE-DGRB-UAM-000179/2013, 8 January 2013, **CCM Annex 367**.

deadlines for resolving the “maritime issue”.⁶⁹³ On the day of the press release, the Bolivian Foreign Minister, David Choquehuanca, was reported as having ruled out bringing a claim to the Court, because Bolivia and Chile would be “giving priority to the bilateral space and a solution under the framework of a bilateral dialogue”.⁶⁹⁴

9.23 Only one month later, Bolivia had changed its position and issued an ultimatum to Chile. The Bolivian President, Evo Morales, stated: “I will wait until 23 March for a concrete proposal that may act as a basis for a discussion.”⁶⁹⁵ On 23 March 2011, the Bolivian President made a public address on Bolivia’s “day of the sea” in which he announced that Bolivia would commence proceedings before the Court. He stated that “the fight for [Bolivia’s] maritime claim . . . now has to include another fundamental element: to go before international tribunals and bodies, claiming, in accordance with law and justice, a free and sovereign outlet on the Pacific Ocean.”⁶⁹⁶

9.24 On 8 July 2011, Bolivia wrote to the Court in the context of the *Maritime Dispute (Peru v. Chile)* case, referring to “different negotiations that have historically taken place” between Bolivia and Chile, in which, Bolivia asserted, “a right of Bolivia to a sovereign territory reaching out to the sea

⁶⁹³ “Bolivia and Chile open dialogue to discuss outlet to the sea”, *La Razón* (Bolivia), 18 January 2011, **CCM Annex 352**, p 2. On 17 January 2011, the Bolivian Foreign Minister was also reported as stating that there were no deadlines. See “Bolivia and Chile engage in formal dialogue on maritime outlet”, *Página Siete* (Bolivia), 18 January 2011, **CCM Annex 353**.

⁶⁹⁴ “Bolivia’s Minister of Foreign Affairs says dialogue will be bilateral”, *Página Siete* (Bolivia), 18 January 2011, **CCM Annex 354**.

⁶⁹⁵ “Evo requests Chile to submit a maritime proposal before 23 March for discussion”, *Agencia Efe* (Spain), 17 February 2011, **CCM Annex 356**, p 2; and Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**, p 158: “my country asked the Chilean President, publicly and in a respectful and fraternal context, to submit a proposal ‘by 23 March’”.

⁶⁹⁶ Speech delivered by President Evo Morales, 23 March 2011, **CCM Annex 358**, p 3.

has been recognized.”⁶⁹⁷ Not once in the two decades of discussions between the two States following 1990 had Bolivia ever claimed that an obligation to negotiate concerning sovereign access existed.⁶⁹⁸ The letter also noted that “Bolivia has sufficient jurisdictional basis to submit to the Court any claims that might be required in order to protect its rights.”⁶⁹⁹

9.25 Notwithstanding Bolivia’s clearly expressed intention to commence proceedings against Chile, the two States continued to discuss practical ways to improve Bolivia’s access to the sea within the framework of the “maritime issue”. On 28 July 2011, only three weeks after Bolivia sent its letter to the Court, the Presidents met. As recorded in the Chilean minutes of that meeting, the Chilean President “reiterated that we were willing to negotiate based on the observance of the 1904 Treaty; not ceding sovereignty and the general proposal outlined in December.”⁷⁰⁰ The President—

“reiterated that a concrete proposal had been made in December, and briefly explained again its terms and conditions. President Piñera added that the proposal was based on:

- Observance of the 1904 Treaty
- No sovereignty
- A solution for the Bolivian Constitution’s provision mandating vindication.”⁷⁰¹

⁶⁹⁷ Letter from David Choquehuanca, Minister of Foreign Affairs of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 8 July 2011, **CPO Annex 65**, para 2.

⁶⁹⁸ See paras 4.11-4.12 above; and *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Judgment*, *I.C.J. Reports 1978*, p 44, para 106.

⁶⁹⁹ Letter from David Choquehuanca, Minister of Foreign Affairs of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 8 July 2011, **CPO Annex 65**, para 4.

⁷⁰⁰ Chilean Minutes of the Meeting between the Presidents of Chile and Bolivia, 28 July 2011, **CCM Annex 360**, para 3.3.

⁷⁰¹ Chilean Minutes of the Meeting between the Presidents of Chile and Bolivia, 28 July 2011, **CCM Annex 360**, para 4.

The Bolivian President responded that he wanted to continue to “fine-tune” the proposal, and the Presidents instructed representatives to engage in confidential talks to that end.⁷⁰²

- 9.26 Under the Bolivian Constitution, the executive branch was required to “denounce and, if necessary, *renegotiate* those international treaties that are contrary to the Constitution”,⁷⁰³ including those that are contrary to Bolivia’s constitutionally declared “unwaivable and imprescriptible right over the territory giving access to the Pacific Ocean”.⁷⁰⁴ The executive branch of the Government was required to take this action within four years of its appointment;⁷⁰⁵ that is, by December 2013.
- 9.27 Before the OAS in 2012, the Bolivian Foreign Minister “demand[ed] the Government of the Republic of Chile to *renegotiate* the 1904 Treaty”.⁷⁰⁶ He further stated that Bolivia made “the specific proposal of renegotiation, *under the framework of our Political Constitution of the State*”.⁷⁰⁷ The following day, the Bolivian Vice-Foreign Minister was reported as stating: “We are asking for a renegotiation *as required by our Constitution*”.⁷⁰⁸ Before the OAS, the Chilean Foreign Minister responded that dialogue

⁷⁰² Chilean Minutes of the Meeting between the Presidents of Chile and Bolivia, 28 July 2011, **CCM Annex 360**, paras 4.3 and 5.

⁷⁰³ Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **CPO Annex 62**, Ninth Transitional Provision (emphasis added).

⁷⁰⁴ Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **CPO Annex 62**, Article 267.

⁷⁰⁵ Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **CPO Annex 62**, Ninth Transitional Provision.

⁷⁰⁶ Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 5 June 2012, **CCM Annex 363**, p 204 (emphasis added).

⁷⁰⁷ Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 5 June 2012, **CCM Annex 363**, p 219 (emphasis added).

⁷⁰⁸ “Bolivia demands at OAS that Chile renegotiate the 1904 Treaty”, *La Razón* (Bolivia), 6 June 2012, **CCM Annex 364**, p 2 (emphasis added).

between the two States “must be based . . . on the validity and full recognition of the Treaty of Peace and Amity”.⁷⁰⁹

9.28 Subsequently, on 6 February 2013, the Bolivian Senate specified that the constitutional duty could be fulfilled not only by renegotiating treaties contrary to the Constitution, but also by challenging such treaties before international tribunals.⁷¹⁰ On 8 February 2013, just two days later, the Bolivian Vice-President stated that:

“Concerning the topic of the 1904 Treaty, the Political Constitution of the State obviously provides for a period up to year-end to adapt all treaties signed by Bolivia with other governments on any subject-matter, to adapt them to the Political Constitution of the State, and most certainly this will be done with the 1904 Treaty.”⁷¹¹

Two months later, in April 2013, Bolivia filed its application with the Court, alleging that Chile is subject to an obligation to negotiate.

⁷⁰⁹ Minutes of the Fourth Plenary Meeting of the OAS General Assembly, 5 June 2012, **CCM Annex 363**, p 208.

⁷¹⁰ Bolivian Law on Normative Application – Statement of Reasons, 6 February 2013, **CPO Annex 71**, Article 6. This was also confirmed by Bolivia’s Constitutional Court. See Constitutional Tribunal of Bolivia, Plurinational Constitutional Declaration No 0003/2013, made in Sucre on 25 April 2013, **CCM Annex 369**, pp 15-16.

⁷¹¹ “García Linera: The adaptation of the 1904 Treaty to the [Political Constitution] will take place by December 2013”, *Agencia de Noticias Fides* (Bolivia), 15 February 2013, **CCM Annex 368**, p 1. Cf. *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/21, 8 May 2015, p 27, para 10: “Ni le traité de 1904 n’a été considéré comme étant contraire à la Constitution, ni à aucun moment le pouvoir exécutif n’a procédé soit à la dénonciation, soit à saisir d’une demande les tribunaux internationaux pour sa terminaison” (“*The 1904 Treaty has never been considered as being contrary to the Constitution*, nor has the Executive Branch ever denounced it or challenged it before an international tribunal”) (emphasis added); and *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/19, 6 May 2015, pp 45-46, paras 21-22.

PART IV

CHAPTER 10. CONCLUSION AND SUBMISSION

10.1 Chile is not under any legal obligation to negotiate with Bolivia. Bolivia has not established:

- (a) the existence of any legal obligation to negotiate;
- (b) when it considers that any obligation first arose;
- (c) the content of the obligation it alleges, including the meaning of “sovereign access”;
- (d) the duration of that obligation, and in particular that it still exists now;
- (e) that Chile is currently in breach of that obligation; or
- (f) that Bolivia is entitled to a remedy for that breach.

Bolivia has the burden to prove its claims and has failed to do so. The result must be their complete dismissal.

10.2 Bolivia has in the past made plain that it is well aware that it cannot establish a case based on law. Before the General Assembly of the Organization of American States in 1995, Bolivia’s Foreign Minister issued “a fraternal call to the Republic of Chile to leave behind the traditional answers that seek a legal basis but avoid solidarity”.⁷¹² Given the absence of a legal basis for its claim, Bolivia is now effectively asking the Court to “leave behind” the law and make an order based on politics,

⁷¹²

Minutes of the Second Meeting of the General Committee of the OAS General Assembly, 6 June 1995, **CCM Annex 311**, p 225.

in the hope that an order of the Court even partially in its favour will enable the Bolivian Government to claim victory before its own constituency and place political pressure on Chile. Since the Court is a court of law, and its “function is to decide in accordance with international law”,⁷¹³ Bolivia is asking the Court to depart from the role States have conferred on it.

- 10.3 Bolivia’s awareness of the inadequacy of the individual documents and exchanges on which it relies is reflected in its inaccurate and incomplete presentation of them to the Court, and in its assertion of an obligation created through “an accumulation of successive acts by Chile”.⁷¹⁴ An accumulation of interactions, none of which created or confirmed a legal obligation, does not create such an obligation by accretion. Intermittent diplomatic and political discussions spread throughout a period of more than a century cannot be reformulated as an international legal obligation.
- 10.4 Chile has behaved as a good neighbour engaging with Bolivia on matters of concern to it. In negotiating with Bolivia, Chile did not undertake a legal obligation to do so again. Bolivia asks the Court to order Chile to do again something it has already done, and which has already failed to produce the result that Bolivia seeks.
- 10.5 It is clear that Bolivia has developed a new legal theory based on a legal obligation to negotiate, and then sought to reinterpret more than a century of disparate facts to fit that new legal theory. As noted above, it is on the events of 1950 and 1975 that Bolivia places greatest weight. At those times, neither State considered that they were under, or were creating, a legal obligation to negotiate. The terms the two States used in 1950 and 1975 demonstrated no intention to create any legal obligation and neither

⁷¹³ Statute of the International Court of Justice, Article 38(1).

⁷¹⁴ Bolivia’s Memorial, para 337. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/21, 8 May 2015, pp 33-34, para 9.

State contemporaneously suggested that they did, or called on the other State to fulfil any obligation that is now much later alleged to have existed. If there had been any basis on which to claim the existence of such an obligation, it is precisely at those times that such a claim would have been voiced. The claimed legal obligation to negotiate is a much later construct, as a reformulation of Bolivia's longstanding aspiration to change the settlement agreed in the 1904 Peace Treaty.⁷¹⁵ It is not a claim based in agreements and practice between the parties.

- 10.6 From 1975 to 1978 Chile negotiated in good faith over a sustained period within what both States then considered to be an acceptable political framework. That process ended when Bolivia rejected the framework it had initially accepted, brought the negotiations to an end, and ruptured diplomatic relations. Since the restoration of democracy in Chile in 1990, Bolivia and Chile engaged and made progress on practical solutions to improve Bolivia's access to the sea, but this was interrupted by Bolivia's insistence, motivated by the new Bolivian Constitution, on renegotiating the form of access to the sea that was established by the 1904 Peace Treaty.
- 10.7 Bolivia's claims before the Court are artificial and unfounded and the Court should dismiss them in their entirety.

⁷¹⁵

“Morales wanted to denounce the 1904 Treaty”, *La Razón* (Bolivia), 24 December 2015, **CCM Annex 373**: “President Evo Morales revealed yesterday that he initially wanted to denounce the 1904 Treaty . . . ‘This was my personal opinion. Then, my people from the legal team explained to me that this was not the way and I (in this way) withdrew my position,’ stated the President, who also said that an intense debate took place prior to choosing the judicial process that started with the application filed in 2013 with the International Court of Justice”.

10.8 Chile concludes this Counter-Memorial with its formal submission to the Court:

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

José Miguel Insulza
Agent of the Republic of Chile
13 July 2016

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José Miguel Insulza

Agent of the Republic of Chile

13 July 2016