

**INTERNATIONAL COURT OF JUSTICE**

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

***(BOLIVIA v. CHILE)***

**REJOINDER OF THE  
REPUBLIC OF CHILE**

**Volume 1 of 3**

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## **REJOINDER OF THE REPUBLIC OF CHILE**

CHAPTER 1. INTRODUCTION .....	1
A.    Chile’s unchanging position .....	1
B.    Bolivia’s changing case .....	3
C.    The dispute over which the Court has taken jurisdiction .....	9
CHAPTER 2. THE LEGAL FRAMEWORK GOVERNING THIS DISPUTE..	11
A.    Chile is subject to no “general obligation to negotiate” sovereign access to the Pacific Ocean for Bolivia.....	12
B.    Obligations to negotiate arising from an intention to be legally bound .....	13
C.    Bolivia’s case on the creation of an obligation to negotiate by estoppel, acquiescence or legitimate expectations.....	19
D.    Rules and principles applicable if an obligation to negotiate has arisen .....	28
CHAPTER 3. THE NON-EXISTENT “NINETEENTH CENTURY HISTORICAL BARGAIN” SAID TO PERSIST BEYOND THE COMPREHENSIVE SETTLEMENT AGREED IN THE 1904 PEACE TREATY .....	39
A.    In negotiating and concluding the 1904 Peace Treaty Bolivia abandoned its claim to a port .....	43
B.    The 1904 Peace Treaty was a comprehensive settlement collateral to which there was no obligation to negotiate sovereign access to the sea for Bolivia.....	50
C.    Conclusions: the enduring significance of the 1904 Peace Treaty.....	53
CHAPTER 4. DIPLOMATIC INTERACTIONS FROM 1920 TO 1926 .....	55
A.    The 1920 Minutes did not create any legal obligation .....	55
B.    The 1926 Kellogg Proposal and related exchanges did not establish or confirm any legal obligation.....	66

CHAPTER 5. THE 1950 DIPLOMATIC NOTES .....	73
A.    The diplomatic notes of June 1950 neither created nor confirmed the existence of any legal obligation .....	73
B.    The discussions leading to the 1950 notes neither created nor confirmed any legal obligation.....	79
C.    Events subsequent to the 1950 notes neither created nor confirmed the existence of any legal obligation .....	81
CHAPTER 6. THE CHARAÑA PROCESS OF 1975 TO 1978 .....	99
A.    The Joint Declaration of Charaña did not create or confirm any legal obligation.....	100
B.    Adoption of guidelines for negotiation, August-December 1975 .....	112
C.    Negotiations between Bolivia and Chile, and consultation with Peru .....	118
D.    Conclusions .....	130
CHAPTER 7. FURTHER POLITICAL INTERACTIONS IN THE PERIOD PRECEDING THE RESTORATION OF DEMOCRACY IN CHILE .....	135
A.    The OAS General Assembly Resolutions and conduct related to them neither confirmed nor created any obligation to negotiate on sovereign access.....	135
B.    Chile did not consent to any obligation to negotiate on sovereign access during the “Fresh Approach” .....	147
CHAPTER 8. CONSTRUCTIVE ENGAGEMENT AFTER THE RESTORATION OF DEMOCRACY IN CHILE .....	153
A.    No legal obligation was created or confirmed between 1990 and 2011.....	154
B.    These proceedings are a function of a change in position by Bolivia.....	162
CHAPTER 9. NO LEGAL OBLIGATION WAS CREATED BY AN ACCUMULATION OF CONDUCT .....	175
A.    There was no consistent and continuous course of conduct recognizing any obligation to negotiate concerning sovereign access.....	176

B.	Any repetition of expressions of political willingness did not demonstrate an intention to be legally bound.....	180
C.	No legal obligation was created by estoppel .....	182
D.	No legal obligation was created by the “doctrine” of legitimate expectations .....	188
E.	No legal obligation was created by acquiescence.....	189
CHAPTER 10. CONCLUSIONS AND SUBMISSION.....		193
A.	Bolivia’s prayer for relief .....	193
B.	Summary of Chile’s case .....	193
C.	Chile’s Submission .....	196
Appendix A. The 1895 Treaties are wholly without effect.....		197
Appendix B. Additional details concerning the 1950 diplomatic notes.....		205



## CHAPTER 1. INTRODUCTION

1.1. In this Rejoinder Chile responds directly to the arguments made by Bolivia in its Reply, many of which were new arguments. In doing so Chile does not repeat the content of its Counter-Memorial, all of the positions expressed in which Chile maintains.

1.2. Bolivia's case has gone through three iterations: in its Memorial, as put orally during the preliminary objection phase, and as now put in its Reply. There have been material changes in the way the claim has been put in these various pleadings, as identified further below. However, the central difficulty for Bolivia remains: it is unable to point to any agreement, unilateral statement or other form of conduct establishing an obligation to negotiate on sovereign access to the Pacific Ocean. The new emphasis in Bolivia's Reply on estoppel and legitimate expectations cannot change that.

### A. Chile's unchanging position

1.3. Chile's position, which is based on and fully supported by a plain reading of the documents on record, is as follows:

(a) In 1904, Chile and Bolivia concluded a Peace Treaty settling the boundary between them and establishing in perpetuity a right of free transit to the sea in favour of Bolivia. The 1904 Peace Treaty was a comprehensive settlement of *all* issues outstanding between the two States at the date of its conclusion, as Bolivia acknowledged at the time.

(b) At certain junctures since 1904, Chile has been willing to engage with Bolivia to see whether it was possible to find a satisfactory formula to grant Bolivia sovereign access to the sea. However, a statement of willingness to engage in negotiations, or indeed the fact of the negotiations themselves, does not give rise to a legal obligation to negotiate. Were it otherwise, States would be largely deprived of the necessary diplomatic space to explore possibilities for resolving the matters that divide them.

(c) The critical question in this case is whether the diplomatic interactions on which Bolivia relies gave rise to a legal obligation to negotiate. The answer is no. Moreover, adding together a number of events that do not individually manifest any intention to be bound cannot create such an intention by accumulation. Whether Chile and Bolivia's engagement over the years is taken individually or cumulatively, nowhere will the Court find an agreement or undertaking by Chile to "negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean".<sup>1</sup> That formulation was created by Bolivia for the purpose of these proceedings. It does not appear in any document relied on by Bolivia. It cannot somehow be conjured into existence by reference to estoppel or legitimate expectations.

(d) Chile has at different times and in different ways sought to engage constructively with Bolivia's desires for improved access to the Pacific, as it has with other issues of importance to one or both countries. Bolivia places great weight on Chile's engagement, but it is difficult to see how a neighbouring State that wishes to have harmonious relations could do otherwise. A State may say that it is willing to "give an ear" to the wishes of a neighbouring State, but that does not mean that a legal obligation somehow arises. Chile's foreign policy has been to seek to improve relations with Bolivia; but, as is entirely to be expected, it has sought to advance that policy taking into account its own interests, employing careful and non-binding language. These political exchanges did not create any legal obligation. Indeed, if Chile had been under any belief or fear to the contrary, it simply would not have entered into any dialogue on such a politically sensitive issue.

(e) From the time of Chile's return to democracy in 1990, Chile and Bolivia have engaged constructively on a range of matters. One of those matters was further improvement of Bolivia's access to the sea. At no stage during twenty years of dialogue, however, was it ever said by Bolivia that Chile was under an *obligation* to negotiate sovereign access. Indeed, that bilateral political dialogue

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<sup>1</sup> Bolivia's Memorial, para 500(a); and Bolivia's Reply, p 192, para (a).



was ongoing when Bolivia announced that it would seize the Court. Bolivia brought this case as a result of domestic imperatives. In 2009, Bolivia had changed its Constitution to declare “its unwaivable and imprescriptible right over the territory giving access to the Pacific Ocean and its maritime space”.<sup>2</sup> That constitutional assertion contained an obligation on Bolivia to act by December 2013. Hence, the current proceedings before the Court.<sup>3</sup>

## **B. Bolivia’s changing case**

1.4. In contrast to Chile’s consistent position, Bolivia’s Reply contains the third variation of the case that Bolivia has put to the Court. These changes of position aptly illustrate the central difficulty for Bolivia’s case, namely its inability to identify any document establishing an obligation to negotiate.

1.5. In its Memorial, Bolivia’s case was put in terms of an alleged *right* of sovereign access. It was claimed that Bolivia “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.”<sup>4</sup>

(a) The existence of this alleged *right* of Bolivia was the basis for the claim that Chile was subject to an obligation to negotiate *leading to a specific result*, namely “the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean”.<sup>5</sup> Bolivia sought an order from the Court giving effect to that claimed obligation to achieve a “predetermined result”,<sup>6</sup> being cession of Chilean territory to Bolivia (“fully sovereign access”).

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<sup>2</sup> Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **CR Annex 447**, Article 267 and Ninth Transitional Provision. See further Chapter 8, Section B below.

<sup>3</sup> See further para 8.16 below.

<sup>4</sup> Bolivia’s Memorial, para 20. See also Bolivia’s Memorial, paras 94 and 21, 36, 96, 143, 254, 271-273, 338, 493, 497 and 498.

<sup>5</sup> Bolivia’s Memorial, para 500(a).

<sup>6</sup> Bolivia’s Memorial, para 404. See also, e.g., Bolivia’s Memorial, para 287.

(b) This obligation to negotiate was said by Bolivia to have arisen prior to 1990,<sup>7</sup> and to be based in various agreements and obligations arising from conduct or unilateral promises said to evince Chile's intention to be bound.<sup>8</sup> The emphasis in the Memorial was on a series of "key episodes", with a particular weight being placed on the 1895 Transfer Treaty (said to establish obligations on Chile to transfer sovereignty over territory to Bolivia).<sup>9</sup>

1.6. In its oral pleadings on Chile's preliminary objection, Bolivia retreated from the assertions of a pre-existing right to sovereign access. It belatedly acknowledged that the 1895 Transfer Treaty had never entered into force and was "wholly without effect".<sup>10</sup> Bolivia also retreated from the claim of an obligation of result to one of conduct,<sup>11</sup> while it also stated that the term "sovereign access" could include "a special zone, or some other practical solution".<sup>12</sup> These changes were made with the aim of defeating Chile's jurisdictional objection that the case put by Bolivia in its Application and in its Memorial engaged the exclusion in Article VI of the Pact of Bogotá because, in seeking an order for negotiation that would lead to territorial cession, Bolivia was seeking to re-open "a matter ... settled ... or governed" by the 1904 Peace Treaty.<sup>13</sup>

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<sup>7</sup> As noted by Chile in its Counter-Memorial, para 9.1, no event after 1990 is discussed in the section of Bolivia's Memorial addressing the "Process of the Formation of the Chilean Obligation" (Bolivia's Memorial, paras 291-396).

<sup>8</sup> Bolivia's Memorial, Chapter II, Part III, Section B.

<sup>9</sup> Bolivia's Memorial, paras 5-18.

<sup>10</sup> See Chile's Counter-Memorial, paras 1.8 and 2.4-2.9; and *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.

<sup>11</sup> 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, p 18, para 9. See also Bolivia's rejection in clear terms in the second round of Chile's position that Bolivia was 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, pp 27-28, para 11.

<sup>12</sup> *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Hearing on the Preliminary Objection*, CR 2015/19, 6 May 2015, pp 50-51, para 3.

<sup>13</sup> See Dissenting Opinion of Judge Arbour, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Preliminary Objection, Judgment*, *I.C.J. Reports 2015*, paras 25-26.

1.7. With Bolivia's Reply, the Court is faced with a third iteration of Bolivia's case.

(a) Having retreated from a claim of a prior *right* to sovereign access, Bolivia now seeks to advance a case based on the alleged "cumulative effect of more than a century of [Chile's] own consistent conduct".<sup>14</sup> This new case emphasizes estoppel, legitimate expectations and acquiescence. It is flatly inconsistent with the case as put in the Memorial. There, it was claimed that Chile had breached obligations owed to Bolivia on the basis of an alleged degradation over time in the (alleged) agreed terms for a negotiation.<sup>15</sup> By contrast, Bolivia now relies on an alleged "continuity" and accumulation since the nineteenth century, and claims that there was a sudden repudiation of the obligation to negotiate by Chile in 2011.<sup>16</sup>

(b) Further, notwithstanding the position adopted at the preliminary objection phase, it is now plain that by "fully sovereign access to the sea" Bolivia is again seeking the cession of territory from Chile.<sup>17</sup>

(c) Also in contrast to Bolivia's earlier case, there is now a new allegation that there were "undertakings post-1990".<sup>18</sup>

1.8. These changes of case are a reaction to Chile's point-by-point rebuttal of Bolivia's reliance on discrete instances of diplomatic engagement between Chile and Bolivia as the foundation of its claim. This shift in Bolivia's Reply to a case based on cumulative conduct beginning in the nineteenth century points both to the shortcomings of Bolivia's case as initially pleaded and to the mercurial character of the case that it puts to the Court of a legal obligation resting on diplomatic engagement.

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<sup>14</sup> Bolivia's Reply, para 7.

<sup>15</sup> Bolivia's Memorial, para 400 *et seq* and para 434.

<sup>16</sup> See, e.g., Bolivia's Reply, paras 13, 346 and 472.

<sup>17</sup> Bolivia's Reply, para 138.

<sup>18</sup> Bolivia's Reply, paras 312-318.

1.9. Bolivia’s new arguments are addressed in the subsequent chapters of this Rejoinder. However, three points on Bolivia’s changing case warrant comment by way of introduction.

1.10. First, in its Memorial, Bolivia sought to rectify the absence of any obligation appearing in the documents on which it relied by inviting the Court to interpret the documents against the backdrop of an alleged pre-existing right to sovereign access that Bolivia sourced in the 1895 Transfer Treaty. Bolivia can no longer sustain such a claim. It has been forced to acknowledge that the 1895 Transfer Treaty never entered into force and is wholly without effect. Undeterred, Bolivia seeks, in its Reply, to reach the same end through a broad invocation of a “nineteenth century historical bargain”<sup>19</sup> of unidentified origin, and a claimed “persisting” obligation to negotiate for so long as its “cause” has not disappeared.<sup>20</sup> In doing so, Bolivia invokes, and misapplies, domestic civil law. Chile’s case, by contrast, is rooted in international law, and is based on an analysis of each of the documents on which Bolivia relies.

1.11. Secondly, at the hearing of the preliminary objection, Bolivia suggested that “sovereign access” could include “a special zone, or some other practical solution”.<sup>21</sup> That was a statement of particular importance given Chile’s objection that the relief sought by Bolivia in its Memorial would inevitably require an “unsettling” of the 1904 Peace Treaty. Having argued for the existence of jurisdiction for its case on one basis, Bolivia cannot now change its case back to a claim with respect to an obligation to negotiate to grant what amounts to a cession of territory.

1.12. Thirdly, in its Reply, Bolivia has sought to set an agenda that directs attention away from the key issue of whether it can identify an agreement or other source of legal obligation on which its case must depend. Thus, in various forms,

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<sup>19</sup> See further Chapter 3 below.

<sup>20</sup> Bolivia’s Reply, para 474.

<sup>21</sup> *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Hearing on the Preliminary Objection, CR 2015/19, 6 May 2015, pp 50-51, para 3.

Bolivia has raised what it characterizes as a “simple, decisive question” of why, if Chile was not under an obligation to negotiate, Chile expressed on various occasions a willingness to negotiate.<sup>22</sup>

1.13. The question is neither simple nor decisive.

1.14. Chile’s periodic engagements with Bolivia over the years have been quintessentially acts of political diplomacy, motivated in part by good neighbourliness, and in part by self-interest in the form of an exploration of the possibilities of a *quid pro quo*. For example, in respect of the diplomatic exchanges of June 1950, Chile was attracted by the possibility of an agreement with Bolivia in which Bolivia, in return for sovereign access to the sea, would allow the waters of Lake Titicaca and other highland lakes to be channelled into Chile to be used for irrigation and hydroelectric power production. This would have been pursuant to a major engineering scheme financed by the US and discussed between Chilean President González Videla and US President Truman in May 1950.<sup>23</sup> In the Charaña process in 1975-1978, Chile was only willing to engage with Bolivia on the basis of a territorial exchange between the two States.<sup>24</sup>

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<sup>22</sup> Bolivia’s Reply, paras 318, 389 and 477. At para 318, Bolivia also asks why Chile repeatedly said that there was a “need” for Bolivia to have sovereign access to the Pacific. Bolivia repeats this allegation throughout its Reply, without providing any references to statements which support its allegation (see, e.g., Bolivia’s Reply, paras 151, 154(e), 321, 341, 342 and 348). However, the simple answer is that, once the 1904 Peace Treaty had been concluded, Chile did not refer to any such “need”. By way of illustration, it is useful to contrast Bolivia’s June 1950 note, which referred to a “need” to obtain sovereign access, with Chile’s responsive note and the 1961 Trucco Memorandum, both of which referred instead to “the possibility of satisfying the aspirations of [Bolivia] and the interests of Chile”. See further Chapter 5 below. There are some isolated and sporadic references by Chile to a “need” to find a solution, but that is something quite different to a “need for Bolivia to have a sovereign access” (see, e.g., President of Chile’s Note, No 685, 30 September 1975, **BM Annex 70** cited in Bolivia’s Reply, para 341; Joint Declaration of the Foreign Ministers of Chile and Bolivia, 10 June 1977, **CCM Annex 222**, cited in Bolivia’s Reply, para 341; and Chilean President’s Note, 7 January 1884, **BM Annex 36**, cited in Bolivia’s Reply, para 475).

<sup>23</sup> See further Chapter 5, para 5.14 below.

<sup>24</sup> See further Chapter 6.

1.15. These engagements were not driven in any way by a sense of legal obligation. Moreover, they were entered into by Chile on each occasion with the comfort of knowing that the 1904 Peace Treaty had settled the territorial arrangements between the Parties and, therefore, that Bolivia had no *entitlement* to any portion of Chilean territory. If a deal was to be done, it would therefore be on terms acceptable to Chile. Chile was under no obligation to grant to Bolivia sovereign access, nor under any obligation to negotiate to do so.

1.16. In the final paragraph of its Reply, Bolivia acknowledges that Chile's various engagements with Bolivia were linked to Chile's interests, but asks how Chile can now claim that its interests are no longer compatible with the negotiation of a sovereign access to the Pacific for Bolivia.<sup>25</sup> That question is fundamentally misconceived. This is not a case that turns on Chile's interests, and still less on Bolivia's subjective impressions concerning them. It is a case that turns on an objective interpretation of the instruments said by Bolivia to have created legal obligations. The principal task for the Court is thus to identify whether, through the terms of the various statements Bolivia relies on, Chile demonstrated the existence of an intention to be bound to the terms of those statements.

1.17. A legal obligation to negotiate does not arise simply in consequence of a willingness to enter into negotiations. What Bolivia seeks from the Court—the *post hoc* grafting on to political-diplomatic dialogue of a legal obligation to negotiate—is counter both to legal principle and to the lifeblood of diplomacy.

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<sup>25</sup> Bolivia's Reply, para 477.

### C. The dispute over which the Court has taken jurisdiction

1.18. In its Judgment of 24 September 2015 on the preliminary objection, the Court noted that: “The Application does not ask the Court to adjudge and declare that Bolivia has a right to sovereign access.”<sup>26</sup>

1.19. The Court characterized the dispute over which it assumed jurisdiction as follows:

“In view of the foregoing analysis, the Court concludes that the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia’s sovereign access to the Pacific Ocean, and, if such an obligation exists, whether Chile has breached it.”<sup>27</sup>

The Court also observed 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”.<sup>28</sup>

1.20. It follows that the dispute in respect of which the Court has taken jurisdiction is a dispute over whether Chile is obliged to negotiate in good faith Bolivia’s sovereign access and if so, whether Chile has breached that obligation.

1.21. By contrast, it is *not* a dispute over whether Bolivia has a right of sovereign access. Nor is it a dispute concerning an obligation to negotiate to reach a result that grants Bolivia sovereign access to the sea.

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<sup>26</sup> *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (Obligation to Negotiate Access to the Pacific Ocean, Preliminary Objection)*, para 32.

<sup>27</sup> *Obligation to Negotiate Access to the Pacific Ocean, Preliminary Objection*, para 34. The wording does not follow the wording to be found in Bolivia’s prayer for relief, but rather adds the words “in good faith” in place of “in order to reach an agreement granting”.

<sup>28</sup> *Obligation to Negotiate Access to the Pacific Ocean, Preliminary Objection*, para 33.

1.22. Following this introduction, in Chapter 2 of this Rejoinder Chile examines the relevant issues of international law. In Chapter 3, it addresses Bolivia's new claim to the existence of a "nineteenth century historical bargain", notwithstanding the conclusion of the 1904 Peace Treaty, and notwithstanding that the 1895 Treaties never entered into force and are wholly without effect.

1.23. In Chapters 4 to 8, Chile addresses each of the later periods, and each document or exchange within each period, said by Bolivia to give rise to an obligation to negotiate.

1.24. In Chapter 9, Chile responds to Bolivia's newly developed case on continuity and its contention that an obligation to negotiate has arisen through an accumulation of events.

1.25. Finally, in Chapter 10, Chile concludes this Rejoinder with a summary of Chile's case and with Chile's submission.

1.26. This Rejoinder is accompanied by the 81 annexes referred to in the list of annexes that accompanies it. They are organized in chronological order in Volumes 2 and 3. Chile begins the numbering of the annexes filed with this Rejoinder at Annex 374, earlier ones having been filed with previous pleadings. With the electronic version of this Rejoinder Chile has provided a consolidated list of all annexes filed by either Party organized in chronological order, together with all of the annexes themselves organized in the same way.



## CHAPTER 2. THE LEGAL FRAMEWORK GOVERNING THIS DISPUTE

2.1. The essence of the present dispute is whether through the various interactions Bolivia relies on, Chile demonstrated an intention to be bound by international law to negotiate with Bolivia on sovereign access to the Pacific Ocean. Since it is clear that Chile demonstrated no such intention, Bolivia says that Chile is subject to an obligation to negotiate not only arising from “individual, formal agreements”, but “also from sources and legal processes, such as informal agreements, tacit agreements, acquiescence, unilateral acts, and doctrines such as estoppel based on clear and consistent courses of conduct”.<sup>29</sup> Since it is also clear that no obligation to negotiate arose by any of those means, Bolivia additionally asserts an “obligation to negotiate under general international law” concerning “any pending issue” that “needs to be settled”.<sup>30</sup> These different attempts to create a legal source for an obligation to negotiate concerning sovereign access to the sea are all baseless, but if Bolivia could establish that Chile was subject to a legal obligation to negotiate, the remaining questions would concern the content of any such obligation, whether it had been breached, and whether it persisted today.

2.2. This chapter accordingly addresses the legal framework relevant to:

- (a) the “general obligation to negotiate” said by Bolivia to apply in this case (**Section A**);
- (b) creation of obligations to negotiate through an intention to be bound by such an obligation (**Section B**);
- (c) Bolivia’s arguments concerning the creation of obligations to negotiate through the operation of (i) estoppel, (ii) legitimate expectations, and (iii) acquiescence (**Section C**); and

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<sup>29</sup> Bolivia’s Reply, para 164.

<sup>30</sup> Bolivia’s Reply, Chapter 4, especially para 168.

(d) issues arising if an obligation to negotiate is created, including (i) its content, (ii) when a subsequent obligation replaces an earlier one, and (iii) its discharge (**Section D**).

2.3. It is by reference to the legal framework analyzed in this chapter that the facts on which Bolivia relies are assessed in the following chapters.

**A. Chile is subject to no “general obligation to negotiate” sovereign access to the Pacific Ocean for Bolivia**

2.4. Bolivia claims that Chile is subject to an obligation to negotiate sovereign access to the sea sourced in “the general obligation to seek the settlement of disputes”, principally as reflected in Article 2(3) and Article 33 of the UN Charter.<sup>31</sup> Bolivia contends that a general obligation to negotiate “applies to any pending issue between two (or more) countries which needs to be settled”<sup>32</sup> and, in particular, to the “maritime issue”,<sup>33</sup> which it describes as “pending” between Bolivia and Chile because “Bolivia gave up its maritime territory to Chile in the expectation that it would have a sovereign access to the sea restored to it”.<sup>34</sup>

2.5. The obligation imposed by the UN Charter is to settle disputes by “peaceful means”. One such means is negotiation, but there are many others, and there is no obligation to negotiate in preference to pursuing other means of peaceful settlement of disputes.

2.6. Moreover, the obligation concerns the settlement of “disputes”. It does not apply to “any pending issue ... which needs to be settled”. In this case there is no dispute about whether Bolivia has a right to sovereign access. It is accepted by both States that it does not.<sup>35</sup> There is accordingly no basis on which the UN

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<sup>31</sup> Bolivia’s Reply, paras 167-175.

<sup>32</sup> Bolivia’s Reply, para 168.

<sup>33</sup> On the meaning of the “maritime issue”, see para 8.8 below.

<sup>34</sup> Bolivia’s Reply, para 174. On the role of “expectations”, see paras 2.26-2.33 below.

<sup>35</sup> Bolivia’s Reply, para 27. See also paras 1.20-1.21 above.

Charter or any equivalent source<sup>36</sup> could impose a “general obligation to negotiate” on Bolivia and Chile with respect to sovereign access to the Pacific Ocean. The only relevant dispute between the two States arose from 2011 and concerns whether there is an obligation to negotiate sovereign access to the Pacific Ocean. If any “general obligation” to settle disputes by peaceful means were to apply, it would only apply to the dispute that arose from 2011 concerning whether there is any obligation to negotiate sovereign access to the Pacific Ocean.

2.7. Furthermore, any obligation arising under Article 33 of the UN Charter applies to disputes “likely to endanger the maintenance of international peace and security”, a condition which is plainly not met in this case.

## **B. Obligations to negotiate arising from an intention to be legally bound**

### *1. Creation by explicit agreement of obligations to negotiate*

2.8. Bolivia agrees with Chile that “a legal obligation to negotiate can only arise if, objectively construed, that is the intention of the States concerned”.<sup>37</sup> Whether States have the requisite intention is to be discerned from an instrument’s “actual terms and ... the particular circumstances in which it was drawn up.”<sup>38</sup> Bolivia accepts that it must “demonstrate how the various acts of Chile evidence its intention to be bound”.<sup>39</sup> Bolivia then proceeds, instead, to concentrate on

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<sup>36</sup> Likewise, there is no basis for Bolivia’s invocation at para 170 of its Reply of Articles 24 and 25 of the OAS Charter, to which the points in this and the preceding paragraph also apply.

<sup>37</sup> Bolivia’s Reply, para 180, quoting with approval Chile’s Counter-Memorial, para 4.1.

<sup>38</sup> *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, I.C.J. Reports 1978 (***Aegean Sea Continental Shelf***), para 96 (cited in Bolivia’s Reply, para 84, fn 79). See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 1994 (***Qatar v. Bahrain, Jurisdiction and Admissibility, 1994***), para 23.

<sup>39</sup> Bolivia’s Reply, para 80. See also Bolivia’s Memorial, para 300; and Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969 (entry into force 27 January 1980), 1155 UNTS 331 (***VCLT***), Article 2(1)(a). Article 2(1)(a) is not directly applicable because Bolivia has not ratified the VCLT, which would anyway only apply to treaties concluded after its entry into force in 1980 (see Article 4). However, the essence of the definition of a treaty—an agreement governed by international law—reflected customary international law in 1950. See the discussion of the views of ILC Special Rapporteurs Brierly, Lauterpacht and Fitzmaurice in 1950, 1953, 1956 and 1959, in Ph. Gautier, “Article 2”, in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties* (2011) 33, pp 40-45 and in

Chile's expressions of "willingness" to negotiate, on the basis that "there is no opposition between the terms 'willingness' and 'intention'; the affirmation of one (the willingness) indicates the existence of the other (the intention)."<sup>40</sup> Crucially, Bolivia must show not that Chile merely had an intention to negotiate (as States do all the time), but that it had an intention to be bound by international law to do so. Bolivia seeks to elide this important distinction.

2.9. A key point that divides the Parties is thus whether an expression of "willingness" to negotiate manifests a State's intention to create a legally binding obligation to negotiate. For Chile, and as a matter of common diplomatic practice, an expression of willingness to negotiate does not create a legal obligation to do so. In contrast, Bolivia argues that the existence of "willingness" demonstrates an intention to create a legal obligation.<sup>41</sup> Bolivia's case proceeds by way of a *non sequitur*: "Chile had in fact expressed its willingness to negotiate sovereign access *and thus* had an intention to be bound."<sup>42</sup>

2.10. Bolivia's position makes neither practical nor legal sense. As to the former, States must be free to express willingness to negotiate over a given issue without thereby becoming legally bound to do so. Any rule to the contrary would have an obvious negative impact on diplomatic relations. As to the legal position, it is plain that the language used in any particular instrument will be crucial to determining whether the State or States creating it intended by doing so to become bound by international law to the terms of that instrument. The mere statement of a willingness to negotiate is not language demonstrating an intention to be bound

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O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le droit des traités* (2006) 45, pp 56-62. See also UN, *Office of Legal Affairs, UN Secretariat Treaty Handbook* (2012), para 5.3.4: "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."

<sup>40</sup> Bolivia's Reply, para 80.

<sup>41</sup> Bolivia's Reply, para 80. See also Bolivia's Reply, paras 10, 79-80, 141, 153-154, 177-179, 181, 185-186, 216 and 477.

<sup>42</sup> Bolivia's Reply, para 10 (emphasis added).

by international law to negotiate. Even using terms such as “agree” will not necessarily evidence such an intention.

2.11. This was the case in *Newfoundland and Labrador / Nova Scotia* in which the arbitral tribunal was considering a Joint Statement and a Communiqué containing a series of points to which the participating Premiers “agreed”.<sup>43</sup> The tribunal recalled that factors such as the—

“absence of a signed document, especially on a matter of importance such as the determination of an international boundary; the use of language which is vague or which does not appear to embody any immediate commitment; a shared understanding between the parties to negotiations that their in principle agreement is to be embodied in some later formal document or is to be subject to some subsequent process of implementation in order to become binding ... may together or separately lead to the conclusion that a statement does not constitute a binding agreement under international law.”<sup>44</sup>

2.12. In applying these principles the tribunal held that both the Joint Statement and the Communiqué (which used imprecise and conditional language) were not legally binding, and concluded with respect to the Joint Statement that its “terms ... are more consistent with a political, provisional or tentative agreement, which may lead to a formal agreement but which is not itself that agreement.”<sup>45</sup> In the *Bay of Bengal* case, the International Tribunal for the Law of the Sea similarly

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<sup>43</sup> *Arbitration between Newfoundland and Labrador and Nova Scotia concerning Portions of the Limits of their Offshore Areas as defined in the Canada–Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada–Newfoundland Atlantic Accord Implementation Act*, First Phase Award, 17 March 2001, 128 ILR 425 (***Newfoundland and Labrador / Nova Scotia, First Phase***). See para 4.16 for the text of the Joint Statement.

<sup>44</sup> *Newfoundland and Labrador / Nova Scotia, First Phase*, para 3.18.

<sup>45</sup> *Newfoundland and Labrador / Nova Scotia, First Phase*, para 7.3; and see para 7.5. See also *The Republic of the Philippines v. The People’s Republic of China*, PCA Case No 2013-29, Award on Jurisdiction and Admissibility, 29 October 2015 (***Philippines v. China, Jurisdiction and Admissibility***), paras 242-243. The Court has recently emphasized the importance of analyzing the text as a whole in order to interpret any particular part thereof: *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment*, 2 February 2017 (***Somalia v. Kenya, Preliminary Objections***), paras 65 and 70-80. See also *Qatar v. Bahrain, Jurisdiction and Admissibility, 1994*, paras 23-30.

held that joint minutes were not legally binding even though the word “agree” was used.<sup>46</sup> Equally, the Tribunal recognized in that case that repetition of non-binding language does not make it binding.<sup>47</sup>

2.13. In its Reply, Bolivia accuses Chile of adopting a “subjective approach” to the establishment of legal obligations because, in its Counter-Memorial, Chile highlighted Bolivia’s failure to assert the existence of an obligation to negotiate at the time that it is now said to have arisen.<sup>48</sup> However, as the Court confirmed in the *Aegean Sea Continental Shelf* case, the circumstances in which an instrument is drawn up and the contemporaneous conduct of the parties are important in assessing the intention of the parties, objectively construed.<sup>49</sup> The two States’ contemporaneous conduct is therefore relevant to determining, objectively, whether or not they had the intention to create rights and obligations under international law.<sup>50</sup> The few isolated and belated assertions by Bolivia, in the 1960s and 1980s, of the existence of any legal obligation to negotiate, and Chile’s rejections of that characterization, are addressed below.<sup>51</sup> The fact that in the two decades following 1990, up until 2011 when Bolivia had already announced that it would bring a claim to the Court, neither Bolivia nor Chile asserted that an obligation to negotiate concerning sovereign access to the sea had previously come into existence, indicates, objectively, that neither State had any intention to be bound by any such obligation.

## 2. Creation by tacit agreement of obligations to negotiate

2.14. Bolivia alleges in its Reply that even if none of the episodes on which it relies amounted to an express agreement governed by international law, the

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<sup>46</sup> *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, Case No 16 (**Bay of Bengal**), paras 92-98.

<sup>47</sup> *Bay of Bengal*, para 98. See also Chile’s Counter-Memorial, para 4.10.

<sup>48</sup> Bolivia’s Reply, para 148.

<sup>49</sup> *Aegean Sea Continental Shelf*, para 107. See also *Land and Maritime Boundary (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, paras 258 and 262-263; and D.P. O’Connell, *International Law* (1970), p 205.

<sup>50</sup> Chile’s Counter-Memorial, paras 1.5 and 1.26.

<sup>51</sup> See paras 5.20, 5.31 and 5.33-5.34.

conduct of the two States has nonetheless given rise to a tacit agreement by which they are now bound.<sup>52</sup> The burden for establishing the existence of a tacit agreement by conduct is high. This is especially so in relation to matters associated with sovereignty. In *Nicaragua v. Honduras*, the Court formulated the test as follows:

“Evidence of a tacit legal agreement must be compelling. The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed.”<sup>53</sup>

2.15. Bolivia relies on *Peru v. Chile*, in which the Court recognized the establishment of a maritime boundary by tacit agreement.<sup>54</sup> On the facts of that case, the “compelling evidence” threshold was met, particularly by reference to the terms of a treaty which proceeded on the basis that the maritime boundary had already been agreed: “In this case, the Court has before it an Agreement which makes clear that the maritime boundary along a parallel already existed between the Parties. The 1954 Agreement is decisive in this respect. That Agreement cements the tacit agreement.”<sup>55</sup> There is no equivalent to that 1954 Agreement in the present case. The Court has found tacit agreements to exist only in exceptional cases, where there was unambiguous conduct and no contrary statement by any of the States concerned. In this case Bolivia and Chile did not proceed on the basis that they were subject to a legal obligation to negotiate on sovereign access. Indeed Chile expressly denied that it was subject to any such obligation.<sup>56</sup>

### 3. *Creation by unilateral declaration of obligations to negotiate*

2.16. Bolivia acknowledges that the objective intention of the State issuing a unilateral statement is determinative of whether that statement creates any legal

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<sup>52</sup> Bolivia’s Reply, paras 6, 27, 165, 317 and 349.

<sup>53</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, paras 253 and 256. See also *Bay of Bengal*, para 117; and *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014 (*Peru v. Chile*), para 91.

<sup>54</sup> Bolivia’s Reply, para 165(b).

<sup>55</sup> *Peru v. Chile*, para 91.

<sup>56</sup> See paras 5.20, 5.30, 5.31 and 5.33 below.

obligation.<sup>57</sup> An objective intention to be bound by international law to negotiate cannot be established by a unilateral statement of willingness to negotiate.<sup>58</sup> The relevant question is whether a State has made a clear and specific statement evidencing an intention to be legally bound to act in a certain way.<sup>59</sup>

2.17. Bolivia alleges that in the *Nuclear Tests* cases: “The Court *did not rule out* in 1974 the *possibility* that the willingness to do something can result in a legal undertaking”.<sup>60</sup> What the Court actually held, as Bolivia quotes, was that: “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 ...”.<sup>61</sup> Bolivia adds the following remark: “The Court made thus a reference to the intention as the core criterion without qualifying the said intention.”<sup>62</sup> Of course the Court qualified the intention. It said very clearly that the State’s intention in respect of the declaration needed to be “that it should become bound according to its terms”.<sup>63</sup>

2.18. Bolivia has also failed to engage with the judgment in the *Frontier Dispute (Burkina Faso/Republic of Mali)*, which held that, in a bilateral context, where States are able in the normal course of their relations to undertake legal obligations by way of agreement, an even more restrictive approach applies to the creation of legally binding obligations on the basis of unilateral statements.<sup>64</sup> In this case, as in *Burkina Faso/Mali*, there was “nothing to hinder the Parties from

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<sup>57</sup> Bolivia’s Reply, para 154(a).

<sup>58</sup> See Chile’s Counter-Memorial, paras 4.16-4.22.

<sup>59</sup> See Chile’s Counter-Memorial, para 4.20; and *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986 (**Frontier Dispute (Burkina Faso/Republic of Mali)**), paras 39-40.

<sup>60</sup> Bolivia’s Reply, para 154(c) (emphasis added).

<sup>61</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974 (**Nuclear Tests (Australia v. France)**), para 43; and *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, (**Nuclear Tests (New Zealand v. France)**), para 46.

<sup>62</sup> Bolivia’s Reply, para 154(a).

<sup>63</sup> *Nuclear Tests (Australia v. France)*, para 43; and *Nuclear Tests (New Zealand v. France)*, para 46.

<sup>64</sup> Chile’s Counter-Memorial, paras 4.21-4.22, referring to *Frontier Dispute (Burkina Faso/Republic of Mali)*, para 40.



manifesting an intention to accept the binding character of [a particular commission] by the normal method: a formal agreement on the basis of reciprocity”, rather than by unilateral declaration.<sup>65</sup> The fact that, on Bolivia’s case, there were many statements and declarations,<sup>66</sup> reinforces—not weakens—the important point that was made in *Burkina Faso/Mali*. If Chile intended to be legally bound to negotiate with Bolivia, and is said to have manifested that intention unilaterally not just once but on a repeated basis, why then was it not manifested in the normal way, i.e. through a bilateral agreement between Bolivia and Chile? The obvious answer is that there was no intention to be bound.

2.19. Bolivia also fails to grapple with Chile’s argument that, unlike in the very particular circumstances of *Nuclear Tests* where the obligation undertaken could be performed unilaterally, negotiations cannot occur unilaterally.<sup>67</sup> Negotiations require the participation of at least two parties. It follows that a commitment to negotiate entails reciprocal obligations on the part of both the putative negotiating parties. This is precisely a situation in which “a formal agreement on the basis of reciprocity” would be expected.<sup>68</sup>

**C. Bolivia’s case on the creation of an obligation to negotiate by estoppel, acquiescence or legitimate expectations**

*1. Estoppel*

2.20. In its Memorial, Bolivia made only one passing reference to estoppel.<sup>69</sup> Since Chile’s Counter-Memorial made clear that Bolivia cannot demonstrate an objective intention on the part of Chile to be bound by a legal obligation to negotiate, Bolivia now relies heavily on estoppel to seek to avoid needing to prove

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<sup>65</sup> *Frontier Dispute (Burkina Faso/Republic of Mali)*, para 40.

<sup>66</sup> Bolivia’s Reply, para 196.

<sup>67</sup> Chile’s Counter-Memorial, para 4.22.

<sup>68</sup> *Frontier Dispute (Burkina Faso/Republic of Mali)*, para 40.

<sup>69</sup> Bolivia’s Memorial, para 332.

an intention to be bound.<sup>70</sup> In order to establish estoppel, Bolivia would have to demonstrate all of the following:

- (a) that a clear and unequivocal representation was made by one State to another;<sup>71</sup>
- (b) that the representation was voluntary, unconditional, and made by a person authorized to make it;<sup>72</sup>
- (c) that the State to which the representation was made, in reliance on it, changed its position to its detriment or to the advantage of the State making the representation, or suffered some prejudice;<sup>73</sup> and
- (d) that such reliance was reasonable in the circumstances.<sup>74</sup>

2.21. Although Bolivia acknowledges some of these elements,<sup>75</sup> it assigns to estoppel a broader scope of operation than international law permits. Bolivia

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<sup>70</sup> Bolivia's Reply, Chapter 6, pp 126-142, especially para 323.

<sup>71</sup> *Serbian Loans, Judgment, 1929, P.C.I.J., Ser A, Nos 20/21*, p 39; *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969 (North Sea Continental Shelf)*, para 30; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998 (Cameroon v. Nigeria, Preliminary Objections)*, para 57; and D. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence" (1957) 33 *BYIL* 176, pp 188-189.

<sup>72</sup> *Case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US), Judgment, I.C.J. Reports 1984 (Gulf of Maine Area)*, para 139; and D. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence" (1957) 33 *BYIL* 176, p 190.

<sup>73</sup> *North Sea Continental Shelf*, para 30; *Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008 (Pedra Branca)*, para 228; *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, para 63; and D. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence" (1957) 33 *BYIL* 176, pp 193-194.

<sup>74</sup> *Cameroon v. Nigeria, Preliminary Objections*, para 57 (reliance would only be reasonable if the representation were made "consistently" and in a "fully clear" manner); *Santa Isabel Claims (USA v. United Mexican States)*, 26 April 1926, IV *RIAA*, p 803; and D. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence" (1957) 33 *BYIL* 176, pp 193-194.

<sup>75</sup> Bolivia's Reply, para 336.

alleges that estoppel operates where “declarations or conduct *did not express an intention to be bound* or where there is room for doubt in that regard”.<sup>76</sup> This is incorrect and is contradicted by the two authorities relied on by Bolivia in making its assertion. Both Judge Fitzmaurice in his Separate Opinion in the *Case concerning the Temple of Preah Vihear* and the arbitral tribunal in *Chagos Marine Protected Area* explicitly state that estoppel can only have any role to play in situations of uncertainty. Where there is certainty that there is *no* obligation, because a State has clearly not expressed an intent to be legally bound, estoppel cannot operate.<sup>77</sup>

2.22. Bolivia is therefore wrong when it asserts that the “purpose” of estoppel is to manufacture another basis for an obligation where it is clear that the State has not expressed any intention to be legally bound.<sup>78</sup> In doing so, Bolivia seeks to convert what is in fact the true “purpose” of estoppel—consistency and good faith in inter-State relations—into a source of legal obligation.<sup>79</sup> The Court, however, has consistently recognized that good faith cannot create a new legal obligation: although the “principle of good faith is ... ‘one of the basic principles governing the creation and performance of legal obligations’ ...; *it is not in itself a source of obligation where none would otherwise exist.*”<sup>80</sup> The principle of good faith is relevant “only to the fulfilment of existing obligations.”<sup>81</sup>

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<sup>76</sup> Bolivia’s Reply, para 326 (emphasis added).

<sup>77</sup> Separate Opinion of Judge Fitzmaurice, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, I.C.J. Reports 1962 (Temple of Preah Vihear, Merits)*, p 63; and *Chagos Marine Protected Area (Republic of Mauritius v. United Kingdom)*, Award, 18 March 2015 (162 ILR 1), paras 445-446. See also A. McNair, *The Law of Treaties* (1961), p 486.

<sup>78</sup> Cf. Bolivia’s Reply, para 323: “the purpose of estoppel ... is precisely to provide a basis for obligations *other than* the intention to be bound” (emphasis in original).

<sup>79</sup> Bolivia does acknowledge that estoppel stems from the principle of good faith: Bolivia’s Reply, paras 320, 331 and 337.

<sup>80</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, para 94 (emphasis added); *Cameroon v. Nigeria, Preliminary Objections*, para 39.

<sup>81</sup> *Cameroon v. Nigeria, Preliminary Objections*, para 59.

2.23. Further, estoppel should not be lightly assumed.<sup>82</sup> This is because estoppel is a form of preclusion. Judge Fitzmaurice explained in his Separate Opinion in the *Case concerning the Temple of Preah Vihear* that estoppel “prevents the assertion of what might in fact be true. Its use must in consequence be subject to certain limitations”.<sup>83</sup> Similarly, Sir Robert Jennings wrote that—

“the principle of estoppel in international law must be approached with some caution; for once loosed from the many technical shackles that severely limit its operation in the common law, from which it is after all by analogy derived, it is in danger of seeming to be applicable to almost any situation in which a State has expressly or tacitly adopted some attitude towards a legal question. This tends only to obscure the actual legal questions and principles involved.”<sup>84</sup>

2.24. Particular care must be taken when considering representations said to found an estoppel that were made in the context of diplomatic and political exchanges. In *ELSI*, the Court rejected the argument that Italy was estopped from asserting that local remedies had not been exhausted, and in doing so recognized “the difficulties about drawing any such conclusion from the exchanges of correspondence when the matter was still being pursued on the diplomatic level.”<sup>85</sup>

2.25. Bolivia does not acknowledge these limits on the operation of estoppel. It chooses instead to present estoppel superficially, as one of a number of legal principles through which it attempts to manufacture a legal obligation that plainly does not exist. In doing so, as is clear from the facts examined in the following chapters of this Rejoinder, Bolivia fails to satisfy the elements of estoppel for any

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<sup>82</sup> *Gulf of Maine Area*, paras 140-142; and M. Shaw, *International Law* (7th edn, 2014), p 375.

<sup>83</sup> Separate Opinion of Judge Fitzmaurice, *Temple of Preah Vihear, Merits*, p 63.

<sup>84</sup> R. Jennings, *The Acquisition of Territory in International Law* (1963), p 41. See also *Gulf of Maine Area*, para 148 referring to “the problems that the application of this concept in international law may raise generally”; and J. Crawford, *Brownlie’s Principles of Public International Law* (8th edn, 2012), pp 420-421 noting that “it is necessary to point out that estoppel in municipal law is regarded with great caution, and that the ‘principle’ has no particular coherence in international law, its incidence and effects not being uniform.”

<sup>85</sup> *Elettronica Sicula S.p.A. (ELSI) (US v. Italy), Judgment, I.C.J. Reports 1989 (ELSI)*, para 54.

individual representation on which it seeks to rely, and, as explained in Chapter 9,<sup>86</sup> equally for what it describes as Chile’s “course of conduct”.

## 2. *Legitimate expectations*

2.26. In its Memorial, Bolivia referred in passing to a “legal doctrine” of “legitimate expectations”, without developing its source in law, content, or application to this case.<sup>87</sup> In its Reply, “legitimate expectations” has become a prominent part of Bolivia’s case, but again Bolivia makes no credible attempt to establish that any doctrine of legitimate expectations exists in international law as a source of legal obligation applicable in relations between States.<sup>88</sup>

2.27. What its Reply does make clear is that Bolivia has deployed the concept of legitimate expectations as a device to seek to circumvent the requirement of detrimental reliance necessary to establish estoppel. By focusing only on the making of the alleged representations by Chile, their alleged effect in raising expectations for Bolivia, and whether Chile satisfied those expectations, Bolivia attempts to deflect attention away from its inability to prove that it relied to its detriment on the alleged representations. Bolivia simply says that because of the “doctrine” of legitimate expectations it is “entitled to rely”<sup>89</sup> upon the alleged representations made by Chile and that the frustration of those expectations is itself “very detrimental to Bolivia”.<sup>90</sup>

2.28. In seeking to argue that “creating legitimate expectations and then frustrating them can give rise to legal obligations under international law”,<sup>91</sup> Bolivia refers to three cases, none of which supports its assertion. The first, the 1905 *Affaire Aboilard*, concerns representations made by Haiti to an individual,

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<sup>86</sup> See paras 9.13-9.26.

<sup>87</sup> Bolivia’s Memorial, paras 332, 334, 337, 396, 409 and 436. It received similarly cursory treatment at the oral hearing on the Preliminary Objection: CR 2015/19, 6 May 2015, p 19, para 17; CR 2015/21, 8 May 2015, pp 12-13, para 12 and p 32, para 6.

<sup>88</sup> Cf. its bald assertion to that effect at para 328 of its Reply.

<sup>89</sup> Bolivia’s Reply, para 339.

<sup>90</sup> Bolivia’s Reply, para 348. See also Bolivia’s Reply, para 319.

<sup>91</sup> Bolivia’s Reply, para 328.

not a State, the non-fulfilment of which constituted conduct falling short of the minimum standard of treatment of aliens.<sup>92</sup> The second, *The Corvaia Case*, decided by the Italian-Venezuelan Claims Commission in 1903, found that Italy was estopped from claiming Baron Corvaia as an Italian citizen in circumstances where he had lost such citizenship by operation of Italian law.<sup>93</sup> This is a simple case of estoppel, which does not even mention the concept of legitimate expectations. The third, *Gold Reserve v. Venezuela*, surveyed in passing only five internal legal systems as the basis for its implicit suggestion that the “doctrine” of legitimate expectations is a general principle of law applicable in the relationship between States and foreign investors.<sup>94</sup> This is plainly insufficient to establish a rule applicable between States as a matter of general international law.

2.29. Even if Bolivia is correct that a “doctrine” of legitimate expectations exists in the context of the protection of foreign investments,<sup>95</sup> Bolivia does not address how such a “doctrine” could create obligations applicable in relations between States either generally, or between Bolivia and Chile in this case. It is unable to do so for at least three reasons.

2.30. First, an investor’s legitimate expectations are not a *source* of the host State’s legal obligation. Their creation and frustration is relevant to determining whether there has been a breach of a *pre-existing treaty obligation* to provide investors and their investments with “fair and equitable treatment”, or of the customary international law minimum standard of treatment of aliens.<sup>96</sup>

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<sup>92</sup> Bolivia’s Reply, para 329; *Affaire Aboilard (France/Haïti)* Award, 26 July 1905, XI *RIAA* (*Affaire Aboilard*), pp 79-80. See also *Merrill & Ring Forestry L.P. v. Canada* (NAFTA), Award, 31 March 2010, p 80, fn 139, citing *Affaire Aboilard* in the context of a discussion of the development of the minimum standard of treatment of aliens.

<sup>93</sup> Bolivia’s Reply, fn 484 citing *The Corvaia Case*, 1903, X *RIAA*, p 633.

<sup>94</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014, paras 575-576, referring to Argentine, English, French, German and Venezuelan law.

<sup>95</sup> Bolivia’s Reply, para 339.

<sup>96</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Annulment Decision, 25 September 2007, para 89: “Although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not,

2.31. Secondly, Bolivia ignores limitations that attach to the concept of legitimate expectations even within the foreign investment context, including that mere “political statements ... create no legal expectations”<sup>97</sup> and that investors must have *relied on* the representation or conduct said to have generated the legitimate expectation.<sup>98</sup>

2.32. Thirdly, even if a “doctrine” of legitimate expectations existed as an independent rule of international law applicable to States in their vertical relationship with natural and legal persons subject to their jurisdiction, it is entirely without foundation to seek to transpose such a principle into general international law applicable horizontally between States.<sup>99</sup>

2.33. There is no rule of international law that holds a State legally responsible because the expectations of another State are not met. Bolivia’s attempt to deploy

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as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause contained in the BIT.” As recently reaffirmed by another investment tribunal, expectations “however legitimate” are not “norms in their own right” and “[i]nternational law does not make binding that which was not binding in the first place”: *Blunsun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3), Award, 27 December 2016, para 371. Bolivia is therefore wrong when it asserts that the “purpose of ... legitimate expectations is precisely to provide a basis for obligations *other than* the intention to be bound”: Bolivia’s Reply, para 323 (emphasis in original).

<sup>97</sup> *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011, para 378. See also *Parkerings-Companiet AS v. Lithuania* (ICSID Case No. ARB/05/08), Award, 11 September 2007, para 344: “not every hope amounts to an expectation under international law”.

<sup>98</sup> The reliance must also be reasonable. See, e.g., *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, para 340; and *Marion Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1), Award, 16 May 2012, paras 269-270.

<sup>99</sup> See, e.g., *SD Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, para 263; and *Saluka Investments B.V. v. Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, paras 300 and 305-306. In *Gold Reserve v. Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014, para 576, the tribunal pointed out that the “concept of legitimate expectations is found in different legal traditions according to which some expectation may be reasonably or legitimately created *for a private person* by the constant behavior and/or promises of its legal partner, in particular when this partner is the public administration *on which this private person is dependent*” (emphasis added).

a “doctrine” of legitimate expectations as an independent basis for the creation of legal obligations between States is bereft of logic and authority.

### 3. *Acquiescence*

2.34. Bolivia did not mention acquiescence in its Memorial, and referred to it twice, in passing, during the oral hearing on the preliminary objection.<sup>100</sup> In the Reply it has become another of the “multiple legal sources” on the basis of which Bolivia attempts to manufacture a legal obligation that does not exist,<sup>101</sup> although Bolivia does no more than assert that international obligations can arise by way of acquiescence.<sup>102</sup>

2.35. The cases in which international courts or tribunals have found there to have been acquiescence have been situations where the circumstances called for protest in order to preserve rights, and the absence of such protest amounted to tacit consent to the relinquishment of those rights.<sup>103</sup> The authorities relied upon by Bolivia demonstrate the point. They involve Honduras acquiescing in the loss of the right to assert a territorial claim,<sup>104</sup> the loss by France of the right to prevent US airlines servicing certain destinations from Paris,<sup>105</sup> the loss by Nicaragua of its right to object to the validity of an arbitral award<sup>106</sup> and a treaty<sup>107</sup> both of

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<sup>100</sup> *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 7 and p 28, para 12.

<sup>101</sup> Bolivia’s Reply, paras 149, 161, 189, 258, 317 and 344, and fnns 153 and 360.

<sup>102</sup> Bolivia’s Reply, paras 6, 27, 164, 165, 293, 317 and 349.

<sup>103</sup> *Pedra Branca*, para 121; *Anglo-Norwegian Fisheries (UK v. Norway)*, Judgment, I.C.J. Reports 1951 (*Anglo-Norwegian Fisheries*), pp 138-139; and I. MacGibbon, “The Scope of Acquiescence in International Law” (1954) 31 *BYIL* 143, p 143: Acquiescence “is used to describe the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights: it is not intended to connote the forms in which a State may signify its consent or approval in a positive fashion.”

<sup>104</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment, I.C.J. Reports 1992 (*El Salvador/Honduras: Nicaragua Intervening*), para 364.

<sup>105</sup> *Interpretation of the air transport services agreement between the US and France*, 22 December 1963, XVI *RIAA* (*Interpretation of the air transport services agreement*), pp 62-66.

<sup>106</sup> *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, I.C.J. Reports 1960, pp 209 and 213.



which determined territorial and maritime rights, and the loss by the United Kingdom of high seas rights by acquiescing in Norway's method of delimiting its territorial sea.<sup>108</sup> Bolivia has not explained how in the circumstances of its claim acquiescence could lead to the *creation* of a legal obligation, nor provided a single authority in support of that position.

2.36. Bolivia also makes no attempt to demonstrate that the specific silences that it alleges amounted to Chile consenting to the creation of a legal obligation to negotiate. Of course, not all failures to object will constitute acquiescence. The legal significance of an absence of protest must be assessed in the light of all of the surrounding facts and circumstances to determine whether or not the silence constitutes consent.<sup>109</sup> Factors relevant to assessing that legal significance include: the nature and degree to which the silent State's rights were directly and substantially affected by the acts or assertions to which it did not object;<sup>110</sup> the degree to which the acts or assertions that were not objected to came to the attention of the silent State (notoriety);<sup>111</sup> the period of time during which there was no protest;<sup>112</sup> and the degree to which the silence or inaction was maintained in a clear, sustained and consistent manner.<sup>113</sup>

2.37. Acquiescence involves inferring a State's consent from its silence. That inference must be "so probable as to be almost certain"<sup>114</sup> or "manifested clearly

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<sup>107</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (Nicaragua v. Colombia, Preliminary Objections)*, paras 79-80.

<sup>108</sup> *Anglo-Norwegian Fisheries*, pp 138-139.

<sup>109</sup> R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, 1996), pp 1194-1195.

<sup>110</sup> *Anglo-Norwegian Fisheries*, p 139; and R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, 1996), p 1195.

<sup>111</sup> *Anglo-Norwegian Fisheries*, pp 138-139.

<sup>112</sup> *Anglo-Norwegian Fisheries*, pp 138-139; and *Nicaragua v. Colombia, Preliminary Objections*, paras 79-80.

<sup>113</sup> *Gulf of Maine Area*, para 146; and *Interpretation of the air transport services agreement*, p 64.

<sup>114</sup> *The Grisbådarna Case (Norway v. Sweden)*, Award, 23 October 1909, (1910) 4 *AJIL* 226, p 234; and J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), p 419.

and without any doubt”.<sup>115</sup> Bolivia cannot even approach discharging this heavy burden, and indeed it has made no meaningful effort to do so.

#### **D. Rules and principles applicable if an obligation to negotiate has arisen**

2.38. Chile does not accept that it ever assumed any legal obligation to negotiate with Bolivia regarding sovereign access to the Pacific, whether by agreement or otherwise. Even assuming, *arguendo*, that there was such an obligation, Bolivia has not correctly identified the legal principles that would be relevant to determining its content (sub-section 1), to whether it would have been superseded by any later obligation (sub-section 2) or to whether it would have been discharged (sub-section 3).

##### *1. Determining the content of an obligation to negotiate*

2.39. The content of any obligation, including an obligation to negotiate, is to be determined by reference to the terms of the instrument or statement creating it.<sup>116</sup> It is therefore essential to focus on and interpret the specific wording used by States in a document or statement creating an obligation in order to determine the content of the specific obligation they have accepted.

2.40. Bolivia is acutely aware that an obligation with the content it postulates in its prayer for relief cannot be found in any of the documents on which it relies. Bolivia therefore argues that: “International law provides ample guidance on the conduct required once an obligation to negotiate has arisen and its object has been defined by mutual agreement”.<sup>117</sup> Bolivia then simply locates the words “sovereign access” in a document, claims that to be the “object” of required negotiations, and then seeks to provide the remainder of the content of the alleged obligation not from the terms of that document (because it cannot), but from general “guidance” that Bolivia claims can be sourced elsewhere.

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<sup>115</sup> *Pedra Branca*, para 122. See also Joint Dissenting Opinion of Judges Simma and Abraham, *Pedra Branca*, para 29.

<sup>116</sup> *Affaire du lac Lanoux (Espagne, France)*, 16 November 1957, XII *RIAA*, pp 306-307. See also Chile’s Counter-Memorial, para 4.26.

<sup>117</sup> Bolivia’s Reply, para 112.

2.41. The “guidance” that may be drawn from the existing cases on obligations to negotiate, however, is that each arises in different circumstances, with a different source, and that those circumstances and that source are essential to determining the content of any obligation.

2.42. One type of situation in which obligations to negotiate have arisen is in the context of resolving the limits of *competing rights* held by States. For example, in the *Fisheries Jurisdiction* cases, on which Bolivia relies,<sup>118</sup> the objective of the negotiations in question was “the delimitation of the rights and interests of the Parties, the preferential rights of the coastal State on the one hand and the rights of the Applicant on the other”.<sup>119</sup>

2.43. Where there are such competing rights, the extent of compromise required by each negotiating party has been held to be the greatest. In the *Fisheries Jurisdiction* cases, the Court held that:

“The task before [the two States] will be to conduct their negotiations on the basis that each must in good faith *pay reasonable regard to the legal rights of the other* in the waters around Iceland outside the 12-mile limit, thus bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation, and *having regard to the interests of other States which have established fishing rights in the area.*”<sup>120</sup>

2.44. Similarly, in the *North Sea Continental Shelf* cases, also relied on by Bolivia,<sup>121</sup> in the context of delimiting rights to the continental shelf, the States were—

“under an obligation so to conduct themselves that the negotiations are meaningful, which *will not be the case when*

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<sup>118</sup> Bolivia’s Memorial, paras 249-250.

<sup>119</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974 (Fisheries Jurisdiction)*, para 73.

<sup>120</sup> *Fisheries Jurisdiction*, para 78 (emphasis added).

<sup>121</sup> Bolivia’s Reply, para 114.

*either of them insists upon its own position without contemplating any modification of it*”.<sup>122</sup>

2.45. Obligations to negotiate have also arisen in situations where, although there were no *competing rights* which needed to be resolved, there was nonetheless some *underlying right* to which the negotiations related. In the arbitration concerning the *Tacna-Arica question*, for example, there was such an underlying right: Chile and Peru both had a right for a plebiscite to be conducted.<sup>123</sup> The obligation to negotiate in question was an obligation to negotiate on the terms of that plebiscite, and the extent of compromise required by each negotiating party was lower than in cases of competing rights, expressed as follows—

“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 unsatisfactory to itself provided it did not act in bad faith.*”<sup>124</sup>

2.46. In the course of the negotiations, a protocol (the Billinghurst-Latorre protocol) was signed by the two States, but failed to pass the Chilean Chamber of Deputies, and further proposals were made by Chile, but not answered by Peru.<sup>125</sup> As stated by the arbitrator, “Chile was no more bound to ratify the Billinghurst-Latorre protocol than Peru was bound to accept later the proposals made by Chile”.<sup>126</sup> The arbitrator further stated that Chile and Peru—

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<sup>122</sup> *North Sea Continental Shelf*, para 85(a) (emphasis added).

<sup>123</sup> *Tacna-Arica question (Chile, Peru)*, 4 March 1925, II *RIAA (Tacna-Arica question)*, p 926.

<sup>124</sup> *Tacna-Arica question*, p 929 (emphasis added).

<sup>125</sup> *Tacna-Arica question*, pp 930-932.

<sup>126</sup> *Tacna-Arica question*, p 934.

“having left to a future agreement the conditions of the plebiscite must be deemed to have thereby agreed that each Party should have the right to make proposals, and to object to the other’s proposals, so long as they acted in good faith.”<sup>127</sup>

2.47. In such situations, there is no requirement that a negotiating party accommodate any interests or proposals of a counterparty. States must consider their counterparty’s proposals in good faith, but otherwise remain free to make and oppose proposals, and are not required to forego their interests or reach any agreement that they regard as unsatisfactory.

2.48. In the present case, there are no competing rights to be resolved, as there were in the *Fisheries Jurisdiction* cases or the *North Sea Continental Shelf* cases, and there is not even an underlying right to which negotiations relate, as there was in the *Tacna-Arica question* arbitration. Bolivia has no underlying right to sovereign access to the sea, and now explicitly presents its case on that basis.<sup>128</sup> Bolivia seeks, through negotiation, to be granted a new right of sovereign access by Chile, but Bolivia does not have nor claim to have any such right. In these circumstances, where the only right Bolivia claims is one to negotiate, Bolivia cannot draw an analogy with the content of obligations to negotiate considered in cases where the negotiation concerned underlying rights, whether competing or not.

2.49. If any obligation to negotiate ever existed (none did), all that could have been required was for the terms of the obligation, as they appeared in the document said to have created the obligation, to have been carried out in good faith. As set out in the following chapters with reference to the particular documents and statements alleged by Bolivia to have created an obligation, the

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<sup>127</sup> *Tacna-Arica question*, p 933.

<sup>128</sup> See, e.g., Bolivia’s Reply, para 27: “Bolivia does not claim that this sovereign access constitutes a ‘right’. Its claim is that negotiations on this matter are required”.

terms of any obligation to negotiate would have been nothing like what Bolivia postulates in its prayer for relief.<sup>129</sup>

## 2. *One obligation to negotiate superseding another*

2.50. Conscious of the weakness of each individual episode on which it relies, in the Introduction to its Reply, Bolivia states that at “multiple points” Chile entered into agreements and made unilateral declarations that “created and affirmed” the alleged obligation to negotiate.<sup>130</sup> Bolivia asserts that each of the 1920 Minutes, the 1926 Matte memorandum, the 1950 notes, the Charaña process, the communiqués issued on 13 November 1986, and the 2000 Algarve Declaration, constituted binding agreements.<sup>131</sup> Bolivia further posits that they all concerned the same subject matter,<sup>132</sup> and that they were all linked to the same alleged historical bargain.<sup>133</sup> Bolivia in particular proceeds on the basis that the Charaña process concerned the same subject matter as the 1950 notes, arguing that Chile “accepted again to enter into negotiations on this subject matter in the 70s”.<sup>134</sup>

2.51. Bolivia’s view is that these different alleged agreements “reinforce” or “strengthen” each other.<sup>135</sup> That is incorrect. As set out in Chile’s Counter-Memorial,<sup>136</sup> and not contested by Bolivia in its Reply, the relevant rule concerning when one agreement would supersede and terminate an earlier agreement would be the rule reflected in Article 59(1) of the Vienna Convention on the Law of Treaties:

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<sup>129</sup> See in particular paras 5.9, 5.39, 6.7-6.12, 6.27-6.30 and 10.2 below.

<sup>130</sup> Bolivia’s Reply, para 13. See also Bolivia’s Reply, paras 176 and 181.

<sup>131</sup> Bolivia’s Reply, paras 199, 228, 264, 316 and 443.

<sup>132</sup> Bolivia’s Reply, para 94: “In their exchanges, Bolivia and Chile *consistently identified the subject matter* of the negotiations into which they were willing to enter, namely the granting to Bolivia of sovereign access to the Pacific Ocean ... Many examples exist of exchanges between the two States in which Chile commits itself *on this subject matter*” (emphasis added). See also Bolivia’s Reply, para 190.

<sup>133</sup> See, e.g., Bolivia’s Reply, para 198.

<sup>134</sup> Bolivia’s Reply, para 389.

<sup>135</sup> Bolivia’s Reply, para 197; *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 9.

<sup>136</sup> See Chile’s Counter-Memorial, paras 7.7(a) and 7.22, and fn 442.

“A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.”<sup>137</sup>

2.52. As to the rule in Article 59(1)(a), the requisite intention will be apparent where the later treaty covers the whole subject matter of the earlier treaty.<sup>138</sup> As to the rule in Article 59(1)(b), two treaties will not be able to be applied at the same time where, for example, they require contradictory things to occur.

2.53. Bolivia cannot credibly say that an obligation to negotiate allegedly created more than a century ago persists today in unaltered form, in circumstances where (on Bolivia’s case) there have since that time been a series of different agreements on the same subject matter, each agreement having different terms. In particular, as discussed in Chapter 6,<sup>139</sup> if the 1950 notes and the documents relating to the Charaña process each created binding agreements (which they did not), the later agreement would necessarily have superseded and terminated the earlier one, as the two agreements would have governed the same subject matter and would also have required contradictory things to occur. Bolivia’s assertion that there are “numerous *consistent* agreements and unilateral declarations

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<sup>137</sup> VCLT, Article 59. The rules set out in this provision reflect customary international law. See F. Dubuisson, “Article 59”, in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties* (2011) 1325, pp 1328-1332, paras 6-16 and in O. Corten and P. Klein (eds), *Les Conventions de Vienne sur le droit des traités* (2006) 2091, pp 2095-2102, paras 6-16. At the Vienna Conference in 1968 and 1969, no State contested the rule contained in Article 59. See UN Conference on the Law of Treaties, Official Records, Documents of the Conference (1971), Report of the Committee of the Whole on its work at the first session of the Conference, p 180. The Article was adopted by 104 votes to none. See UN Conference on the Law of Treaties, Official Records, 2nd Session, 1969 (1970), 21st Meeting, p 111.

<sup>138</sup> See, e.g., Summary records of the 15th session, *ILC Yearbook 1963*, Vol. I, 709th meeting, p 244, para 81 (Special Rapporteur Waldock): “although the parties did not expressly state their intention to terminate the previous treaty, they nevertheless made it clear that they engaged in the new treaty with the idea of *covering the whole of the subject-matter of the old treaty*” (emphasis added).

<sup>139</sup> See para 6.60 below.

expressing [Chile's] commitment to negotiate”<sup>140</sup> is disproved by the documents on which it relies.

### 3. *Discharge and termination of obligations to negotiate*

2.54. Unless an obligation of result has been explicitly agreed,<sup>141</sup> there will be no obligation to reach a result, still less any particular result.<sup>142</sup> A question that can arise, therefore, is when negotiations occurring in fulfilment of an obligation of conduct<sup>143</sup> will have been pursued far enough to have discharged that obligation, such that it terminates.

2.55. Even if the test were whether negotiations have been pursued “as far as possible”,<sup>144</sup> Chile would have discharged the obligation to negotiate to which it was allegedly subject. But, as Chile explained in its Counter-Memorial,<sup>145</sup> the correct test in the particular circumstances of the present case would be whether there have been good faith, meaningful efforts to negotiate over a period of time that is reasonable in the circumstances.

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<sup>140</sup> Bolivia's Reply, para 197 (emphasis added).

<sup>141</sup> As discussed in Chapter 1, the Court has taken jurisdiction over a dispute concerning an alleged obligation of *conduct*, not result. See paras 1.18-1.21 above.

<sup>142</sup> *Somalia v. Kenya, Preliminary Objections*, paras 90 and 95; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011*, paras 132 and 134; *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 (Georgia v. Russian Federation)*, para 158; and *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaikiadorys), Advisory Opinion, 1931, P.C.I.J. Ser A/B, No 42 (Railway Traffic between Lithuania and Poland)*, p 116.

<sup>143</sup> Bolivia argues in its Reply that obligations to negotiate do “not divide neatly into two distinct categories (i.e., obligations of conduct, and obligations of result)”. Bolivia posits that at one end of the spectrum there are obligations of result, that at the other end there are “non-conditional obligations”, and that in between there are “conditional obligations”. See Bolivia's Reply, paras 117-118. What Bolivia terms “non-conditional obligations” and “conditional obligations” are all still obligations of conduct.

<sup>144</sup> See Bolivia's Reply, para 386; and *Railway Traffic between Lithuania and Poland*, p 116.

<sup>145</sup> See Chile's Counter-Memorial, para 4.39.



2.56. In its Reply, Bolivia advances two extreme arguments regarding the meaning of the phrase “as far as possible”, neither of which is correct.<sup>146</sup> First, Bolivia argues that the meaning of the phrase “is enshrined in the general theory on obligations according to which every obligation is based on a cause. *As long as this cause does not disappear, the obligation persists*”.<sup>147</sup> According to Bolivia, the “cause” of the alleged obligation to negotiate in the present case is the Parties’ “common interest”<sup>148</sup> in Bolivia obtaining sovereign access to the sea. In support of the allegation that this is a “mutual interest”,<sup>149</sup> Bolivia cites one Chilean statement *from 1884*, blithely overlooking that it preceded the 1904 Peace Treaty, and then alleges (citing no evidence) that the “same motivation” and the “exact same reasons” as expressed *in 1884* motivated *all* negotiations between the two States until 2011.<sup>150</sup> Bolivia invokes the work of Paul Reuter in support of its argument about the “cause” of an obligation,<sup>151</sup> but misunderstands his point. Reuter’s position was that an obligation to negotiate persists until it appears that there are no reasonable prospects that a successful outcome can be achieved.<sup>152</sup> He did not say that it persists for so long as an alleged “common interest” exists.

2.57. Secondly, Bolivia argues that even if negotiations fail, negotiations will not have been pursued “as far as possible”.<sup>153</sup> Bolivia relies on the *North Sea Continental Shelf* cases, in which the Court held that negotiations had failed

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<sup>146</sup> It is unclear what point is being made at Bolivia’s Reply, paras 385-386. The Permanent Court’s observation was that negotiations must be pursued “as far as possible”. The obvious implication is that, on this authority, they need not be pursued beyond that point.

<sup>147</sup> Bolivia’s Reply, para 474 (emphasis added).

<sup>148</sup> Bolivia’s Reply, para 475.

<sup>149</sup> Bolivia’s Reply, para 476.

<sup>150</sup> Bolivia’s Reply, paras 475 and 476, quoting Chilean President’s Note of 7 January 1884, **BM Annex 36**.

<sup>151</sup> Bolivia’s Reply, para 474.

<sup>152</sup> P. Reuter, “De l’obligation de négocier”, *Processo internazionale, Studi in onore di Gaetano Morelli* (1975), pp 726 and 727: “une telle obligation subsiste tant qu’il existe raisonnablement des chances d’aboutir, car une obligation cesse d’exister quand elle a perdu sa cause”. Bolivia’s unsubstantiated assertion that it was “firmly believed that a solution was *always* attainable and feasible”, from 1884 to 2011, is fictitious. See Bolivia’s Reply, para 476.

<sup>153</sup> Bolivia’s Reply, para 473.

because neither side was willing to modify its position.<sup>154</sup> As discussed above,<sup>155</sup> the alleged obligation to negotiate in the present case is not comparable to the obligation considered in the *North Sea Continental Shelf* cases, which was aimed at delimiting *rights* to the continental shelf.

2.58. Moreover, negotiations may have been pursued “as far as possible” when they fail, become futile or reach a deadlock. In *Georgia v. Russia*, after quoting from the *Railway Traffic between Lithuania and Poland* Advisory Opinion,<sup>156</sup> the Court stated that:

“Should it find that Georgia genuinely attempted to engage in such negotiations with the Russian Federation, the Court would examine whether Georgia pursued these negotiations *as far as possible* with a view to settling the dispute. To make this determination, the Court would ascertain whether the negotiations *failed, became futile, or reached a deadlock* before Georgia submitted its claim to the Court”.<sup>157</sup>

2.59. Indeed, in its Memorial, Bolivia acknowledged that an obligation to negotiate “ceases” when negotiations “have been properly and fully exhausted and/or become futile”.<sup>158</sup> Negotiations will also have been pursued “as far as possible” when two States have negotiated in good faith, but it has become apparent that their respective interests are irreconcilable or mutually incompatible.<sup>159</sup> There is no basis on which it could be said that either Bolivia or

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<sup>154</sup> *North Sea Continental Shelf*, para 87: “the Kingdoms of Denmark and the Netherlands, convinced that the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic, *saw no reason to depart from that rule*; and equally, given the geographical considerations stated in the last sentence of paragraph 7 above, the Federal Republic *could not accept the situation resulting from the application of that rule*” (emphasis added).

<sup>155</sup> See paras 2.42-2.44 and 2.48 above.

<sup>156</sup> *Georgia v. Russian Federation*, para 158.

<sup>157</sup> *Georgia v. Russian Federation*, para 162 (emphasis added).

<sup>158</sup> Bolivia’s Memorial, para 281.

<sup>159</sup> See *Philippines v. China, Jurisdiction and Admissibility*, para 349: “That more sustained negotiations did not occur and no agreement was reached does not reflect a lack of interest or commitment by either Party, but rather *mutually incompatible views* as to how such talks should be conducted” (emphasis added).

Chile could have been required to accept suggestions put forward by its counterparty that it considered contrary to its own interests.<sup>160</sup>

### **Conclusion**

2.60. The essential point of law, which Bolivia continues to seek to avoid, is that a legal obligation to negotiate can only arise if, objectively construed, that is the intention of the States concerned. Absent a clear intention to create legal obligations, which is to be discerned from the actual terms of a document and the circumstances in which it was drawn up, there will have been no such intention. As shown in the following chapters, neither Bolivia nor Chile ever demonstrated an intention to create a legal obligation to negotiate.

2.61. Bolivia is equally unable to demonstrate that an obligation to negotiate was created through (i) estoppel, (ii) legitimate expectations, or (iii) acquiescence, all three of which it seeks to misapply.

2.62. Furthermore, even if Chile assumed a legal obligation to negotiate with Bolivia regarding sovereign access to the Pacific, whether by agreement or otherwise (which it did not), the content of that obligation would be far more limited than Bolivia posits, since it would not require either State to forego its interests or to reach any agreement that it regarded as unsatisfactory, and it would have been fulfilled and discharged.

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<sup>160</sup> See paras 2.47-2.49 above.



### CHAPTER 3. THE NON-EXISTENT “NINETEENTH CENTURY HISTORICAL BARGAIN” SAID TO PERSIST BEYOND THE COMPREHENSIVE SETTLEMENT AGREED IN THE 1904 PEACE TREATY

3.1. In its Reply Bolivia argues that Chile is bound by a “fundamental nineteenth century historical bargain whereby Bolivia ceded its coastal territories in exchange for sovereign access to the sea on Chile’s then-undefined northern boundary with Peru”.<sup>161</sup> This newly formulated argument is a substitute for Bolivia’s reliance in its Memorial on the 1895 Transfer Treaty, which it then described as an “indisputably formal, legally-binding” agreement,<sup>162</sup> which “created an international obligation for Chile ‘to transfer’ a pre-defined area of territory, materializing a sovereign access to the sea for Bolivia”.<sup>163</sup> Bolivia now acknowledges, following the Court’s finding,<sup>164</sup> that: “The 1895 Transfer Treaty did not ultimately enter into force”.<sup>165</sup> Bolivia nonetheless still seeks in its Reply to use the content of the 1895 Transfer Treaty as the content of its “historical bargain”.<sup>166</sup> On Bolivia’s case in its Reply, this “historical bargain” was reached in an unspecified manner at an unspecified point in time prior to the 1895 Transfer Treaty,<sup>167</sup> the terms of which Bolivia now says would have merely “confirmed” the “commitment” that had already arisen.<sup>168</sup>

3.2. This “historical bargain” of unidentified origin is now a pillar of Bolivia’s case, which is based on a contention that there is “in effect a unity” or a “continuity of Chile’s undertakings” that has existed “since the nineteenth

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<sup>161</sup> Bolivia’s Reply, para 142.

<sup>162</sup> Bolivia’s Memorial, para 368.

<sup>163</sup> Bolivia’s Memorial, para 340.

<sup>164</sup> See *Obligation to Negotiate Access to the Pacific Ocean, Preliminary Objection*, 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.

<sup>165</sup> Bolivia’s Reply, para 8. Cf. Bolivia’s Memorial, paras 9, 36, 71-88 (especially 76), 115, 131, 167, 228, 311, 338-344, 355, 368, 388, 410-411, 416, 428 and 497, where Bolivia based its claim on the 1895 Transfer Treaty without acknowledging that it never entered into force.

<sup>166</sup> Bolivia’s Reply, paras 142 and 198. See also Bolivia’s Reply, paras 8, 177, 182 and 188.

<sup>167</sup> Bolivia’s Reply, para 8.

<sup>168</sup> Bolivia’s Reply, para 8.

century”.<sup>169</sup> Bolivia describes the subsequent events in the twentieth and twenty-first centuries on which it also relies as “all” being “linked to the original historical bargain and the commitment that it generated on the part of Chile”,<sup>170</sup> and as having occurred “in fulfilment of that historical bargain”.<sup>171</sup>

3.3. Bolivia’s new “fundamental nineteenth century historical bargain” does not exist:

(a) The 1895 Treaties did not enter into force because Bolivia and Chile agreed, by exchange of notes in 1896, that unless two protocols to the 1895 Treaties were approved by the Congress of each State then the 1895 Treaties would be “wholly without effect”.<sup>172</sup> That condition was not satisfied, and thus by application of the agreement of the Parties, the 1895 Treaties were, and remain, “wholly without effect”. Bolivia cannot credibly say that the content of the 1895 Transfer Treaty nonetheless reflected a pre-existing legally binding commitment of unspecified origin that persisted beyond the agreement that the 1895 Treaties would be wholly without effect. Bolivia chose in its Reply not to make any comment about the statement by Bolivia’s Foreign Minister to Bolivia’s Congress in 1900 that the 1895 Treaties “have been abandoned and forgotten”.<sup>173</sup> Neither State suggested then, as Bolivia does now, that the content of the 1895 Transfer Treaty nonetheless somehow reflected an enduring legal obligation.

(b) After the 1895 Treaties were left wholly without effect, Chile and Bolivia engaged in fresh negotiations and reformulated the basis on which they would conclude a peace treaty.

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<sup>169</sup> Bolivia’s Reply, para 197.

<sup>170</sup> Bolivia’s Reply, para 198.

<sup>171</sup> Bolivia’s Reply, para 142.

<sup>172</sup> Note from the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile to the Minister of Foreign Affairs of Chile, No 117, 29 April 1896, **CPO Annex 5**; Note from the Minister of Foreign Affairs of Chile to the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 521, 29 April 1896, **CPO Annex 6**; and Note from the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile to the Minister of Foreign Affairs of Chile, No 118, 30 April 1896, **CPO Annex 7**.

<sup>173</sup> See Chile’s Counter-Memorial, para 2.5, referring to the Report of the Minister of Foreign Affairs of Bolivia to the Bolivian Congress, 20 August 1900, **CCM Annex 104**, p 23.

(c) Chile was no longer willing to envisage ceding any coastal territory under its control that might ultimately come under its sovereignty, but it was willing to grant Bolivia a right of free transit in perpetuity over Chilean territory, to pay monetary compensation, and to provide additional funds to build railways linking Bolivia to the Pacific Ocean so that Bolivia could enjoy its right of free transit.

(d) Bolivia carefully weighed its position and accepted these benefits “as a means to replace the lack of a port by building much-needed communication routes” and “as compensation for an element of progress that was being eliminated by another that could be provided”, and on that basis successfully negotiated a settlement in which it was able to increase the benefits Chile conferred on Bolivia in return for Bolivia’s abandonment of its claim to a port and recognition of Chile’s sovereignty over all territory to the West of the agreed boundary.<sup>174</sup>

(e) The 1904 Peace Treaty was thus a comprehensive negotiated settlement reached by Bolivia and Chile resolving all the issues between them at that time.<sup>175</sup> There was no suggestion by Bolivia or Chile in 1904, or in the years immediately following, that in parallel to the 1904 Peace Treaty there was an obligation to negotiate in the future on sovereign access to the sea for Bolivia. On the contrary, Bolivia was clear at the time of the 1904 Peace Treaty that it resolved “all of our issues”<sup>176</sup> and established “our clear and finally determined borders”.<sup>177</sup> When Bolivia later sought sovereign access to the sea, it did not do so by alleging that an obligation to negotiate had been created in the nineteenth century and existed in parallel to the 1904 Peace Treaty, as it now does before the Court. Rather, it sought revision or nullification of the 1904 Peace Treaty.<sup>178</sup> The Court has noted,

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<sup>174</sup> Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, 25 January 1901, **CR Annex 375**, p 66.

<sup>175</sup> See further Chile’s Counter-Memorial, Chapter 3.

<sup>176</sup> Bolivia, Congressional Record, 2 February 1905, **CPO Annex 30**, p 119. See para 3.21(a) below.

<sup>177</sup> Bolivia, Congressional Record, 2 February 1905, **CPO Annex 30**, p 123. See para 3.21(c) below.

<sup>178</sup> See Chile’s Counter-Memorial, para 5.1, and paras 4.13-4.16 below, concerning Bolivia’s conduct at the League of Nations. For a modern manifestation of an equivalent approach in

and Bolivia has reiterated, that Bolivia does not seek to question “the validity of the 1904 Peace Treaty” before the Court.<sup>179</sup> Bolivia does, however, allege before the Court that the 1904 Peace Treaty was not comprehensive, in the sense that Bolivia asserts that an obligation to negotiate concerning sovereign access to the Pacific Ocean was created prior to the 1904 Peace Treaty, indeed prior to the 1895 Transfer Treaty, and that the same continuous obligation persisted after the 1895 Transfer Treaty was rendered wholly without effect, and after the entry into force of the 1904 Peace Treaty.<sup>180</sup>

3.4. In response to Bolivia’s invocation of events preceding the 1904 Peace Treaty as a basis for legal obligations said to persist to the present day, Chile will in this chapter demonstrate that in negotiating the 1904 Peace Treaty Bolivia abandoned its claim to a port in return for other benefits (**Section A**) and that the 1904 Peace Treaty was a comprehensive negotiated settlement collateral to which there was no obligation to negotiate sovereign access to the sea for Bolivia (**Section B**). The conclusions drawn at the end of this chapter (**Section C**) concern the significance of the 1904 Peace Treaty for subsequent exchanges between the two States when Bolivia expressed an aspiration to obtain sovereign access to the sea.<sup>181</sup> Further explanation of the 1895 Treaties and the circumstances in which they became “wholly without effect” by operation of the 1896 exchange of notes, such that neither they nor their content can form the basis of any enduring “bargain”, is provided in Appendix A to this Rejoinder.

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the context of Bolivia’s 2009 Constitution, see paras 8.15-8.19 below concerning Bolivia’s conduct before the General Assembly of the OAS in 2012.

<sup>179</sup> *Obligation to Negotiate Access to the Pacific Ocean, Preliminary Objection*, para 30; and Bolivia’s Reply, para 34.

<sup>180</sup> See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Hearing on the Preliminary Objection*, CR 2015/19, 6 May 2015, pp 10-11, para 4.

<sup>181</sup> See also Chile’s Counter-Memorial, paras 3.2 and 3.3.



**A. In negotiating and concluding the 1904 Peace Treaty Bolivia abandoned its claim to a port**

*1. Chile proposed benefits for Bolivia instead of a port*

3.5. On 13 August 1900, Chile's Minister Plenipotentiary in La Paz wrote to Bolivia's Minister of Foreign Affairs, stating: "I have the honor to put in Your Excellency's hands the present note which contains a careful explanation of the final bases for peace accepted by my Government". Chile proposed "in exchange for the definitive cession of the Bolivian littoral" that Chile would (a) satisfy financial obligations undertaken by Bolivia concerning that territory, (b) finance the construction of a railway connecting a Chilean port to Bolivia, and (c) declare the Chilean port connected to Bolivia by this railway to be "free for the products and merchandise shipped through it in transit to Bolivia, and for the Bolivian products and merchandise exported through the same".<sup>182</sup>

3.6. The Chilean Minister recorded that Bolivia's Foreign Minister had previously informed him that "the offers advanced were not enough compensation for the Bolivian littoral, and that Bolivia needed a port and absolute commercial freedom". The request for a "port" that Bolivia had made was by that time a request to obtain "perpetual control over a zone of territory embracing one of the ports at present known", not a request for full sovereignty over territory. Chile agreed to all of the commercial aspects of Bolivia's requests, but stated that Bolivia's request concerning a port was "a demand doubly difficult and almost impossible to grant". This was because in the areas where there were ports "all the towns are Chilean" and "there are almost no Bolivians".<sup>183</sup> This is an important historical fact that Bolivia has declined to acknowledge.

3.7. Chile's Minister described the 1895 Treaties as "premature, still-born pacts". He noted that "public opinion in my country has been notably modified since the last days of 1895. We do not think as we did in years past." Having

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<sup>182</sup> Note from the Minister Plenipotentiary of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, 13 August 1900, **CPO Annex 27**, pp 75-76.

<sup>183</sup> Note from the Minister Plenipotentiary of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, 13 August 1900, **CPO Annex 27**, pp 76-78.

described Bolivia's demand for control over a port, and explained why Chile would not accept it, Chile's Minister stated: "We are forced, therefore, to lay aside this demand which comes to prevent an amicable understanding between the two countries."<sup>184</sup>

2. *Bolivia ultimately abandoned its claim to a port and sought and received other benefits instead*

3.8. One week after Chile had submitted these new bases for a peace treaty to Bolivia, Bolivia's Minister of Foreign Affairs reported to Bolivia's Congress. Of the 1895 Treaties he said: "Five years have gone by and the pacts have been abandoned and forgotten." He recounted the bases for a definitive peace treaty that had just been proposed by Chile and remarked that they "have been the subject of discussions, but no final agreement has been reached." He observed that Chile had pronounced "that it will not surrender an inch of territory on the coast to Bolivia".<sup>185</sup>

3.9. In October of 1900 Bolivia's Foreign Minister then replied to Chile's letter from August of the same year, discussed above at paragraphs 3.5-3.7. Bolivia's Foreign Minister indicated that he had submitted the bases for a peace treaty proposed by Chile to Bolivia's Congress. He referred to Bolivia's demand for a port and said: "We are in agreement that this is the only difficulty which prevents an arrangement between both Republics."<sup>186</sup>

3.10. Bolivia's Foreign Minister then set out at length and forcefully the rationale for Bolivia's demand for a port. Of Bolivia's Littoral Province, he noted that:

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<sup>184</sup> Note from the Minister Plenipotentiary of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, 13 August 1900, **CPO Annex 27**, pp 80-81.

<sup>185</sup> Report of the Minister of Foreign Affairs of Bolivia to the Bolivian Congress, 20 August 1900, **CCM Annex 104**, pp 23-24.

<sup>186</sup> Note from the Minister of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, No 25, 15 October 1900, **CPO Annex 29**, p 342.

“There has been, therefore, no absolute cession of ownership, and this being the case the cession requested by Chile ought to be the subject of new negotiations and stipulations, and that is what is being done at present. It is, therefore, legitimate to compare the bases and weigh their equity.”<sup>187</sup>

3.11. He stated that since Chile was no longer willing to concede a port to Bolivia, “my country is in need of reflection”, noting that Bolivia “in her negotiations has a right to proceed calmly, consulting her interests.” He concluded by stating that “the Bolivian Congress will consider the bases proposed by both Ministries of Foreign Affairs” and assuring his counterpart that “the present negotiations shall continue on peaceful and cordial terms”.<sup>188</sup> That is indeed what happened.

3.12. Bolivia’s Foreign Ministry sent a circular to its own legations abroad in January 1901 summarizing the negotiations. Bolivia filed only part of it as Annex 234 to its Reply. A complete version of that circular demonstrates that Bolivia’s Foreign Ministry emphasized the “series of burdensome conditions” imposed on Bolivia by the 1884 Truce Pact, and the desirability of Bolivia “replacing it with a definitive peace, even if it had to resign itself to accepting painful sacrifices.” Bolivia recalled to its own representatives that prior to the 1895 Treaties a protocol of 19 May 1891 had “ruled out the idea of a port for Bolivia” and that “this protocol was, after serious resistance in the Bolivian Congress, approved by it”.<sup>189</sup>

3.13. That same circular, on pages omitted by Bolivia from the annex it provided to the Court, goes on to describe the “solution” the two States began to craft. It records that when it became clear that Chile would not provide coastal

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<sup>187</sup> Note from the Minister of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, No 25, 15 October 1900, **CPO Annex 29**, p 359.

<sup>188</sup> Note from the Minister of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, No 25, 15 October 1900, **CPO Annex 29**, pp 364-365.

<sup>189</sup> Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, 25 January 1901, **CR Annex 375**, pp 59-60. The Preliminary Peace Protocol between Bolivia and Chile, 19 May 1891, is **CR Annex 374**.

territory to Bolivia, Chile's Minister Plenipotentiary in La Paz and the Bolivian President engaged in "a candid, friendly exchange of ideas ... in search for a possible solution" that would allow Bolivia efficiently to develop its commerce and to receive "fair compensation and satisfy a pressing need felt by the Bolivian people".<sup>190</sup> This contemporaneous Bolivian account of the negotiations recorded the following:

"Therefore, it was said: if Bolivia were to renounce its port, necessary as an indispensable condition for its progress and commercial development, it was required that Bolivia be provided with other means capable of making up the absence of a port, and be compensated, as far as possible, for the absence of a port, which Chile stated it could not grant to Bolivia.

It was then thought that said means, perhaps the only means possible, could be the construction of *railways and roads* connecting Bolivia not only with the Pacific Ocean but also with isolated regions in the west and northwest, which actually is one of Bolivia's most pressing needs.

The minimum amount required to satisfy such need was set at *two million pounds sterling*.

Such amount was designated not as a sum of money to be received in payment for the territories ceded, but as a means to replace the lack of a port by building much-needed communication routes; and as compensation for an element of progress that was being eliminated by another that could be provided."<sup>191</sup>

3.14. This 1901 Bolivian internal document concluded by stating that—

"our Government will persist in its unwavering efforts to secure an amicable, equitable arrangement, which both nations have been pursuing for so long. There is no doubt in my mind that such task will require the willingness of learned, sensible men from both

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<sup>190</sup> Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, 25 January 1901, **CR Annex 375**, pp 65-66.

<sup>191</sup> Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, 25 January 1901, **CR Annex 375**, p 66 (emphasis in original).

countries, so that *peace* may be secured, which ... constitutes the *ultimate interest of Nations*.”<sup>192</sup>

3.15. As negotiations evolved, Bolivia sought, and ultimately received, additional benefits. The next year, in April 1902, Bolivia’s Chargé d’affaires in Chile, Julio César Valdés, wrote to the President of Bolivia, General Pando, reporting on meetings held in Chile between, on the one hand, himself and Félix Avelino Aramayo, who was Bolivia’s lead negotiator for the 1904 Peace Treaty, and, on the other hand, President Riesco of Chile, concerning the terms of the 1904 Peace Treaty that was yet to be finalized. As with Bolivia’s 1901 circular to its own legations, this internal Bolivian document merits a full review as an indication of the Bolivian approach to negotiations with Chile concerning the matters pending between the two States at that time. Among other things, the Bolivian Chargé d’affaires reported to the President of Bolivia as follows:

“In the solemn Conference held with Mr. Riesco and his Cabinet, we managed to capture the thoughts of this Government and certain specific declarations that should shed plenty of light for future solutions. Thus, we can already assume the following bases as effective for the Peace Treaty: recognition of our debts, in conformity with what has already been studied in the May 1895 Treaties and in the proposals of the König mission; customs freedom and, consequently, regaining our trade sovereignty, decent compensation for the cession of the Littoral, sufficient to cover our sustainability needs, as desired by the country. These crucial ideas, summarized and embodied in the bases of the treaty which, confidentially, Mr. Aramayo submitted to the Government of Chile, did not receive any opposition or fundamental objections; the Ministry of Foreign Affairs is currently analyzing them to express their frank opinion. I believe that they will not undergo any transcendental modifications and will not meet any fierce opposition. On the contrary, I believe that the Government

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<sup>192</sup> Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, 25 January 1901, **CR Annex 375**, p 67 (emphasis in original).

will appreciate the situation and opportunity we are offering to reach the solution they are so eager to find.”<sup>193</sup>

3.16. Bolivia regarded these terms, which were more onerous on Chile than the ones Chile had proposed in 1900 (see paragraph 3.5 above), as ones that Bolivia was “offering” to Chile. Bolivia recorded that both States considered that the 1904 Peace Treaty “should be concluded quickly to avoid failure, to prevent it from failing if public discussions, which are always passionate, are given enough time to destroy and dismantle it”.<sup>194</sup>

3.17. This Bolivian report emphasized the importance to Bolivia at that time of “railroads to move our industries and to bring foreign capital into action” and the “essential goal” of “customs independence” and, accordingly, “the creation of customs agencies in Chilean ports”. These were the “essential elements” for Bolivia, and it was noted that they had “been secured”.<sup>195</sup> The 1904 Peace Treaty was the product of negotiations on all matters regarded as pending at that point in time, and was regarded by both States as a satisfactory outcome to which they were prepared to bind themselves under international law.

3.18. This is equally clear from the writings of the Foreign Minister of Chile who ultimately signed the 1904 Peace Treaty, Emilio Bello Codesido. In his book published in 1919 concerning Chile’s negotiations with Bolivia and Peru he stated—

“new bases for a peace treaty with Bolivia arose, and the idea of offering this country an area with access to the sea was disregarded because it was impracticable, although it was a logical and legitimate aspiration, given its condition as a landlocked

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<sup>193</sup> Letter from the Legation of Bolivia in Chile to the President of Bolivia, 10 April 1902, **CR Annex 376**, p 1 of the original.

<sup>194</sup> Letter from the Legation of Bolivia in Chile to the President of Bolivia, 10 April 1902, **CR Annex 376**, p 1 of the original.

<sup>195</sup> Letter from the Legation of Bolivia in Chile to the President of Bolivia, 10 April 1902, **CR Annex 376**, p 2 of the original.

country. This was not for Chile to grant. The 1895 negotiations had demonstrated this point.”<sup>196</sup>

3.19. Minister Bello Codesido went on to quote at length from the Memoria of the Ministry of Foreign Affairs of Chile from 1902, concerning the visit to Chile of Ambassador Aramayo of Bolivia—the same visit described in Bolivia’s internal report described at paragraph 3.15 above—who brought with him bases for an agreement “accepted by the Government of Bolivia”. The Memoria continued as follows:

“In the meetings held on this matter, the following items received particular treatment:

1. Bolivia’s abandonment of any aspiration to a port on the Pacific;
2. This country’s trade independence, granting Chile most favoured nation status;
3. Payment by Chile of a sum of money, in annuities, destined for the construction of railroads that will provide an easy outlet to the Pacific for Bolivia’s products.

An almost complete agreement was reached with regard to these items, and the negotiation progressed enough for it to be completed once the diplomatic representations of each country were established, through the appointment of the Ministers Plenipotentiary.”<sup>197</sup>

3.20. On this basis the definitive text of the 1904 Peace Treaty, described in detail in Chapter 3 of Chile’s Counter-Memorial and summarized at paragraph 3.24 below, was negotiated between Bolivia and Chile.

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<sup>196</sup> E.B. Codesido, *Annotations to the History of Diplomatic Negotiations with Peru and Bolivia 1900-1904* (1919), **CR Annex 383**, p 189.

<sup>197</sup> E.B. Codesido, *Annotations to the History of Diplomatic Negotiations with Peru and Bolivia 1900-1904* (1919), **CR Annex 383**, p 191.

**B. The 1904 Peace Treaty was a comprehensive settlement collateral to which there was no obligation to negotiate sovereign access to the sea for Bolivia**

3.21. Bolivia's Reply asserts that "Bolivia gave up its maritime territory to Chile in the expectation that it would have a sovereign access to the sea restored to it".<sup>198</sup> Leaving to one side the dispositive point that one State's "expectation" cannot create an obligation binding on another State,<sup>199</sup> in the light of the negotiating history explained in the previous section, as well as the plain terms of the 1904 Peace Treaty, Bolivia did not have any such expectation when it negotiated and consented to be bound by the 1904 Peace Treaty. Furthermore, in arguing that any such expectation legitimately survived the 1904 Peace Treaty, Bolivia has failed to respond to the following points made in Chile's Counter-Memorial:

(a) In presenting the 1904 Peace Treaty to Bolivia's Congress for approval in 1905, the Chairman of Bolivia's Congress stated:

"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.*"<sup>200</sup>

(b) As he indicated, and as Chile indicated at paragraphs 3.10 and 3.15, and Figure 1, of its Counter-Memorial, the boundary delimitation between Bolivia and Chile was complete, and included the boundary between the coastal provinces of Tacna and Arica (both then already controlled by Chile) and Bolivia, to their

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<sup>198</sup> Bolivia's Reply, para 174. 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 12-13, paras 11-12.

<sup>199</sup> See paras 2.26-2.33 above.

<sup>200</sup> Chile's Counter-Memorial, para 3.6, quoting Bolivia, Congressional Record, 2 February 1905, **CPO Annex 30**, p 119 (emphasis added).



East.<sup>201</sup> This stood in contrast to the position under the 1895 Treaties, in which no boundary had been delimited between Tacna and Arica, on the one hand, and Bolivia, on the other. A comparison between the incomplete boundary envisaged in 1895, and the complete boundary ultimately delimited in 1904, is illustrated in the figure following paragraph A.2 of Appendix A.

(c) On this basis, the President of Bolivia, responding to the statement of the Chairman of Bolivia’s Congress, observed that the 1904 Peace Treaty “puts an end to the uncertainties and hesitations that lasted a quarter of a century”, that achieving it “demanded the sacrifice of our strongest sentiments towards the country in its moments of anguish” and that it would allow Bolivia to prosper “within our clear and finally determined borders”.<sup>202</sup>

3.22. Bolivia abandoning its claim to a Pacific port and instead accepting the free transit regime and other benefits conferred on it by the 1904 Peace Treaty was opposed by some within Bolivia. Bolivia’s President addressed them in concluding his remarks to Congress:

“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 good work.”<sup>203</sup>

3.23. It is clear that the “effect of any delimitation” on land is “an apportionment of the areas of land lying on either side of the line.”<sup>204</sup> The Court has also noted

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<sup>201</sup> See further Protocol to the 1904 Treaty of Peace and Amity between Bolivia and Chile, 20 October 1904, **CR Annex 378**, mentioned in Bolivia’s Memorial, para 93; Treaty on Demarcation of Frontiers between Peru and Bolivia, 23 September 1902, **CR Annex 377**; and Treaty on Rectification of Borders between Peru and Bolivia, 17 September 1909, **CR Annex 379**.

<sup>202</sup> Bolivia, Congressional Record, 2 February 1905, **CPO Annex 30**, p 123.

<sup>203</sup> Bolivia, Congressional Record, 2 February 1905, **CPO Annex 30**, p 123.

<sup>204</sup> *Frontier Dispute (Burkina Faso/Republic of Mali)*, para 17.

that: “In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality.”<sup>205</sup> Insofar as Bolivia considers that “sovereign access” involves sovereignty over coastal territory,<sup>206</sup> that would necessarily be territory sovereignty over which was apportioned to Chile in the complete boundary delimitation agreed between Bolivia and Chile in 1904. In arguing that there was an obligation to negotiate sovereign access to the sea for Bolivia that arose before the 1904 Peace Treaty, and continued uninterrupted by it, Bolivia argues that it was a peace treaty establishing a boundary and, as between Bolivia and Chile, apportioning sovereignty over territory on each side of that boundary, that both parties had, at the time of its signature, already agreed to negotiate to change. That is contrary to the comprehensive and definitive terms of the 1904 Peace Treaty, to its negotiating history, and to the way the President of Bolivia and the Chairman of Bolivia’s Congress described it when it received the approval of Bolivia’s Congress.

3.24. The terms of the 1904 Peace Treaty were not explicitly or implicitly conditional on anything external to that treaty. The historical settlement between Bolivia and Chile following the War of the Pacific was contained entirely within their 1904 Peace Treaty. Bolivia recognized Chile’s sovereignty over all coastal territory to the West of the complete boundary delimitation agreed between them. Chile granted Bolivia the substantial benefits outlined in the 1904 Peace Treaty and described in detail in Chapter 3 of Chile’s Counter-Memorial, which were in summary:

- (a) the restoration of “relations of peace and friendship”,
- (b) certainty as to the entire boundary between the two States,
- (c) the “fullest and most unrestricted right of commercial transit” over all Chilean territory and at Chilean ports “in perpetuity”,

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<sup>205</sup> *Temple of Preah Vihear, Merits*, p 34.

<sup>206</sup> As to which see paras 1.5-1.11 above.

- (d) the right to establish Bolivian customs posts at Chilean ports,
- (e) construction of and payment for the Arica-La Paz railway connecting Bolivia's capital city to a major port, and
- (f) guarantees to facilitate investment in other railways in Bolivia.

3.25. In its Reply, Bolivia brushes over the right of free transit and other benefits that Chile conferred on it in the 1904 Peace Treaty, asserting that: "In practice, the free-transit regime is severely restricted and limited and is far from being observed by Chile."<sup>207</sup> As to the legal content of the free transit regime, Bolivia has not contested any of the description in Chapter 3, Section B, of Chile's Counter-Memorial of the extensive access to the Pacific Ocean that Bolivia enjoys across Chilean territory in accordance with the 1904 Peace Treaty and instruments subsequently agreed to implement and expand that access. Bolivia's access to the Pacific Ocean was at the core of the comprehensive negotiated settlement contained within the 1904 Peace Treaty. As to Bolivia's allegations that Chile is not observing its obligations concerning free transit, Chile rejects those unsubstantiated assertions and agrees with Bolivia that they play no role in the case before the Court.

### **C. Conclusions: the enduring significance of the 1904 Peace Treaty**

3.26. There was no "historical bargain" that took effect prior to the 1904 Peace Treaty, still less one which then survived the comprehensive settlement agreed in that treaty. The 1904 Peace Treaty apportioned sovereignty over territory on either side of the complete boundary that it delimited and established in perpetuity a right of free transit in Bolivia's favour. Since in the 1904 Peace Treaty Chile had already conferred substantial benefits on Bolivia, an essential part of the exchanges that occurred in the twentieth century concerning potential further improvements to Bolivia's access to the sea was what compensation Bolivia would be willing to grant Chile in return. There was no historical bargain that

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<sup>207</sup> Bolivia's Reply, para 40.

remained to be fulfilled. If there was to be any new bargain after the 1904 Peace Treaty, then it would need to be negotiated afresh, with benefits to be conferred on each State. Furthermore, in any negotiation concerning transfer of sovereignty over territory, the 1904 Peace Treaty provided the settled position against the backdrop of which any negotiation would occur.

3.27. From 1904 onwards, any discussions or negotiations that occurred therefore did not involve any territorial dispute, nor competing rights, nor any Bolivian right of sovereign access to the sea, but only whether the status quo established by the 1904 Peace Treaty might be modified in some way, or whether some new arrangement might be created in parallel to it.<sup>208</sup> Any legal obligation to conduct such negotiations could therefore only arise if both States accepted such an obligation, and it would be limited to compliance in good faith with the terms of any such acceptance.<sup>209</sup> As this chapter has demonstrated, no legal obligation to negotiate on a new arrangement following the 1904 Peace Treaty can be said to have been created prior to it and to have persisted after it. As the following chapters demonstrate, nor has any such legal obligation arisen after the 1904 Peace Treaty.

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<sup>208</sup> See further paras 2.39-2.48 above.

<sup>209</sup> See para 2.49 above.

## CHAPTER 4. DIPLOMATIC INTERACTIONS FROM 1920 TO 1926

4.1. In the years immediately following conclusion of the 1904 Peace Treaty, Bolivia accepted and acted in accordance with the comprehensive settlement that it had reached with Chile in that treaty. When Bolivia sought, in the 1920s, to change the settlement agreed in the 1904 Peace Treaty, this was not on the basis of an “historical bargain” said to have persisted in parallel to it. Rather, Bolivia sought the revision or nullification of the 1904 Peace Treaty, consistently with the fact that the 1904 Peace Treaty was a comprehensive settlement in parallel to which there was no obligation to negotiate sovereign access.

4.2. The correct position concerning the documents from the 1920s on which Bolivia continues to rely is as follows:

(a) The 1920 Minutes stated in terms that they did not create any legal obligation (**Section A**). Bolivia cannot avoid that simple fact.

(b) The events subsequent to the 1920 Minutes, including the 1926 Kellogg Proposal and related Matte memorandum, did not establish or reflect any obligation to negotiate sovereign access to the sea (**Section B**).

### **A. The 1920 Minutes did not create any legal obligation**

4.3. Bolivia’s contention that the 1920 Minutes give rise to an obligation to negotiate sovereign access to the sea is untenable by reference to the text of the Minutes (sub-section 1), the correspondence preceding them (sub-section 2), and the exchanges following them (sub-section 3).

#### *1. The text of the 1920 Minutes*

4.4. The 1920 Minutes record that the Minister of Chile proposed seven “fundamental ideas or points” that might become the “bases for an agreement”.

(a) At point I, the 1904 Peace Treaty was said to “define ... 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”. At point III, it was stated that the “Bolivian aspiration to its own port was replaced by the construction of the railway” and the “rest of the obligations undertaken by Chile” in the 1904 Peace Treaty.<sup>210</sup> These statements are plainly inconsistent with Bolivia’s current claim of an agreement to negotiate originating in an unfulfilled “historical bargain” dating from before, and surviving, the 1904 Peace Treaty.

(b) At point V, Chile stated that it “accepts to initiate new negotiations directed at satisfying the aspiration of the friendly country, subject to the victory of Chile in the plebiscite”.<sup>211</sup>

4.5. In its Memorial Bolivia failed to bring to the Court’s attention the passage in the 1920 Minutes that is most obviously relevant to determining whether it created any legal obligation. It reads:

“Given that the present declarations do not contain provisions that create rights or obligations for the States whose representatives make them, the Minister of Foreign Affairs of Bolivia states that, maintaining the freedom of both Governments to direct their diplomatic efforts in a way which best takes into account their respective interests ...”.<sup>212</sup>

This is conclusive evidence of an intention by the signatories of the 1920 Minutes not to assume any legal obligations.<sup>213</sup>

4.6. Having ignored it in the Memorial, in its Reply Bolivia argues that this stipulation “refers to the modality of sovereign access rather than the agreement to

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<sup>210</sup> Minutes of 10 January 1920, **CCM Annex 118**, pp 323 and 325.

<sup>211</sup> Minutes of 10 January 1920, **CCM Annex 118**, p 325.

<sup>212</sup> Minutes of 10 January 1920, **CCM Annex 118**, p 339.

<sup>213</sup> In support of its argument that Chile assumed a commitment in the 1920 Minutes, Bolivia relies on a book published in 2004. In a passage not quoted by Bolivia, the author said that the 1920 document “is not a treaty. It merely enumerates the bases for a future treaty and records the considerations put forward by Chile and Bolivia in regard to the matter” (O. Pinochet de la Barra, *Chile and Bolivia: How much longer!* (2004), **BR Annex 352**, p 39).

negotiate such access”.<sup>214</sup> That is spurious. The reservation is cast in broad terms. It plainly applies to “the present declarations” recorded in the Minutes, and is not limited to any particular statement concerning “the modality” of Bolivia’s access to the sea.

4.7. There is no basis for Bolivia’s contention that there is a distinction between the “core of the matter” agreed in the 1920 Minutes and the “details”, only the latter of which Bolivia asserts “would not be binding until the conclusion of a formal agreement”.<sup>215</sup> Bolivia seeks to avoid the effect of the reservation by conflating it with the preceding paragraph in the Minutes, which contains a statement by Bolivia’s Minister that compensation “shall be the object of a previous agreement to avoid differences over details hindering the execution of what is essential”. To suggest that the general reservation was somehow confined to this paragraph, or that the issue of compensation to be provided to Chile was a mere detail, is untenable.

4.8. Further, the terms used elsewhere in the 1920 Minutes indicate that no legal obligation was being confirmed or created. The Bolivian Foreign Minister referred to Chile’s proposal as being motivated by “cordiality and political rapprochement”, and as being “as spontaneous as it is friendly”, acknowledging “the elevated spirit that informs it”.<sup>216</sup> Those terms do not convey any intention to create a legal obligation.<sup>217</sup> Bolivia’s Minister likewise recognized that Chile’s representative had conditioned Chile’s willingness to consider the possibility of

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<sup>214</sup> Bolivia’s Reply, para 202.

<sup>215</sup> While denying that the reservation has any legal effect, Bolivia simultaneously seeks to take advantage of it, contending that the failure to include such a reservation in other exchanges demonstrates that those other exchanges created legal obligations: see Bolivia’s Reply, para 201. It will be apparent to the Court that the inclusion of an express reservation is not a requirement to avoid the creation of a legal obligation. Rather, it must be shown that there was an intention to create a legal obligation.

<sup>216</sup> Minutes of 10 January 1920, **CCM Annex 118**, pp 327 and 329.

<sup>217</sup> At para 204(c) of its Reply, Bolivia cites the 1920 Minutes as referring to “the fulfilment of its legitimate expectation”, a translation used in *Acta Protocolizada*: Act of 10 January 1920, **BM Annex 101**. The word “expectation” is an incorrect translation of the Spanish word *aspiraciones*. It is correctly translated as “aspiration” on six other occasions within **BM Annex 101**, and on all occasions in Chile’s translation at **CCM Annex 118**.

cession on Chile securing unconditional sovereignty over both Tacna and Arica through the then-envisaged plebiscite.<sup>218</sup> That condition was never satisfied. The plebiscite never took place, and eventually Peru retained sovereignty over Tacna, and Chile obtained it over Arica.

2. *The correspondence preceding the 1920 Minutes does not confirm Bolivia's interpretation of those Minutes*

4.9. Since the 1920 Minutes are plainly incapable of creating any legal obligation, Bolivia relies in its Reply on correspondence preceding them which is said to confirm the “intention behind the 1920 Act”.<sup>219</sup>

4.10. Thus, Bolivia refers to a memorandum of 22 April 1910 addressed by Bolivia to Chile and Peru. Referring to its “aspirations”, Bolivia asked whether Chile and Peru would “listen to propositions” from Bolivia concerning the question of a port and offered to propose “satisfactory bases and compensations in the event of their being willing to enter upon negotiations”.<sup>220</sup> Bolivia sent a further letter to Chile on 29 April 1910, referring to its “aspirations to the possession of a port on the Pacific” and stating that it would “listen with absolute deference to ... Chile”, and if Chile considered it “more appropriate to postpone the study of this matter”, Bolivia would do so.<sup>221</sup> This gives rise to three points.

(a) First, in its 1910 memorandum, Bolivia noted that “[t]he Cabinet of La Paz would be ready to propose to those of Santiago and Lima satisfactory bases and compensations in the event of their being willing to enter upon negotiations”.<sup>222</sup> This is again inconsistent with the existence of any “historical bargain” that survived the 1904 Peace Treaty that Chile was yet to fulfill.

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<sup>218</sup> Minutes of 10 January 1920, **CCM Annex 118**, p 331.

<sup>219</sup> Bolivia's Reply, para 205.

<sup>220</sup> Bolivian Memorandum of 22 April 1910, **BM Annex 18**, pp 90-91.

<sup>221</sup> Letter from the Minister of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, 29 April 1910, **CR Annex 380**.

<sup>222</sup> Bolivian Memorandum of 22 April 1910, **BM Annex 18**, p 91.



(b) Secondly, Chile replied on 14 August 1910 stating that, in view of the arrangements with Peru concerning Tacna and Arica, Chile was unable to discuss the cession of Arica with Bolivia. However, Chile expressed willingness to discuss “other means to serve [Bolivia’s] commercial interests”, including through provision of facilities for Bolivian trade at Chilean ports.<sup>223</sup> This evidently did not suggest any intention to be legally bound to negotiate sovereign access.

(c) Lastly, Bolivia responded on 29 August 1910 noting that it would submit proposals relating to potential advantages for Bolivian commerce in Chilean ports in due course.<sup>224</sup> No suggestion was made that Chile was subject to any legal obligation to negotiate, and in the event no proposals were forthcoming.<sup>225</sup>

#### 4.11. Bolivia also emphasizes two documents from 1919.

(a) First, it continues to rely on a Bolivian internal note to seek to support its allegation that in May 1919 Chile’s Foreign Minister stated that “Bolivia’s claim for its own port on the Pacific Ocean on terms aligned with the 1895 settlement was legitimate and just”.<sup>226</sup> This internal note actually refers to Bolivia’s “longing of owning a port”, and makes no reference at all to any “1895 settlement”.

(b) Secondly, Bolivia contends that a proposal submitted by Chile’s Foreign Minister on 9 September 1919 confirms Bolivia’s interpretation of the 1920

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<sup>223</sup> Letter from the Minister Plenipotentiary of Chile in Bolivia to the Government of Bolivia, 14 August 1910, **CR Annex 381**.

<sup>224</sup> Letter from the Ministry of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, 29 August 1910, **CR Annex 382**.

<sup>225</sup> Bolivia relies on a 1913 statement by its former President Montes said to reiterate Bolivia’s right to have a port of its own on the Pacific. The document referred to, Legation of Bolivia’s Note No 136 of 25 April 1913, **BM Annex 41**, does not contain any such statement. It further appears from the document that the statements that Mr. Montes was making were his personal views.

<sup>226</sup> Bolivia’s Memorial, para 98; and Bolivia’s Reply, para 206, citing, but not quoting, Bolivian Minister of Foreign Affairs and Worship’s Note No 126 of 24 May 1919, **BM Annex 42**, p 179. Chile pointed out in the Counter-Memorial that Bolivia’s English translation represented that this was a document signed by “Alberto Gutiérrez Minister of Foreign Affairs of Chile” (Chile’s Counter-Memorial, para 5.11). As the Spanish original indicates, it was sent by Bolivia’s Minister of Foreign Affairs to Bolivia’s own envoy to Chile, as Bolivia now acknowledges.

Minutes. In this document, Chile stated that the 1904 Peace Treaty “defines the political relations between the two countries definitively” and that “Bolivia’s aspiration to a port of its own was replaced by the construction of a railway ... and ... other obligations assumed by Chile.”<sup>227</sup> Chile further said that, “with the intention of laying a solid foundation for the future union of the two countries, Chile is willing to seek that Bolivia acquire its own outlet to the sea” and, in a separate paragraph, that it “accepts to initiate new negotiations aimed at satisfying the aspirations of the friendly country”.<sup>228</sup> That language does not denote an intention to be legally obliged to negotiate, and any negotiations were to be with respect to Bolivia’s “aspirations”. Chile also made clear that its acceptance of new negotiations was “subject to Chile’s triumph in the plebiscite”,<sup>229</sup> a condition that was never satisfied. Bolivia also fails to refer to the fact that its own position at the time was not to accept the Chilean proposal.<sup>230</sup>

3. *The exchanges following the 1920 Minutes did not establish a legally binding commitment*

4.12. Bolivia refers to statements allegedly made by Chile after the 1920 Minutes and first asserts that those statements confirmed the Parties’ understanding “as to the objective of the agreed negotiations”.<sup>231</sup> In fact, the

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<sup>227</sup> Chilean Memorandum of 9 September 1919, **CCM Annex 117**, paras I and III, cited in Bolivia’s Reply, para 207.

<sup>228</sup> Chilean Memorandum of 9 September 1919, **CCM Annex 117**, paras IV and V.

<sup>229</sup> Chilean Memorandum of 9 September 1919, **CCM Annex 117**, para V; and Note from the Ministry of Foreign Affairs of Bolivia to the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, 21 November 1919, **CR Annex 384**, p 4, recording this condition when Chile mentioned its proposal again in November 1919. See also Rios Gallardo, *After the Peace... The Chilean-Bolivian Relations* (1926), **BR Annex 241**, p 91, confirming that Chile would not be prepared to discuss Bolivia’s access to the sea until the situation of Tacna and Arica had been resolved.

<sup>230</sup> Note from the Ministry of Foreign Affairs of Bolivia to the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, 21 November 1919, **CR Annex 384**. Bolivia’s reliance at footnote 273 of its Reply on a characterization by the US Chargé d’affaires in Bolivia in a communication to the US Secretary of State dated 6 October 1919 (Telegram 732.2515/503 from the Chargé d’affaires of the US in Bolivia to the US Secretary of State, 6 October 1919, **BR Annex 235**) does not assist Bolivia establish any intention to be bound on the part of Chile.

<sup>231</sup> Bolivia’s Reply, para 204.

statements to which Bolivia refers are quotes from the Minutes themselves.<sup>232</sup> They are therefore all subject to the explicit statement of the intention not to create rights or obligations. Bolivia then relies on exchanges between the Parties after the 1920 Minutes to argue that those exchanges themselves established a legally binding commitment for Chile.<sup>233</sup> That is also incorrect.

(a) *Statements made before the League of Nations*

4.13. In 1921, Bolivia sought to bring a claim to the League of Nations for revision or nullity of the 1904 Peace Treaty. Had there been any “historical bargain” in existence in parallel to the 1904 Peace Treaty, creating an obligation for Chile to negotiate sovereign access to the Pacific for Bolivia, Bolivia would no doubt have been seeking to hold Chile to that bargain, rather than asking the League of Nations to revise or nullify the 1904 Peace Treaty.

4.14. Rather than grappling with this difficulty for its case, Bolivia relies on part of a statement made by Chile before the League of Nations in 1921, that “‘Bolivia can seek satisfaction through the medium of direct negotiations’ and that, by doing so, Bolivia will exercise “*the right of negotiations with Chile*”.<sup>234</sup> On this basis, Bolivia argues that “Chile categorically recognized an obligation to negotiate sovereign access with Bolivia”.<sup>235</sup> That is plainly not the meaning of the document.

4.15. In his statement, Chile’s delegate said that Chile would be “pleased” to discuss with Bolivia “the best means of furthering her development”, not that it was bound to do so as a result of the 1920 Minutes or otherwise, and not that it was willing to discuss sovereign access. Following a short statement from

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<sup>232</sup> Bolivia’s Reply, para 204(a) is a quote of the second paragraph of the Minutes of 10 January 1920, **CCM Annex 118**, p 323; para 204(b) is a quote of paras IV and V, p 325; and para 204(c) is a quote of the fourth and fifth paragraphs, p 333 (quoting from Bolivia’s translation of the 1920 Minutes, which is **BM Annex 101**).

<sup>233</sup> Bolivia’s Reply, paras 208 *et seq.*

<sup>234</sup> Records of the 22nd Plenary Meeting of the Assembly of the League of Nations, 28 September 1921, **CCM Annex 120**, pp 467 and 469 (emphasis added).

<sup>235</sup> Bolivia’s Reply, para 203.

Bolivia's representative, the Chilean delegate made the statement that Bolivia now relies on, which should be seen in full:

“Bolivia has finally decided to exercise the only right she can assert: namely, the right of negotiations with Chile, not with a view to the revision of the Treaty of 1904, but, as I said before, *to the consideration with Chile of the best means of furthering her development.*”<sup>236</sup>

This is manifestly not a reference to any “right of negotiations” concerning sovereign access, but rather a statement concerned with furthering Bolivia's development. It is but one example of the need for the Court to exercise caution in respect of the misleading partial quotations with which Bolivia's Reply is replete.

4.16. Bolivia also relies on a statement in a September 1922 letter from the Chilean delegate to the League of Nations that Chile was “quite ready to enter into negotiations on this subject”.<sup>237</sup> Bolivia argues that this demonstrates “Chile's agreement to enter into direct negotiations with Bolivia”.<sup>238</sup> Bolivia seeks to draw an analogy between the Chilean statement and the statement by France that it was “ready to proceed to underground tests” examined by the Court in the *Nuclear Tests* cases. That analogy is flawed. In those cases, the French statement of readiness was accompanied by more unequivocal statements.<sup>239</sup> There is no

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<sup>236</sup> Records of the 22nd Plenary Meeting of the Assembly of the League of Nations, 28 September 1921, **CCM Annex 120**, p 469 (emphasis added); see also p 467.

<sup>237</sup> Bolivia's Reply, paras 209-210, referring to Letter from the 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**. In support of its interpretation of the Chilean letter, Bolivia refers to Chilean President Alessandri's memoirs published in 1967 (Bolivia's Reply, fn 279). These merely suggest that Chile would be open to “hearing in a new negotiation something about the aspirations of Bolivia, based on compensation”. Furthermore, Bolivia fails to quote President Alessandri's view at the time that “we consider ... our situation with Bolivia completely settled, we do not owe Bolivia anything, even if we do not refuse to talk about new bases or propositions of an arrangement with no relation to the Treaty.” (A. Alessandri Palma, *Memoirs of my Government, Volume I* (1967), **BR Annex 294**, p 77).

<sup>238</sup> Bolivia's Reply, para 210. See also Bolivia's Reply, fn 278.

<sup>239</sup> In particular, the Court emphasized the unequivocal character of statements by the French President that “I had myself made it 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” and by the French Minister of Defence that “there would not be any atmospheric

unequivocal language in the letter upon which Bolivia relies. The Chilean representative's expressed "readiness" to discuss "other means" of access to the sea cannot be said to reflect any objective intention to create a legal obligation. As to the "subject" of any discussions, Bolivia asserts that these declarations referred to "the question of sovereign access".<sup>240</sup> But the express terms of the letter relied on point in the opposite direction. The Chilean representative recalled that the President of Chile "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". He also recalled that "the aspirations of Bolivia might be satisfied by other means".<sup>241</sup>

(b) *Bilateral discussions between Chile and Peru in 1921*

4.17. Bolivia also contends that, in the context of bilateral discussions carried out between Chile and Peru in 1921 to seek to resolve their dispute regarding sovereignty over Tacna and Arica, Chile reiterated its intention to negotiate with Bolivia.<sup>242</sup>

4.18. In December 1921 Bolivia approached Chile and proposed that the question of Bolivia's access to the Pacific be considered at an international conference.<sup>243</sup> Bolivia now relies on one line of Chile's response in which Chile's Foreign Minister recalled that Bolivia's Government had previously been "invited ... to directly explain to Chile its points of view regarding the aspirations to have

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tests in 1975": *Nuclear Tests (Australia v. France)*, para 37; and *Nuclear Tests (New Zealand v. France)*, *Judgment, I.C.J. Reports 1974*, paras 40 and 43.

<sup>240</sup> Bolivia's Reply, para 210.

<sup>241</sup> Letter from the 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**, p 391.

<sup>242</sup> Bolivia's Reply, para 212. Bolivia does not contend that Chile intended to be legally bound to negotiate, but only that Chile intended to negotiate, as to which see paras 2.8-2.10 above.

<sup>243</sup> Note from the Minister of Foreign Affairs of Bolivia to the Minister of Foreign Affairs of Chile, 20 December 1921, **BR Annex 236**, p 138.

a port in the Pacific”.<sup>244</sup> It is on the basis of this statement that Bolivia claims that Chile reiterated an intention to negotiate.

4.19. Chile’s clearly expressed intention was exactly the opposite. Chile emphasized that the 1904 Peace Treaty had established “the conditions of justice and equity convenient for [Chile and Bolivia]” and the “way Bolivia was linked to the sea”. Chile recalled that it had subsequently invited Bolivia to “directly explain to Chile its points of view regarding the aspirations to have a port in the Pacific” and that Bolivia failed to submit any responsive proposals.<sup>245</sup> It was not, in 1921, reiterating a readiness to enter into discussions. To the contrary, Chile did not consider itself bound to consider any of Bolivia’s new proposals, stating:

“The antecedents presented lead me to declare to Your Excellency that my Government believes it is excused from considering the proposals contained in the telegraph note to which I reply”.<sup>246</sup>

This note does not demonstrate any intention on Chile’s part to create a legal obligation to negotiate with Bolivia.<sup>247</sup>

(c) *The 1923 correspondence*

4.20. Bolivia continues to rely on correspondence between Chile and Bolivia in early 1923.<sup>248</sup> In its letter dated 6 February 1923, Chile once again rejected

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<sup>244</sup> Note from the Minister of Foreign Affairs of Chile to the Minister Plenipotentiary of Bolivia in Chile, 21 December 1921, **CR Annex 385**, p 3.

<sup>245</sup> Note from the Minister of Foreign Affairs of Chile to the Minister Plenipotentiary of Bolivia in Chile, 21 December 1921, **CR Annex 385**, pp 2 and 3.

<sup>246</sup> Note from the Minister of Foreign Affairs of Chile to the Minister Plenipotentiary of Bolivia in Chile, 21 December 1921, **CR Annex 385**, p 3.

<sup>247</sup> Bolivia also places emphasis on a memorandum from Uruguay to Bolivia in which Uruguay referred to Chile’s expressed “willingness” to consider “solutions directly with Bolivia” (Bolivia’s Reply, para 213; and Information Service of the Ministry of Foreign Affairs of Chile, *Chile and the Aspiration of Bolivia for a Port in the Pacific* (1922), **BR Annex 238**, p 156). A statement that Chile was “willing” to consider solutions with Bolivia can in no sense be taken as reflecting a sense of legal obligation. Likewise, there is no indication of any legal obligation to be found in the recollection of the Bolivian Chargé d’affaires’ discussion with Chile’s Foreign Minister on 27 January 1922: Note from the Chargé d’affaires of the Bolivian Legation to Chile to the Minister of Foreign Affairs of Bolivia, No 117, 27 January 1922, **BR Annex 239**.

Bolivia's request to revise the 1904 Peace Treaty, but stated that it "maintains its purpose to listen, with the utmost spirit of conciliation and equity, to the proposals that Your Excellency's Government wishes to submit".<sup>249</sup> Bolivia asserts that these expressions of willingness amount to an agreement by Chile to initiate negotiations on the topic of sovereign access to the sea. Bolivia nowhere explains how, by stating that it "maintains its purpose to listen" to proposals, Chile was manifesting an intention to be legally bound to negotiate sovereign access. Bolivia appears to rest its claim concerning the letter of 6 February 1923 on the phrase "will devote great efforts to consult [Bolivia]", arguing that the "use of the simple future tense denotes the commitment to pursue a course of conduct".<sup>250</sup> Chile does not agree that those words, or the tense used, convey any sense of legal obligation. In the event, Bolivia ultimately rejected Chile's invitation, stating that if Chile refused to consider revising the 1904 Peace Treaty, Bolivia would not participate in any negotiations.<sup>251</sup>

4.21. In a second letter, dated 22 February 1923, Chile again expressed its "willingness to discuss the proposals that the Bolivian Government wishes to present".<sup>252</sup> Bolivia argues that this is an expression of a legally binding commitment. But as explained in Chapter 2 above, an expression of willingness to discuss proposals does not of itself demonstrate an intention to be bound by law to do so.<sup>253</sup> Furthermore, what Chile expressed itself as being willing to discuss was not "maritime revindication", but only "free access to the sea".<sup>254</sup>

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<sup>248</sup> Bolivia's Reply, para 214. A full account of this correspondence is set out in Chile's Counter-Memorial: paras 5.21-5.29. Bolivia omits to deal with the points made by Chile at paras 5.22-5.24, 5.26 and 5.28-5.29.

<sup>249</sup> 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**, p 405.

<sup>250</sup> Bolivia's Reply, para 215.

<sup>251</sup> Note from the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile to the Minister of Foreign Affairs of Chile, 12 February 1923, **CPO Annex 40**.

<sup>252</sup> 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**, p 415.

<sup>253</sup> See paras 2.8-2.13. In support of its argument, Bolivia relies on a reference by the ILC Special Rapporteur to a "declaration whereby Cuba expressed its willingness" without rejecting its status as a binding unilateral act (Bolivia's Reply, fn 287). This concerns a

4.22. Bolivia then relies on a statement made in April 1923 by the Chilean President to the effect that he would “generously consider Bolivia’s aspirations” but that “legally, we have no commitment towards Bolivia”.<sup>255</sup> Bolivia argues that this limitation “specifically referred to the revision of the 1904 Treaty”.<sup>256</sup> There is no basis for this. To the contrary, the President’s statement was made in connection with his expressed willingness to consider “Bolivia’s aspirations”.

**B. The 1926 Kellogg Proposal and related exchanges did not establish or confirm any legal obligation**

4.23. In advance of the plebiscite envisaged by the 1883 Treaty of Peace between Chile and Peru, Bolivia proposed to collaborate with Chile to seek Chile’s success in that plebiscite—in return for an undertaking from Chile to transfer a port to Bolivia upon transfer of sovereignty over territory from Peru to Chile pursuant to the plebiscite. Chile stated that it accepted in principle this idea. Chile’s expressed willingness was conditioned, however, on success in the plebiscite. Bolivia understood that at the time.<sup>257</sup>

4.24. The plebiscite envisaged by the 1883 Treaty of Peace between Chile and Peru was ultimately not carried out, and Chile and Peru sought to settle the

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statement of markedly different wording in a different context. The statement did not include the word “willingness”. Further, the issue of interest for the Special Rapporteur was whether what one State (Cuba) characterized as a donation could be characterized as a commercial transaction by the recipient State (Uruguay) which applied a credit against a debt for the goods received. Both States considered a legal act to have taken place, but one (Cuba) considered the act (of a donation) to be unilateral in nature. The Special Rapporteur characterized this as a case “of interest” but did not state a view on it. The reference is of no assistance to the Court: see Eighth report to the ILC on unilateral acts of States, Document A/CN.4/557, 26 May 2005, pp 35-36, paras 36-43.

<sup>254</sup> 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**, p 415.

<sup>255</sup> “President Alessandri explains the guidelines of Chile’s foreign policy”, *El Mercurio* (Chile), 4 April 1923, **CCM Annex 127**, p 423.

<sup>256</sup> Bolivia’s Reply, para 217.

<sup>257</sup> Note from the Minister of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Bolivia to Chile, No 200, 31 March 1926, **BR Annex 240**, pp 77, 79 and 81. In its response, Bolivia sought to change the basis of its proposal, stating that any initiative related to Bolivia’s participation or cooperation in the plebiscite was untimely. Bolivia also indicated that Chile would receive compensation.



question of sovereignty over Tacna and Arica with the aid of the good offices of the US. In this context, potential cession of territory to Bolivia was raised, and Bolivia asserts in the Reply that Chile “agreed with the United States about its specific proposals to grant Bolivia a sovereign access to the sea”.<sup>258</sup> As the evidence below demonstrates, the cession of territory to Bolivia was one of the options put forward by Secretary of State Kellogg,<sup>259</sup> and it was discussed by Chile and the US. However, those discussions never gave rise to any obligation, and they were subject to the outcome of the dispute between Chile and Peru.

### *1. The Kellogg Proposal and the Matte memorandum*

4.25. On 30 November 1926, Secretary of State Kellogg delivered a memorandum to Chile and Peru in which he suggested the cession of both Tacna and Arica to Bolivia.<sup>260</sup> Chile responded on 4 December 1926 to the US Secretary of State in the so-called Matte memorandum.

4.26. In its Reply, Bolivia argues that the Matte memorandum is “part of a clear course of conduct by Chile aimed at satisfying Bolivia’s sovereign access to the Pacific Ocean.” Bolivia refers in this regard to Chile’s “‘repeated’ and ‘public’ ‘assurances’ during this period to negotiate Bolivia’s sovereign access to the sea”.<sup>261</sup> However, Bolivia is unable to point to a single document created by Bolivia or Chile containing or referring to any such assurance.<sup>262</sup>

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<sup>258</sup> Bolivia’s Reply, para 222.

<sup>259</sup> See Minutes of the Meeting of the Plenipotentiaries of Peru and Chile, Under the Extension of Good Offices of the US Secretary of State, 4 June 1926, **BR Annex 247**; Secretary of State’s Memorandum of 30 November 1926, **BM Annex 21**; Telegram 723.2515/2415 from the US Secretary of State to the Ambassador of the US in Chile, 9 June 1926, **BR Annex 248**; and Chilean Memorandum of 23 June 1926, **BM Annex 20**.

<sup>260</sup> Memorandum on Tacna-Arica delivered by the US Secretary of State to the Governments of Chile and Peru, 30 November 1926, **CCM Annex 128**.

<sup>261</sup> Bolivia’s Reply, paras 219 and 220.

<sup>262</sup> Bolivia relies on a letter sent by the US Ambassador to Chile to the US Secretary of State (Telegram 723.2515/2124 from the US Ambassador in Chile to the US Secretary of State, 11 April 1926, **BR Annex 244**). However, what two officials of the US might have said in internal correspondence between them is not pertinent to an assessment of the existence of any obligation to negotiate as between Bolivia and Chile.

4.27. In the Matte memorandum itself, Chile emphasized that the Kellogg Proposal “goes much farther than the concessions which the Chilean Government has generously been able to make”, in part because it involved “the definitive cession to the republic of Bolivia of the territory in dispute” between Chile and Peru.<sup>263</sup> Further, Chile made clear that “[n]either in justice nor in equity can justification be found for [Bolivia’s] demand which it formulates today as a right”.<sup>264</sup> That is not language consistent with Chile considering itself bound by a legal obligation to negotiate with Bolivia, still less one created some time prior to 1895 and persisting after the 1904 Peace Treaty.

4.28. Bolivia also argues in the Reply that the Matte memorandum constituted “an offer by Chile to negotiate sovereign access to the sea”, that through the memorandum, Chile “agreed to resolve Bolivia’s landlocked condition” and that the memorandum “constitutes ... a unilateral promise and representation of Chile’s position”.<sup>265</sup>

4.29. Each of these propositions is incorrect. The correct position is that in the Matte memorandum:

(a) Chile expressed the view that “in the course of the negotiations conducted during the present year before the State Department 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”.<sup>266</sup> Chile maintained its position that if the plebiscite envisaged in the Treaty of Ancón led to its definitive sovereignty over Tacna and Arica, it would “honour its declarations in regard to

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<sup>263</sup> Memorandum of the Minister of Foreign Affairs of Chile Delivered to the US Secretary of State regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, p 436.

<sup>264</sup> Memorandum of the Minister of Foreign Affairs of Chile Delivered to the US Secretary of State regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, p 435.

<sup>265</sup> Bolivia’s Reply, paras 224, 225 and 227.

<sup>266</sup> Memorandum of the Minister of Foreign Affairs of Chile Delivered to the US Secretary of State regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, pp 435-436 (emphasis added).

*consideration of Bolivian aspirations*”.<sup>267</sup> This language did not demonstrate any intention to generate any legal obligation, whether taken on its own or together with Bolivia’s note dated 7 December 1926.<sup>268</sup> Moreover, Chile’s statement that it would honour its declarations was dependent on a plebiscite result in its favour, whereas no such plebiscite was ever held.

(b) Chile was explicit that at no time had it abandoned its “solid juridical position” as well as its “desire[] to attest once more, that in discussing such propositions it does not abandon those rights.”<sup>269</sup> In the Reply, Bolivia says that this is compatible with an obligation to negotiate. But the question is not one of compatibility; it is whether Chile created or confirmed an obligation to negotiate. It did not: the Matte memorandum was not addressed to Bolivia and its reservation of Chile’s rights was inconsistent with any intention to create a legal obligation.

## 2. *Bolivia’s note of 7 December 1926*

4.30. Bolivia nonetheless contends in the Reply that it accepted “the Chilean offer” by note dated 7 December 1926.<sup>270</sup> The Matte memorandum was not, however, an offer by Chile to Bolivia. Conscious of this difficulty, Bolivia states that the memorandum was conveyed through diplomatic channels to Bolivia. That is correct,<sup>271</sup> but it does not somehow establish an intention by Chile to bind itself *vis-à-vis* Bolivia.

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<sup>267</sup> Memorandum of the Minister of Foreign Affairs of Chile Delivered to the US Secretary of State regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, p 436 (emphasis added).

<sup>268</sup> 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**.

<sup>269</sup> Memorandum of the Minister of Foreign Affairs of Chile Delivered to the US Secretary of State regarding Tacna-Arica, 4 December 1926, **CCM Annex 129**, p 436.

<sup>270</sup> Bolivia’s Reply, para 227; and 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**.

<sup>271</sup> Letter from the Legation of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, 5 December 1926, **CR Annex 386**.

4.31. The language of Bolivia's note of 7 December 1926 does not suggest the existence of any legal obligation, but instead refers to Chile's "conciliatory attitude" and "friendly disposition", and concludes by "reiterating the friendly willingness of my country to welcome any suggestion of neighbor and friendly countries".<sup>272</sup> Nowhere did Bolivia suggest "that negotiations were required",<sup>273</sup> nor did it assert that Chile had assumed any legal obligation, but rather referred to Bolivia's "policy", and to its "aspirations".<sup>274</sup>

4.32. Ultimately, the Kellogg Proposal was not accepted by Chile or Peru.<sup>275</sup> This was acknowledged by Bolivia at the time, and Bolivia did not then assert that Chile was subject to any obligation to negotiate sovereign access.<sup>276</sup> Chile did not obtain sovereignty over the province of Tacna and 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.

### 3. *Bolivia did not then "persist in" any claim*

4.33. There was an extended period of silence following the 1926 Matte memorandum, in part because in 1929 the Province of Tacna was returned to Peru and in part because of Bolivia's armed conflict with Paraguay in the 1930s. Bolivia nevertheless claims that it continued to "persist in its claim".

(a) Bolivia relies on a 1936 memorandum presented by Bolivia to the Peruvian Minister for Foreign Affairs in which Bolivia says that it "sought to prepare the ground for obtaining Peru's consent for future negotiations between Chile and Bolivia for the Bolivian access to the Pacific Ocean".<sup>277</sup> This was a

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<sup>272</sup> 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**, pp 443 and 445.

<sup>273</sup> Cf. Bolivia's Reply, para 227.

<sup>274</sup> 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**, pp 441 and 443.

<sup>275</sup> Memorandum of the Government of Peru Delivered to the US Secretary of State regarding Tacna-Arica, 12 January 1927, **CCM Annex 131**.

<sup>276</sup> See Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, 21 January 1927, **CR Annex 387**.

<sup>277</sup> Bolivia's Reply, para 355.

communication from Bolivia to Peru (not Chile), in which Bolivia communicated “bases or topics ... for a rapprochement plan between Bolivia and Peru”.<sup>278</sup> There is no basis for suggesting that, by this memorandum, Bolivia “persisted in its claim” against Chile.

(b) Bolivia also refers to a multilateral conference held in Argentina in 1936 during which it says that it called the “conference’s attention to Bolivia’s landlocked position”.<sup>279</sup> At this conference, Bolivia made clear that it “asked for nothing”, and the Bolivian position at the time was that “the climate was still not appropriate for raising the [port] question to the diplomatic plans”.<sup>280</sup> Bolivia did not suggest that Chile was bound by any legal obligation to negotiate.

4.34. These two isolated events are in fact inconsistent with the existence of any obligation to negotiate on sovereign access to the sea, whether arising from the 1920 Minutes, the Matte memorandum or otherwise.

### Conclusion

4.35. Bolivia’s continued reliance on the 1920 Minutes—despite the fact that these state in terms that they did not create any legal obligation—is indicative of the weakness of its case. The events preceding and subsequent to the 1920 Minutes that Bolivia invokes do not somehow change the conclusion that the two States did not create any legal obligation. Nor was any such obligation created in connection with the Kellogg Proposal, which was not made by or to Bolivia, and to which Chile responded by indicating that it was not subject to any legal obligation.

4.36. Following the failure of the Kellogg Proposal, and following the 1929 Treaty of Lima between Chile and Peru, there was silence on the subject of

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<sup>278</sup> Note from the Minister Plenipotentiary of Bolivia in Peru to the Minister of Foreign Affairs of Bolivia, No 169, 11 June 1936, **BR Annex 249**, p 125.

<sup>279</sup> Bolivia’s Reply, para 355.

<sup>280</sup> E.J. Holland, *A Historical Study of Bolivia’s Foreign Relations 1935-1946* (1967), **BR Annex 295**, pp 230-231.

Bolivia's access to the sea that lasted into the 1940s. The documents that Bolivia relies on to assert the contrary, and to claim that there was a "continuous course of conduct", are presented by Bolivia as leading to the exchange of notes between Bolivia and Chile in 1950, and are thus dealt with in that context in the next chapter, and in Appendix B.

## CHAPTER 5. THE 1950 DIPLOMATIC NOTES

5.1. Bolivia alleges in its Reply that the diplomatic notes of 1 and 20 June 1950 constitute a treaty under international law, and that their terms are “clear and unequivocal”.<sup>281</sup> Bolivia contends that in the 1950 notes “Bolivia and Chile undertook (i) to negotiate and (ii) to do so on the basis of an agreed outcome, namely the sovereign access to the sea.”<sup>282</sup>

5.2. The 1950 notes did not give rise to or confirm any legal obligation. They were differing diplomatic expressions of what each State thought would be politically acceptable. Consistent with the 1950 notes not having given rise to any obligation, no negotiations ever took place in pursuance of the agreement now said by Bolivia to have been reached. Moreover, in the decade following the 1950 notes, Bolivia did not claim either that any obligation existed or that the failure to negotiate was a breach of any obligation. That the 1950 notes involved no legal obligation is clear from their nature and content (**Section A**), the conduct of the Parties before the conclusion of the notes (**Section B**), and subsequent events (**Section C**).

### **A. The diplomatic notes of June 1950 neither created nor confirmed the existence of any legal obligation**

5.3. On 1 June 1950, Bolivia made a formal proposal of negotiations that, in relevant part, was as follows:

“With such important antecedents that reveal 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

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<sup>281</sup> Bolivia’s Reply, para 228.

<sup>282</sup> Bolivia’s Reply, para 236.

landlocked situation of Bolivia on bases that take into account the mutual benefits and genuine interests of both peoples.”<sup>283</sup>

5.4. By its note of 20 June 1950, Chile did not agree to what Bolivia had proposed. It did not agree that the two Governments “formally enter into a direct negotiation to satisfy the fundamental need of Bolivia to obtain its own sovereign access to the Pacific Ocean”. Instead, Chile’s note stated (in relevant part):

“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.*”<sup>284</sup>

5.5. Three points follow from the pointedly different language that Chile used in its note of 20 June 1950.

5.6. First, the 1950 notes could not constitute a treaty as is alleged by Bolivia because there was no agreement. As Chile pointed out in its Counter-Memorial, if State A proposes X, and State B proposes Y, it is self-evident that no agreement has been reached.<sup>285</sup> Bolivia has not responded in its Reply by saying that, at some point subsequent to 20 June 1950, it accepted the counter-proposal made in Chile’s note. Instead, it seeks to obfuscate what is a very basic point by focusing

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<sup>283</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Chile, 1 June 1950, **CR Annex 398** (emphasis added), p 3.

<sup>284</sup> Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, **CR Annex 399** (emphasis added), p 2

<sup>285</sup> Chile’s Counter-Memorial, para 6.12. See also fn 39 above.



on the fact that drafts of the notes were exchanged by the two States before the final versions were sent.<sup>286</sup> But that is irrelevant to the point that Chile is making. It is not because State A proposes X, and knows in advance that State B will propose Y, that there is suddenly the requisite correspondence between X and Y. Instead, all that has happened is that the two States have, with a very careful eye to what they think will be politically and publicly acceptable, coordinated to some extent in the communication of differing positions. Referring to political discussions that precede the drafting of diplomatic instruments as “*travaux préparatoires*”<sup>287</sup> does not turn two different statements of openness to negotiate into an international treaty or evidence an intention to create a legal obligation.

5.7. Secondly, the 1950 notes do not demonstrate an intent to be bound. As explained in Chapter 2 above, and as Bolivia acknowledges, to determine whether an instrument creates a legal obligation, 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.”<sup>288</sup> Their objective intention to do so is to be gauged from the terms of the instrument and the circumstances in which it is drawn up.<sup>289</sup> It follows that the terms used, read in context, are crucial to determining whether a particular instrument creates or confirms any legal obligation.

5.8. Remarkably, Bolivia places little emphasis on the actual terms used in the two notes: it does not address the terms of its own note in any comprehensive way, and it does not seriously engage with the analysis in Chile’s Counter-Memorial of the wording of Chile’s note. For Bolivia, a statement that Chile “is open formally to enter into a direct negotiation” expresses a clear intention to be bound and “to act in a certain way”.<sup>290</sup> Bolivia cites no authority for this assertion and there is none. By contrast, the authorities to which Chile refers in Chapter 2 above<sup>291</sup> support Chile’s position that this wording does not denote an intent to be

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<sup>286</sup> Bolivia’s Reply, para 232.

<sup>287</sup> Bolivia’s Reply, para 232.

<sup>288</sup> Bolivia’s Memorial, para 300.

<sup>289</sup> See Chile’s Counter-Memorial, paras 4.4-4.14; and paras 2.8 and 2.13 above.

<sup>290</sup> Bolivia’s Reply, para 237.

<sup>291</sup> See paras 2.8-2.13 above and references therein.

bound. The wording actually used by Chile points only to a political expression of willingness.<sup>292</sup>

5.9. Thirdly, the negotiation to which Chile stated that it was open was manifestly not “on the basis of an agreed outcome, namely the sovereign access to the sea”,<sup>293</sup> as Bolivia now claims. The negotiation to which Chile was open was, by contrast, to be one that (a) aimed (b) at searching for (c) a formula that (d) would make it possible to (e) give Bolivia its own sovereign access to the sea and (f) for Chile to obtain compensation of a non-territorial character which effectively took into account its interests. In any exercise of identification of what Chile was open to, each one of the terms at (a) to (d) and (f) must be given effect, and not just the language at (e). In this respect:

(a) Far from having any agreed outcome, the negotiation was merely “aimed” towards a certain form of conduct. That is equivocal language, envisaging something more vague and less onerous even than a negotiation to search for something.

(b) To have a negotiation “aimed at searching for” something involves a form of conduct, such that if there were any legal obligation attached (there is not), it would in these circumstances be discharged by good faith efforts.

(c) The object of the search was a “formula”. This is a carefully chosen if unusual word, reflecting the complexity of the matter at issue and the political and other difficulties that would have to be surmounted.

(d) The formula would have needed to be one that “would make it possible” for Chile to act in a certain way, i.e. “to give”. This is important because it reinforces how far this proposed negotiation was to be from a negotiation concerning competing or underlying rights, where the States concerned would

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<sup>292</sup> See also Chile’s Counter-Memorial, paras 6.9-6.11.

<sup>293</sup> Bolivia’s Reply, para 236.

have equal standing in the matter to be negotiated.<sup>294</sup> Here, the question would be whether a formula had been found that made it possible for Chile to give Bolivia sovereign access to the sea. Chile would need to negotiate in good faith in search of such a formula, but whether a formula had been found that made it possible for Chile to give sovereign access to Bolivia would ultimately be a matter for Chile. Chile's language in no sense contemplated Chile having to modify its position if it did not consider that such a formula had been found.

(e) It is only following, and on satisfaction of, these prior elements, coupled with compensation satisfactory to Chile, which were each evidently of critical importance to Chile, that one reaches Bolivia's alleged "agreed outcome", Chile giving Bolivia its own sovereign access to the Pacific.

(f) Bolivia seeks again and again, including in the orders that it requests from the Court, to leave out the further elements of Chile's proposal, i.e. that the formula would have to provide "for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests" and that Chile would "have to consult Peru, in compliance with the Treaties celebrated with this country."<sup>295</sup>

5.10. It is only by seeking to re-formulate Chile's proposal, and by deciding not to engage with the actual wording of that proposal, that Bolivia can make its case, i.e. contend that the two notes "embody the same commitment", and that Chile's note "fully met the initial proposal made by Bolivia."<sup>296</sup> These contentions are not tenable.

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<sup>294</sup> See further paras 2.39-2.49 and 2.54-2.55.

<sup>295</sup> Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, **CR Annex 399**, pp 2-3. As explained in Chapter 3 above, in the absence of any "historical bargain" surviving the 1904 Peace Treaty, that Treaty provided the settled position from which any deviation would have to be accepted by both States, and any new bargain would need to be negotiated afresh, with benefits to be conferred on both States. It follows that compensation for Chile would have formed a significant part of any discussions being contemplated by the two States.

<sup>296</sup> Bolivia's Reply, paras 235 and 236.

5.11. As the text of Chile’s actual proposal is strongly counter to Bolivia’s case, Bolivia seeks to focus the Court’s attention elsewhere, in particular on the introductory wording in each of the notes. Bolivia states that its note of 1 June 1950 characterized as “important precedents” what it now alleges are prior examples of Chile entering into an obligation to negotiate.<sup>297</sup> In its Reply, Bolivia emphasizes that Chile’s note also refers to and uses the term “these precedents”.<sup>298</sup> The term used in Spanish is *antecedentes*, which does not have any legal connotation in the sense of legal precedent, and the most accurate translation of which is “antecedents”.<sup>299</sup> Thus Bolivia referred in its note to “*important antecedents* that reveal a clear orientation in the international policy followed by the Chilean Republic”,<sup>300</sup> while Chile’s note in turn refers to “these antecedents”, before quoting Bolivia’s proposal.<sup>301</sup> This language does not assist Bolivia; to the contrary, it is the language of political, not legal, engagement.

5.12. Bolivia also emphasizes the fact that Chile stated in its note that it “will be consistent with that position”.<sup>302</sup> That was a reference to the statement in the note of Chile’s prior position i.e. that, “together with safeguarding the *de jure* situation established in the Treaty of Peace of 1904, [Chile] has been *willing to study* through direct efforts with Bolivia *the possibility of satisfying the aspirations* of the Government of [Bolivia] and the interests of Chile.”<sup>303</sup> This does not assist Bolivia in any way. Indeed, it is inconsistent with Bolivia’s case that there was (somehow) an enduring obligation to negotiate in accordance with a nineteenth

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<sup>297</sup> Bolivia’s Reply, para 235(b).

<sup>298</sup> Bolivia’s Reply, para 235(d).

<sup>299</sup> In the translation of the 1950 diplomatic notes filed with the Counter-Memorial, Chile translated the Spanish word “*antecedentes*” as “background”. A more accurate English translation of that word is “antecedents”.

<sup>300</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Chile, 1 June 1950, **CR Annex 398**, p 3 (emphasis added).

<sup>301</sup> Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, **CR Annex 399**, p 2.

<sup>302</sup> Bolivia’s Reply, paras 235(d) and 237.

<sup>303</sup> Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, **CR Annex 399**, p 2 (emphasis added). Cf. Bolivia’s Reply, para 235(d), which implies that Chile’s statement that it “will be consistent with that position” refers to Bolivia’s “position”, as expressed in its note of 1 June 1950. As is apparent from a plain reading of Chile’s note, that is an unsustainable interpretation.

century historical bargain or statements by Chile in the 1920s.<sup>304</sup> This part of Chile's note merely confirms that for Chile, safeguarding the 1904 Peace Treaty (which was not even mentioned in Bolivia's note of 1 June 1950) was of fundamental importance; that Chile's past statements merely showed a *willingness to study* Bolivia's proposals in a negotiation relating to Bolivia's "*aspirations*"; and that in stating that it would act consistently with its prior position, Chile was confirming that it would study any Bolivian proposals concerning its "*aspirations*" in a negotiation, and nothing more. Chile was expressly acting in a "*fraternal spirit of friendship towards Bolivia*" and not pursuant to or in creation of any legal obligation. Consistent with that, Bolivia's note of 1 June 1950 had asserted a "*fundamental need*" to obtain sovereign access to the Pacific, not any *right* to negotiate it. Notably, also, Chile's response did not refer to sovereign access as a "*need*" for Bolivia (let alone there being a right to negotiate it).

5.13. For the reasons explained above, the actual terms used in the notes, read in the context of what was clearly careful drafting, do not show any agreement, nor any objective intention on the part of Chile to create a legal obligation. What the notes do show is that neither State considered that it was acting by reference to any prior obligation and that each State considered the content of its note to form an acceptable political basis for discussions on Bolivia's aspirations.

**B. The discussions leading to the 1950 notes neither created nor confirmed any legal obligation**

5.14. Any agreement or obligation could only be derived from the actual terms of the 1950 notes. Nevertheless, consistently with its attempt to shift focus away from those terms, Bolivia places a high degree of emphasis on records of the discussions preceding the 1950 notes. Given the limited relevance of these discussions, Chile's further examination of the documents relied on is confined to Appendix B, at paragraphs B.1-B.18. The key points are as follows:

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<sup>304</sup> Cf. the untenable position adopted at Bolivia's Reply, para 229. For the reasons explained in Chapters 3 and 4 above and in this Chapter 5, none of these earlier documents or statements created any legal obligation to negotiate or reflected an "historical bargain".

(a) Bolivia challenges Chile’s position that, so far as concerns the issue of sovereign access to the sea, there was an extended period of silence from the late 1920s. Bolivia’s contention that it persisted in a “claim” in the 1930s has already been considered at paragraphs 4.33-4.34 above. As to specific exchanges and discussions that took place in the 1940s and on which Bolivia places particular emphasis, those are consistent with Chile’s continued willingness to listen to the aspirations of its neighbour, and are consistent only with the absence of the legal obligation for which Bolivia now contends.

(b) Bolivia claims that by June 1948 Chile and Bolivia “already agreed to initiate negotiations on sovereign access and to formalize that agreement through an exchange of notes”.<sup>305</sup> The documentary record of the discussions in June shows that the States were engaged in preliminary discussions on potential proposals on the topic of granting Bolivia a sovereign access to the sea, not that they had reached any agreement. The records also highlight the extreme political sensitivity of matters concerned with Bolivia’s aspirations to a sovereign outlet on the Pacific, which—as explained in **Section C** below—is entirely as would be expected.

(c) Records of other meetings and exchanges preceding the two 1950 diplomatic notes likewise do not suggest that the notes created any binding legal obligation. In fact, they confirm that no agreement had been reached, and that the preliminary discussions were proceeding on a non-binding basis.

(d) As noted in paragraph 5.9(f) above, one essential aspect of Chile’s eventual proposal for a negotiation as set out in its 20 June 1950 note was for Chile to obtain compensation which effectively took into account its interests. That aspect is effectively ignored by Bolivia, but its significance is demonstrated by Chile’s interests as discussed in the exchanges preceding its note. In March 1950 Chilean President González Videla expressed Chile’s interest in requesting the use of waters from Bolivia’s highland lakes, including Lake Titicaca, as

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<sup>305</sup> Bolivia’s Reply, para 233.

compensation. In April 1950 the Chilean President met with US President Truman to discuss a possible way forward to granting Bolivia sovereign access to the Pacific Ocean, and addressed with him the possibility of using waters of the highlands for irrigation and hydroelectric power production in Chile. This scheme was of particular interest to President Truman, and his backing was of great importance given the need to provide finance for what would have been a major engineering scheme.<sup>306</sup> The nature and scale of the compensation that Chile was considering explains in part its motivation for negotiating with Bolivia, and also makes plain that many further discussions would have been needed before any form of binding agreement could have been reached.

**C. Events subsequent to the 1950 notes neither created nor confirmed the existence of any legal obligation**

5.15. As explained in Chile's Counter-Memorial, the conduct of both States following the two notes did not indicate that they had undertaken any legal obligation to negotiate.<sup>307</sup> In particular:

(a) Bolivia did not respond to Chile's counter-proposal of 20 June 1950 and so did not accept the form of negotiations to which Chile had indicated that it was open.<sup>308</sup>

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<sup>306</sup> These discussions are addressed in detail in Appendix B, paras B.15-B.16 below. See in particular the Statement by the President of Chile regarding the port negotiations, 29 March 1951, **BR Annex 278**; Address by the President of the US opening the meeting of the Foreign Ministers of the American Republics, 26 March 1951, **CR Annex 404**; and Note from the Bolivian Minister of Foreign Affairs to the Ambassador of Bolivia in Chile, 17 May 1950, reproduced in A. Ostria Gutiérrez, *Notes on Port Negotiations with Chile* (1998), **CR Annex 440**, pp 43-47.

<sup>307</sup> Chile's Counter-Memorial, paras 6.17-6.30.

<sup>308</sup> See Chile's Counter-Memorial, para 6.12 and Note from the Chilean Ambassador to Bolivia to the Minister of Foreign Affairs of Chile, 15 February 1962, **CCM Annex 160**, p 34. Bolivia later characterized Chile's note as an "offer": see the statement of the Bolivian Minister of Foreign Affairs in Minutes of the 3rd Meeting of the General Committee of the OAS General Assembly, 16 November 1988, **CCM Annex 302** (this is also **BM Annex 213** which refers to "offering").

(b) Bolivia did not submit the 1950 notes to the Bolivian Congress for approval as a treaty or other international agreement, as would have been required by the Constitution of Bolivia then in force had the notes had that status.<sup>309</sup>

(c) At no time in the 1950s did Bolivia insist on performance of any alleged obligation to negotiate or assert the existence of any such obligation. That omission is particularly telling, given that there were never any negotiations following the two notes.<sup>310</sup>

(d) Nor did Chile suggest that the two States had assumed any legal obligation to negotiate. Chile merely stated that it had communicated to Bolivia that it was willing to give an ear to Bolivia's proposals concerning its aspirations and that it was willing to study Bolivia's proposal in a negotiation.<sup>311</sup> That points only to a political expression of willingness.

(e) Following two changes of regime in Bolivia in the early 1950s, the Bolivian Government led by President Víctor Paz Estenssoro shifted focus to obtaining further practical benefits concerning non-sovereign access to the sea, instead of pursuing any aspiration to obtain a port.<sup>312</sup>

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<sup>309</sup> See Republic of Bolivia, Political Constitution of 1947, 26 November 1947, **CCM Annex 136**, Article 58(13).

<sup>310</sup> See Chile's Counter-Memorial, para 6.16(c). There were in fact no negotiations until the 1970s, following the Joint Declaration of Charaña: see Chapter 6 below.

<sup>311</sup> See, e.g., Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 645/432, 11 July 1950, **CCM Annex 145**; 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 Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 737/472, 3 August 1950, **CCM Annex 147**.

<sup>312</sup> See, e.g., Letter from Víctor Paz Estenssoro to Siles Suazo dated 25 September 1950, published in *El Diario* (Bolivia), 19 June 1964, **CCM Annex 148**; "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**; Memorandum by the Ministry of Foreign Affairs of Chile, 20 March 1964, **CCM Annex 169**, pp 5-6; and "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**. See also Chile's Counter-Memorial, para 6.22 and references therein.



(f) When Bolivia finally suggested in 1963 that the 1950 notes constituted a “commitment”, Chile rejected that characterization in clear terms and repeated that rejection again in 1967, to which Bolivia did not respond.<sup>313</sup>

5.16. In its Reply, Bolivia does not challenge any of these facts. While failing to engage with the points made in Chile’s Counter-Memorial, Bolivia places an increased emphasis on the period immediately following the two notes, alleging that both Chile and Bolivia “acknowledged after 1950 that the Exchange of Notes constituted an agreement entailing legal effects.”<sup>314</sup> That is incorrect.

1. *Contemporaneous conduct of the two States did not create or confirm the existence of a legal obligation*

5.17. Bolivia places significant emphasis on contemporaneous statements of both Chile and Bolivia following the 1950 diplomatic notes, but the Chilean statements relied on by Bolivia merely confirm the expression of political willingness set out in Chile’s 1950 note, consistent with its “traditional policy”, i.e. its willingness to listen to Bolivia on proposals it might make regarding its access to the sea. Such statements do not assist Bolivia in transforming the text of the 1950 notes into a legally binding agreement. Equally, Bolivia’s position, as expressed at the time, was that it did not consider the notes to constitute a binding agreement. The details of the statements on which Bolivia relies are addressed in Appendix B, paragraphs B.19-B.21.

5.18. Consistently with Bolivia’s contemporaneous statements, and as explained in Chile’s Counter-Memorial, Bolivia did not submit the 1950 notes for approval by its Congress as a treaty or international agreement, as required under the 1947 Constitution of Bolivia then in force.<sup>315</sup> In its Reply, Bolivia did not provide any evidence to the contrary—it simply ignored the point. However, Bolivia does now contend that it “registered the Exchange of Notes in the Department of

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<sup>313</sup> See paras 5.31 and 5.33-5.34 below and references therein.

<sup>314</sup> Bolivia’s Reply, para 240.

<sup>315</sup> See Republic of Bolivia, Political Constitution of 1947, 26 November 1947, **CCM Annex 136**, Article 58(13); and Chile’s Counter-Memorial, para 6.16(b).

International Treaties of the Ministry of Foreign Affairs.”<sup>316</sup> The only evidence of this is a letter from the Bolivian Ambassador to the Bolivian Ministry, including a copy of the two 1950 notes and requesting that it be “preserved in the Department”.<sup>317</sup> No evidence that the notes were registered with the Department is presented, much less any evidence that Bolivia’s Congress approved the notes as would have been required had they been a treaty or international agreement.

5.19. Bolivia further relies upon its submission of the 1950 notes to the United Nations Conference of the Law of the Sea in 1958, and Chile’s alleged failure to “object to Bolivia’s characterization of the legal nature of the agreement of 1950.” It asserts that the 1950 notes were submitted “as additional information ... under the label ‘Treaties between Bolivia and Chile’”.<sup>318</sup> This is not an accurate representation of Bolivia’s submission and characterization of the 1950 notes.

(a) The UN Secretariat produced a memorandum for the Conference on the Law of the Sea titled “Memorandum Concerning the Question of Free Access to the Sea of Land-Locked Countries”. It contained a list of examples of bilateral treaties on that subject including, for Bolivia and Chile, parts of the 1904 Peace Treaty, the 1912 Convention on Trade and the 1937 Convention on Transit.<sup>319</sup> It did not include the 1950 notes.

(b) An addendum to that memorandum was later circulated with “Additional information” submitted by Bolivia. That addendum included the 1950 notes, together with a wide range of other documents that are patently not treaties.<sup>320</sup>

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<sup>316</sup> Bolivia’s Reply, para 240.

<sup>317</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 646/433, 13 July 1950, **BR Annex 268**.

<sup>318</sup> Bolivia’s Reply, para 258.

<sup>319</sup> Memorandum Concerning the Question of Free Access to the Sea of Land-Locked Countries by the Secretariat of the UN Conference on the Law of the Sea, A/Conf.13/29, 14 January 1958, **CR Annex 410**, pp 34-36. See also Treaty of Peace and Amity, 20 October 1904, **CCM Annex 106**; Convention on Trade, 6 August 1912, **CPO Annex 34**; and Convention on Transit, 16 August 1937, **CPO Annex 44**.

<sup>320</sup> E.g., the addendum refers to: (i) the offer made “on various occasions” by the Argentine Government to grant free warehouses and zones in the port of Rosario to facilitate Bolivian imports and exports through that port; (ii) a note sent by Brazil to Bolivia on 28 June 1943, in

Further, there was no “characterization of the legal nature of the agreement of 1950” as Bolivia now contends.<sup>321</sup> Bolivia’s delegate to the Conference did not even refer to the 1950 notes when he addressed the key agreements concerning Bolivia’s access to the sea,<sup>322</sup> which included the 1904 Peace Treaty, the 1912 Convention on Trade, the 1937 Convention on Transit, the 1953 Declaration of Arica<sup>323</sup> and the 1955 Treaty of Economic Complementation.<sup>324</sup>

(c) This was not a situation or representation that “called for some reaction, within a reasonable period, on the part of the [Chilean] authorities”, to use the well-known formulation from the *Temple of Preah Vihear* case.<sup>325</sup>

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which Brazil informed Bolivia of its intention to establish a free zone in the port of Santos for the warehousing of goods consigned to or from Bolivia after the Brazil-Bolivian railway came into operation; (iii) an instrument signed by the Brazilian and Bolivian economic delegations on 22 February 1957 which “recommended” to their respective States that they conclude certain treaties relating to trade and warehousing at the Brazilian wharfs for Bolivian goods, and “recommended” that they exchange notes concerning the applicable rules on freedom of transit between the two States; (iv) a note from the Chilean Embassy in La Paz to the Bolivian Chancellery on 22 March 1957 explaining that the need for ratification by the Chilean Congress did not affect Bolivia’s freedom of transit pursuant to existing treaties between the States, or arrangements for the Sica Sica-Arica oil pipeline set down in bilateral agreements and exchanges of notes; and (v) a meeting of the Joint Bolivian-Paraguayan Commission on 10 November 1939 that recommended a study of free transit in accordance with a Peace Protocol of 12 June 1935 and the Final Treaty on Peace, Friendship and Boundaries of 21 July 1938: see UN DOC A/CONF.13/29/Add.1, 3 March 1958, **BR Annex 283**, pp 328-330.

<sup>321</sup> Bolivia’s Reply, para 258.

<sup>322</sup> UN Conference on the Law of the Sea, Official Records Volume VII: 5th Committee (Question of Free Access to the Sea of Land-locked Countries), Summary Records of Meetings and Annexes, A/Conf.13/43, 24 February – 27 April 1958, **CR Annex 411**, pp 18-19.

<sup>323</sup> See Declaration of Arica, 25 January 1953, **CCM Annex 150**.

<sup>324</sup> Chile-Bolivia Treaty of Economic Complementation, 31 January 1955, **CCM Annex 151**.

<sup>325</sup> *Temple of Preah Vihear, Merits*, p 23. Bolivia also claims that Chile acquiesced in a commitment to negotiate sovereign access by not objecting to Bolivia’s declaration made upon signing the UN Convention on the Law of the Sea on 27 November 1984 (see Bolivia’s Reply, paras 149 and 317). The declaration does not support Bolivia’s contention. It states: “Bolivia wishes to place on record that it is a country that has no maritime sovereignty as a result of a war and not as a result of its natural geographic position and that it will assert all the rights of coastal States under the Convention once it recovers the legal status in question as a consequence of negotiations on the restoration to Bolivia of its own sovereign outlet to the Pacific Ocean” (1835 *UNTS* 60). It did not refer to Chile nor to any alleged obligation to

5.20. Bolivia also refers to statements by the Bolivian Minister of Foreign Affairs at the OAS in 1987 and 1988 asserting that the 1950 notes constituted a “commitment” or an “agreement”.<sup>326</sup> On both of these occasions, Chile rejected the suggestion that it was subject to any legal obligation, and Bolivia did not respond.

(a) In 1987, the Bolivian Foreign Minister referred to the “commitments of 1950” and this “agreement” bestowing on Chile an “obligation to engage in negotiations”.<sup>327</sup> Chile rejected this immediately.<sup>328</sup>

(b) In 1988, the Bolivian Foreign Minister referred to the 1950 notes “through which Chile agreed to negotiate the concession to Bolivia of its own continuous

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negotiate. Again, this did not call for some reaction from Chile: cf. *Temple of Preah Vihear, Merits*, p 23. Moreover, Bolivia did not reiterate or confirm its declaration upon ratification of UNCLOS in 1995 (1864 *UNTS* 410).

<sup>326</sup> Bolivia’s Reply, fns 153 and 360.

<sup>327</sup> Bolivia’s Reply, fn 360 referring to Statement by the Foreign Minister of Bolivia at the 4th Session of the General Commission of the General Assembly of the OAS, on 12 November 1987, **BM Annex 210** (a more complete translation is **CR Annex 436**). In the same footnote in its Reply, Bolivia also refers to the Statement by the Bolivian representative at the 2nd Session of the General Commission of the General Assembly of the OAS, on 26 October 1979, **BM Annex 203**, in which—according to Bolivia’s Reply—the delegate referred to “the agreement reached in 1950 and Chile did not object” (see also Bolivia’s Reply, paras 149(a), 161, 189 and 317). In fact, all the Bolivian delegate said about the 1950 notes was to quote verbatim the expression of willingness in Chile’s note. Chile, having objected to the OAS considering an issue that affected its territorial sovereignty, left the room before the Bolivian delegate made the statement and therefore did not respond. See the fuller account in Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**, p 357.

<sup>328</sup> Minutes of the 4th Meeting of the General Committee of the OAS General Assembly, 12 November 1987, **CR Annex 436**, pp 356-357 (“It is ... inappropriate to call those desires or aspirations rights or claims. We can understand respectable desires and aspirations, but they cannot be unilaterally transformed into demands, and we are even less willing to fuel international confusion on the matter. ... It is also necessary to bear in mind that when anyone intends to promote the imposition on Chile of negotiations leading to the delivery to Bolivia of a free, sovereign and useful territorial access to the Pacific Ocean, it is an infringement of the fundamental rights of States; in this case, the sovereignty and territorial integrity of Chile”).

and sovereign access to the Pacific Ocean, without territorial compensation.”<sup>329</sup> Chile again rejected this assertion without delay.<sup>330</sup>

2. *Bolivia’s contemporaneous shifts in focus demonstrate the absence of any legal obligation*

5.21. Bolivia accepts that it did not in fact seek negotiations in fulfilment of what it now characterizes as a legally binding agreement to negotiate.<sup>331</sup> Nor did it allege breach and seek enforcement of any legal obligation to negotiate. On the contrary, after a change of regime in Bolivia in 1952, Bolivia was no longer interested in talking about its desire for sovereign access to the sea. By January 1953, Bolivia had given Chile the impression that it had “tacitly abandoned its pretensions over a Bolivian port on the coast of Chile”.<sup>332</sup>

5.22. Relying on a single document from the end of 1953, Bolivia nonetheless asserts that during this period, it “did not remain passive after the conclusion of the Exchange of Notes of 1950”.<sup>333</sup> As to this:

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<sup>329</sup> Minutes of the 3rd Meeting of the General Committee of the OAS General Assembly, 16 November 1988, **CCM Annex 302**, p 382 (this is also **BM Annex 213**). During this session, the Bolivian Minister of Foreign Affairs also referred to its “rights over the territories of Atacama along the Pacific Ocean” and “Bolivia’s right over the maritime territory of Atacama” (pp 392-393).

<sup>330</sup> Minutes of the 3rd Meeting of the General Committee of the OAS General Assembly, 16 November 1988, **CCM Annex 302**, p 388 (“there is no international convention or custom, general principle of law, judicial decision, or published legal opinion on which Bolivia can base this claim. In truth, just as non-existent as the alleged Bolivian right is the resulting Chilean obligation to ensure sovereign access to the sea for this country”).

<sup>331</sup> Bolivia’s Reply, para 252, noting that “the media speculation on the details of the agreement of 1950 made its immediate enforcement more difficult”; and para 358, admitting that “the negotiations could not materialize immediately.”

<sup>332</sup> Memorandum by the Ministry of Foreign Affairs of Chile, 20 March 1964, **CCM Annex 169**, p 5. See also Letter from Victor Paz Estenssoro to Siles Suazo dated 25 September 1950, published in *El Diario* (Bolivia), 19 June 1964, **CCM Annex 148**, expressing the view that “it is not in [Bolivia’s] best interest to have the port issue immediately resolved but, rather, postpone it to some future point in time” (referred to in Bolivia’s Reply, para 359).

<sup>333</sup> Bolivia’s Reply, para 358. Bolivia also claims that in 1952, the President of Chile instructed the Ambassadors in La Paz “not to abandon ‘the willingness to listen to Bolivia’ regarding the direct proposals that it could formulate about its port issue”: Bolivia’s Reply, para 359 (emphasis in original). The document cited by Bolivia is actually a note from 1962 (Note

(a) The document is a Bolivian record of meetings held in November 1953 at which Bolivia's Special Envoy proposed the conclusion of a declaration that would contain a paragraph reiterating the 1950 notes.<sup>334</sup>

(b) In response, however, the Chilean Foreign Minister said that it would be "untimely" to refer to "the maritime aspiration of Bolivia" in the draft declaration.<sup>335</sup> The Chilean Foreign Minister subsequently provided a new draft declaration which made reference only to matters of economic and commercial ties and not to the port issue. He told the Bolivian Envoy that "his Government has the broad purpose of assisting in the solution of the port issue of Bolivia" but that the matter could not be raised at the time, due to particular political sensitivities.<sup>336</sup> The Chilean President then affirmed that Chile was "willing to consider [the port issue] with due attention in due course."<sup>337</sup>

(c) Bolivia's response was not then to assert that Chile was subject to a continuing legal obligation to negotiate, but rather to thank the Chilean President and Foreign Minister for their "eloquent demonstrations of friendship", and to report back to La Paz that the Chilean Government was at the time subject to criticism from internal political opposition, and that Chilean-Peruvian relations were also difficult. Bolivia's Envoy also urged the Bolivian Government to give "deferential interest to the study of the diplomatic action that would be put into

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from the Chilean Ambassador to Bolivia to the Minister of Foreign Affairs of Chile, 15 February 1962, **CCM Annex 160**), and it makes clear that a "willingness to listen" to Bolivia formed part of Chile's "traditional foreign affairs policy" (p 19) and that it was not to be equated to a "willingness to seek a solution" (p 1). It does not assist Bolivia in establishing that the 1950 notes constituted an agreement to have negotiations on sovereign access to the sea, and nor does it somehow demonstrate that "Bolivia did not remain passive" in the early 1950s.

<sup>334</sup> Report entitled "*Declaration regarding the port issue*," from the Special Envoy of Bolivia to Chile to the Minister of Foreign Affairs of Bolivia, 31 December 1953, **BR Annex 282**, p 3.

<sup>335</sup> Report entitled "*Declaration regarding the port issue*," from the Special Envoy of Bolivia to Chile to the Minister of Foreign Affairs of Bolivia, 31 December 1953, **BR Annex 282**, p 7.

<sup>336</sup> Report entitled "*Declaration regarding the port issue*," from the Special Envoy of Bolivia to Chile to the Minister of Foreign Affairs of Bolivia, 31 December 1953, **BR Annex 282**, p 9.

<sup>337</sup> Report entitled "*Declaration regarding the port issue*," from the Special Envoy of Bolivia to Chile to the Minister of Foreign Affairs of Bolivia, 31 December 1953, **BR Annex 282**, p 10.

practice in due time.”<sup>338</sup> It could scarcely be clearer that Bolivia did not consider that Chile was subject to any legal obligation arising from the 1950 notes.

5.23. As to the possibility of providing Chile with the compensation in which it was interested, in the form of utilization of waters of Bolivia’s northern plateau, this appeared to have been foreclosed. The potential for such a project was publicly addressed by President Truman in a speech made in March 1951.<sup>339</sup> However, the President of Peru, General Odría Amoretti, then declared that the “waters of Lake Titicaca belong in indivisible condominium to Peru and Bolivia and their disposition and utilization belong exclusively to these two countries.”<sup>340</sup> Peru and Bolivia subsequently concluded three agreements concerning their exclusive ownership over the waters of Lake Titicaca and providing for studies of a project for utilization of those waters by Peru and Bolivia.<sup>341</sup>

5.24. Further, as noted above, from around this time, Bolivia’s position shifted from pursuing an aspiration for a port, to obtaining further practical benefits

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<sup>338</sup> Report entitled “*Declaration regarding the port issue*,” from the Special Envoy of Bolivia to Chile to the Minister of Foreign Affairs of Bolivia, 31 December 1953, **BR Annex 282**, pp 10 and 12-14.

<sup>339</sup> See Address by the President of the US opening the meeting of the Foreign Ministers of the American Republics, 26 March 1951, **CR Annex 404**, referred to in para 5.14(d) above. Chile’s interest in obtaining the use of these waters had been discussed with Bolivia in March 1950, as was Chile’s intention to raise the issue with President Truman; see Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 14 March 1950, **CR Annex 395**. See also Letter from the Embassy of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 7 July 1950, **CR Annex 400**.

<sup>340</sup> Telegram from the Embassy of the US in Peru to the US Secretary of State, 31 March 1951, **CR Annex 405** quoting the Peruvian President. See also Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 844/513, 9 September 1950, **BR Annex 275**, indicating that there was “distress caused in Bolivia” when rumours of Chile’s interest in utilizing waters of Lake Titicaca were reported in the press. See also A. Ostria Gutiérrez, *A Work and a Destiny, Bolivia’s International Policy After the Chaco War* (1953), **CR Annex 406**, pp 75-81.

<sup>341</sup> Exchange of notes establishing a Mixed Bolivian-Peruvian Commission, 20 April 1955, **CR Annex 407**; Preliminary Convention between Bolivia and Peru concerning the joint utilization of the waters of Lake Titicaca, 30 July 1955, **CR Annex 408**; and Agreement between Bolivia and Peru concerning a preliminary economic study of the joint utilization of the waters of Lake Titicaca, 19 February 1957, **CR Annex 409** (Article 1 of which reaffirms Bolivia and Peru’s “indivisible and exclusive joint ownership over the waters of Lake Titicaca”).

concerning non-sovereign access to the sea. Between 1951 and 1957, Bolivia and Chile concluded a number of agreements improving the practical implementation of Bolivia's access to the Pacific.<sup>342</sup>

3. *The Trucco memorandum did not create or confirm the existence of any legal obligation*

5.25. In the early 1960s, the Bolivian position shifted again, and it was looking to raise its port aspiration.<sup>343</sup> In this context, the Chilean Ambassador to La Paz drew up an internal document summarizing Chile's position (the *Trucco memorandum*). That document recorded that, consistently with its traditional policy, "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."<sup>344</sup> The memorandum also stated in this respect:

"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.'"<sup>345</sup>

5.26. Bolivia has not provided any credible explanation of how the Trucco memorandum could create rights for Bolivia, much less how it "reflects an agreement" between the two States.<sup>346</sup> Like Chile's 1950 note, the formulation

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<sup>342</sup> See Chile's Counter-Memorial, para 6.22 and references therein.

<sup>343</sup> Memorandum by the Ministry of Foreign Affairs of Chile, 20 March 1964, **CCM Annex 169**, p 6.

<sup>344</sup> Memorandum of the Chilean Embassy in Bolivia, 10 July 1961, **CCM Annex 158**, para 1. Trucco later recalled that this "was no special initiative on our part. We were simply repeating what we had always maintained": Note from the Chilean Ambassador to Bolivia to the Minister of Foreign Affairs of Chile, 15 February 1962, **CCM Annex 160**, p 35.

<sup>345</sup> Memorandum of the Chilean Embassy in Bolivia, 10 July 1961, **CCM Annex 158**, para 2.

<sup>346</sup> Bolivia's Reply, para 263.



used in the 1961 memorandum did not reflect any sense of legal obligation.<sup>347</sup> While it is correct that a copy was given 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 policy at that time.<sup>348</sup>

5.27. As explained in Chile's Counter-Memorial, 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 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 merely expressed its desire 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",<sup>349</sup> apparently appearing to wish to give the impression 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. However, as with Chile's expression of willingness to commence formal negotiations in its 20 June 1950 note, the Trucco memorandum was cast in terms materially different from Bolivia's proposal in its note of 1 June 1950. It appears that Bolivia wished to initiate negotiation but only on its own terms.

5.28. In any event, 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.<sup>350</sup> The position thus adopted by Bolivia

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<sup>347</sup> A reaffirmation of a non-binding document cannot have the effect of creating a legal obligation or any "independent commitment": see para 2.12 above; and *Bay of Bengal*, para 98.

<sup>348</sup> See Speech of the Minister of Foreign Affairs of Chile, 27 March 1963, **CCM Annex 164**, pp 30-33.

<sup>349</sup> Memorandum of the Ministry of Foreign Affairs of Bolivia, No G.M. 9-62/127, 9 February 1962, **CCM Annex 159**, para 4.

<sup>350</sup> Minutes of Secret Session 68 of the Chilean Senate, 18 April 1962, **CCM Annex 162**, p 68; and 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.

brought to an end the possibility at that time of establishing a climate appropriate to the commencement of negotiations.

5.29. Bolivia contends that Chile's Foreign Ministry was wrong in March 1963 to characterize the Trucco memorandum as being nothing more than "a document widely used in Foreign Ministries" which "serves to record something, so much so that in the diplomatic jargon they are called 'Aide Mémoires'".<sup>351</sup> Bolivia repeats its position that the memorandum was provided to Bolivia under instructions from the Chilean Ministry; that its content had been approved by the Chilean Minister; and that it was replied to by Bolivia.<sup>352</sup> None of this, however, demonstrates that the Trucco memorandum reflected any agreement to negotiate on sovereign access.

5.30. Consistent 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 was open to consider means to facilitate Bolivia's transit across Chilean territory, consistently with the 1904 Peace Treaty.<sup>353</sup> So far as concerns the Trucco memorandum, the Chilean Foreign Minister stated:

"It is nothing more than a simple statement of points of view at a certain time. Bolivia did not attach any other significance to it at that time, because the document was archived. Foreign Minister Arze Quiroga did not refer to it again. If it had been an offer by Chile, as some have claimed thereafter, it would have been logical for Bolivia to accept it quickly and initiate direct conversations with Chile. This is not what happened, however. The new Bolivian Foreign Minister dug up the Memorandum many months thereafter, exactly 7 months later, to try to mix a negotiation about

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<sup>351</sup> Bolivia's Reply, para 262, referring to Message of the Foreign Minister of Chile, **BM Annex 171**, which is an extract of the Speech of the Minister of Foreign Affairs of Chile, 27 March 1963, fully translated as **CCM Annex 164**.

<sup>352</sup> Bolivia's Reply, para 263.

<sup>353</sup> Speech of the Minister of Foreign Affairs of Chile, 27 March 1963, **CCM Annex 164**, pp 28-30.

the so-called ‘port problem’ with discussions that were being held about the River Lauca, in an obvious intent to make those discussions fail.”<sup>354</sup>

5.31. As explained in Chile’s Counter-Memorial, it was 13 years after the 1950 notes were sent that Bolivia first contended that they constituted a “commitment” and established “legal rules”.<sup>355</sup> That new contention reflected the position of a new Foreign Minister in Bolivia (José Fellman Velarde). It was rejected by Chile during a meeting in August 1963 in Asunción, Paraguay, between the Bolivian Foreign Minister, José Fellman Velarde, and the former Minister of Foreign Affairs of Chile, Conrado Ríos Gallardo.<sup>356</sup> At that time, former Minister Ríos Gallardo was representing Chile as the Head of a Special Diplomatic Mission of Chile.<sup>357</sup> He was briefed by the Chilean Ministry of Foreign Affairs on Chile’s position on Bolivia’s aspiration for a port and was given instructions to respond on that issue.<sup>358</sup> Moreover, he was treated by the Bolivian Minister of Foreign

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<sup>354</sup> Speech of the Minister of Foreign Affairs of Chile, 27 March 1963, **CCM Annex 164**, pp 33-34.

<sup>355</sup> See Chile’s Counter-Memorial, para 6.16(d). See also 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 Ríos Gallardo, former Minister of Foreign Affairs of Chile, 4 November 1963, **CCM Annex 166**. As recorded in a comment that Ríos Gallardo made on that letter 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, fn 7).

<sup>356</sup> Letter from 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, in which Ríos Gallardo, recalling their meeting in Paraguay, said that the Bolivian Foreign Minister “insist[s] on placing as an obstacle the note of June 1950 and the memorandum of July 1961, in circumstances where I explained to you in Asunción the low value of both documents, which you attempt to elevate to the rank of a diplomatic commitment ... I do not see what positive advantage could be reached through documents that lack the force of a pact and that have also been emphatically rejected. To appeal to them, in my opinion, is to avoid reason.”

<sup>357</sup> See C. Ríos Gallardo, *An Informal Chilean-Bolivian Contact* (1966), **BR Annex 293**, p 35.

<sup>358</sup> See Confidential Aide Mémoire from the Ministry of Foreign Affairs of Chile for the personal information of Ambassador Ríos Gallardo, 6 August 1963, **CR Annex 412**; and Memorandum from the Ministry of Foreign Affairs of Chile to Ambassador Ríos Gallardo, 8 August 1963, **CR Annex 413**.

Affairs, in that meeting and in their subsequent correspondence, as representing the State of Chile.<sup>359</sup>

5.32. Around this time Bolivia, having ruptured diplomatic relations with Chile on the basis of Chile's use of waters of the River Lauca, initially sought a port enclave as a condition for the resumption of diplomatic relations. As is explained in Chapter 6 below, Chile rejected this and Bolivia eventually dropped it as a condition.<sup>360</sup>

5.33. Bolivia's new position that the 1950 notes constituted a "commitment" was reiterated by its President in a statement of 8 April 1967.<sup>361</sup> On 29 May 1967, Chile's Minister of Foreign Affairs wrote to the Ministers of Foreign Affairs of Latin America refuting 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'."<sup>362</sup>

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<sup>359</sup> See also Letter from the Minister of Foreign Affairs of Bolivia to Ríos Gallardo, former Minister of Foreign Affairs of Chile, 4 November 1963, **CCM Annex 166**, pp 52-53.

<sup>360</sup> See paras 6.14 and 6.19 below. See also Note from the Minister of Foreign Affairs of Bolivia to the President of the OAS Permanent Council, 17 February 1963, **BR Annex 286**. Initially Bolivia did not seek a port in reliance on any obligation arising from the 1950 notes, or the Trucco memorandum; it was only after the new Bolivian Foreign Minister first asserted in April 1963 that the notes were a "commitment" that Bolivia made reference to the 1950 notes: "Bolivia firmly maintains its decision not to resume relations with Chile", *El Diario* (Bolivia), 15 June 1963, **BR Annex 289**.

<sup>361</sup> 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**, referred to in Bolivia's Reply, para 371.

<sup>362</sup> 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. This was consistent with what Ríos Gallardo, former Chilean Minister of Foreign Affairs, wrote in 1966: "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 Ostria Gutiérrez himself declared to his country's press that everything that had happened 'had not gone beyond the preliminary diplomatic stage'": See Letter from the Minister of Foreign Affairs of Bolivia to

Bolivia did not then refute this point, and its failure to do so has probative value.<sup>363</sup>

5.34. In its Memorial, Bolivia ignored this 1967 episode. In its Reply, Bolivia has had to acknowledge Chile's 1967 refutation, but cannot and does not claim that it responded in any way to it. It merely seeks to argue that "there was no point in insisting", and to deflect attention from this critical episode by referring back to its own failure to pursue negotiations in the early 1950s.<sup>364</sup> To similar effect, it contends that the rupture of diplomatic relations "cannot entail a termination of the agreements entered into by the parties", and persists in suggesting that "through the highest representatives of the State, [Bolivia] kept the Notes of 1950 and the *Memorandum Trucco* of 1961 as existing commitments".<sup>365</sup> It plainly did not. But in any event, this is no answer to the point that Bolivia asserted the existence of a commitment, Chile refuted this in plain terms, and Bolivia did not then respond, even by way of making some reservation as to its position. Bolivia's failure to do so is probative of the fact that it did not, at the time, consider there to be any obligation to negotiate or other commitment arising from either the 1950 notes or the Trucco memorandum.

### Conclusion

5.35. The central question addressed in this chapter is whether, by reference to the 1950 notes, Bolivia can establish the agreement on which its case turns, i.e. an agreement that binds Chile to "negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean".<sup>366</sup> The answer is that it cannot.

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Ríos Gallardo, former Minister of Foreign Affairs of Chile, 4 November 1963, **CCM Annex 166**, p 52, fn 7.

<sup>363</sup> This was a communication "such as called for some reaction, within a reasonable period, on the part of the [Bolivian] authorities": see *Temple of Preah Vihear, Merits*, p 23.

<sup>364</sup> Bolivia's Reply, para 373.

<sup>365</sup> Bolivia's Reply, paras 373-374 (emphasis in original).

<sup>366</sup> Bolivia's Memorial, para 500(a); Bolivia's Reply, p 192, para (a).

5.36. The terms used in the 1950 notes do not suggest an intention to create binding obligations and, moreover, demonstrate important points of disagreement. It is plain that, while Bolivia sought that Chile “formally enter into a direct negotiation to satisfy the fundamental need of Bolivia to obtain its own sovereign access to the Pacific Ocean”, Chile was not willing to accede to this. It was willing to negotiate, but on different terms. Those terms were evidently not acceptable to Bolivia and, in any event, were not accepted by it.

5.37. Bolivia’s focus on the exchanges prior to June 1950 only serves to emphasize these points. Chile had two years’ advance warning of the contents of the note that Bolivia communicated on 1 June 1950. Instead of responding with a simple affirmative, Chile responded indicating that it was open to a negotiation described in tentative and carefully formulated language. This was not happenstance. Even if Bolivia had been looking to establish a legal obligation to negotiate through its proposal (which it was not), Chile’s choice of language in its note of 20 June 1950 demonstrates that it was evidently not willing to accept any such obligation.

5.38. Moreover, the absence of any actual negotiations after the notes, and the absence for more than a decade of any assertion by Bolivia of either the existence of an obligation to negotiate or breach by the failure to engage in negotiations, confirm that no such obligation had been established. This was manifestly a preliminary diplomatic endeavour to explore the possibilities of satisfying the objectives of both States. There was no agreed outcome, and there was no intention to be bound to pursue a process.

5.39. Even if an obligation to negotiate had been established (which is plainly not the case), its content could only have been as expressed in Chile’s June 1950 note, i.e., as at June 1950, “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.”<sup>367</sup> Contrary to Bolivia’s claim, it would not be an obligation (a) somehow enduring today, or (b) to negotiate to grant to Bolivia a sovereign access to the sea, and it would have been (c) for Chile to obtain compensation that effectively took into account its interests. So far as concerns the latter, Chile was attracted by the possibility of an eventual agreement by which Bolivia would allow waters of several highland lakes, including Lake Titicaca, to be channelled into and used for irrigation and hydroelectric power production in Chile. This possibility appeared to have been foreclosed by the assertion by Peru and Bolivia in the mid-1950s of their exclusive ownership of the waters of Lake Titicaca.

5.40. Moreover, as explained in Chapter 6 below, during the Charaña process of 1975-1978 there were sustained formal negotiations between the two States on a possible transfer of sovereignty over territory from Chile to Bolivia, subject always to the condition that Bolivia would cede an equivalent area of territory to Chile. On Bolivia’s own case, the obligation allegedly created during the Charaña process concerned the same subject matter as the obligation allegedly created by the 1950 notes: that is, sovereign access to the Pacific Ocean. If, as Bolivia contends, they each gave rise to obligations binding Chile (which they did not), then the obligation arising from the Charaña process would necessarily have superseded and terminated any obligation arising from the 1950 notes. Further, if any obligation arose either in 1950 or in the period from 1975 to 1978 (neither is the case), it would have been discharged by the fact that in the Charaña process the two States pursued negotiations as far as possible.

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<sup>367</sup> Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, **CR Annex 399**.





## CHAPTER 6. THE CHARAÑA PROCESS OF 1975 TO 1978

6.1. Bolivia places particular emphasis on the period between 1975 and 1978. During that period, there were sustained formal negotiations on a possible transfer of sovereignty over territory from Chile to Bolivia, subject always to the condition that Bolivia would cede an equivalent area of territory to Chile.

6.2. However, as the contemporaneous record shows:

(a) The two States did not create or confirm any obligation to negotiate. Bolivia alleges that an obligation is to be found in the vague and aspirational wording of paragraph 4 of the Joint Declaration of 8 February 1975, by which the two Parties stated that they had “resolved to continue the dialogue at various levels, to seek formulas 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.”<sup>368</sup> The obligation Bolivia alleges now is plainly absent from the Declaration (**Section A**).

(b) Bolivia’s new case seeks to avoid the guidelines that formed the basis for the Charaña negotiations. This is because these establish that Chile was willing to negotiate only on the basis that it would receive territory from Bolivia in exchange for any cession of territory from Chile. That is a condition that Bolivia explicitly accepted at the time. Bolivia’s case is—perplexingly—that there was a binding agreement to negotiate (there was not), but that the guidelines that formed the express basis for the negotiation formed no part of the alleged agreement (**Section B**).

(c) If Bolivia were somehow able to demonstrate that paragraph 4 of the Joint Declaration established an obligation to negotiate, it would still have to show that Chile breached that obligation and that, despite the conduct but eventual failure of

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<sup>368</sup> Joint Declaration of Charaña, 8 February 1975, **CCM Annex 174**, para 4.

negotiations in the period 1975-1978, the obligation to negotiate endured beyond 1978. It can show neither. As to the Joint Declaration, there is nothing whatsoever in its language to suggest that this was intended to establish an obligation to negotiate, enduring or otherwise. As to the facts, the contemporaneous evidence shows that Bolivia freely accepted the requirement of territorial exchange, and Chile was fully entitled to insist on that condition. At the same time, there is no evidence to show that Chile failed to make adequate efforts to consult with Peru (a pre-requisite to any transfer of territory, as followed from the 1929 Supplementary Protocol). Thus Chile made good faith sustained efforts to negotiate during this period. These facts, coupled with the further fact that it was Bolivia, not Chile, that unilaterally withdrew from negotiations and ruptured diplomatic relations with Chile, mean that Bolivia's allegations as to the Charaña process must fail (**Sections C and D**).

6.3. The Charaña process does no more than demonstrate Chile's negotiation in good faith within a political framework at a particular point in time, and Bolivia's unilateral withdrawal from that political process.

**A. The Joint Declaration of Charaña did not create or confirm any legal obligation**

6.4. On 8 February 1975, General Banzer of Bolivia and General Pinochet of Chile signed a Joint Declaration in Charaña, by which they recorded the decision to resume diplomatic relations between Bolivia and Chile.<sup>369</sup> They also recorded that they had—

“resolved to continue the dialogue at various levels, to seek formulas 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.”<sup>370</sup>

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<sup>369</sup> Joint Declaration of Charaña, 8 February 1975, **CCM Annex 174**, para 6.

<sup>370</sup> Joint Declaration of Charaña, 8 February 1975, **CCM Annex 174**, para 4.

6.5. In its Counter-Memorial,<sup>371</sup> Chile noted that the Joint Declaration did not demonstrate any intention to create a legal obligation to negotiate—a conclusion that is entirely consistent with the contemporaneous conduct of the two States.

6.6. In its Reply, Bolivia nonetheless places great emphasis on the Joint Declaration. Bolivia:

(a) relies on the actual terms of the Joint Declaration, although it focusses on only one term in isolation;

(b) argues that the object and purpose of the Joint Declaration was to ensure that Chile complied with an alleged promise to negotiate sovereign access, and that Chile's resumption of diplomatic relations necessarily meant it accepted an obligation to negotiate;

(c) relies on subsequent statements given by various Chilean individuals, from which it attempts to construct an admission that the Joint Declaration established a legal obligation to negotiate sovereign access, while at the same time obscuring the contemporaneous statement of its own Head of State that it did not entail a commitment; and

(d) argues that Chile regarded the Joint Declaration as an international agreement.

Chile will address each of these strands of argument in turn.<sup>372</sup>

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<sup>371</sup> Chile's Counter-Memorial, para 7.11.

<sup>372</sup> Consistently with Bolivia's new strategy of placing increased emphasis on the Joint Declaration, Bolivia has now developed its arguments so far as concerns the text of the Joint Declaration, but appears to have abandoned or minimized its reliance on the 1975 resolution of the Permanent Council of the OAS and the statement of the Chilean Delegate before the OAS that same year. As Chile explained in its Counter-Memorial, neither the resolution nor the statement created or confirmed the existence of a legal obligation to negotiate. Bolivia has not made any attempt to address that explanation: see Chile's Counter-Memorial, paras 7.12-7.13, referring to OAS, Permanent Council, resolution CP/RES. 157 (169/75),

1. *The actual terms of the Joint Declaration of Charaña do not evidence an intention to create or confirm any legal obligation to negotiate sovereign access*

6.7. As to the terms used in the Joint Declaration, Bolivia makes two arguments.

(a) It argues that “the intention to be bound follows from [an alleged] use of the terms ‘have decided’ (*resuelto*)”, which Bolivia interprets as equivalent to “have agreed”.<sup>373</sup>

(b) It argues that the fact that the same expression (*resuelto*) was used in both paragraph 4 of the Declaration (“to continue the dialogue”) and paragraph 6 (“to normalize the diplomatic relations”) shows an intention to create a legally binding agreement.<sup>374</sup>

6.8. Chile notes that the more precise translation of *resuelto* is “resolved” rather than “decided”, and that Bolivia translated it as such in the Joint Declaration annexed to its Application.<sup>375</sup> It was only in the new translation submitted with its Memorial that Bolivia changed the translation of *resuelto* from “resolved” to “decided”.<sup>376</sup> The more natural Spanish word for “decided” would be *decidido*, while “agreed” would be *acordado*.

6.9. There is no basis for Bolivia’s contention that the use of the word *resuelto* manifests an intention to create a legally binding agreement. The same term is also used in paragraph 5 of the Joint Declaration, which, like paragraph 4, is suggestive of a political statement rather than a legal obligation. It records:

“The two Presidents have resolved [*resuelto*] to continue developing a policy in favour of harmony and understanding so

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6 August 1975, **CCM Annex 175**; and Statement of the Chilean Delegate to the OAS, 6 August 1975, **CCM Annex 176**, p 158.

<sup>373</sup> Bolivia’s Reply, para 268.

<sup>374</sup> Bolivia’s Reply, para 270.

<sup>375</sup> Joint Declaration of Charaña, 8 February 1975, **Annex 13 to Bolivia’s Application**, para 4.

<sup>376</sup> Joint Declaration of Charaña, 8 February 1975, **BM Annex 111**.

that, in a climate of cooperation, a formula for peace and progress is jointly found in our Continent.”<sup>377</sup>

6.10. The fact that the same term appears multiple times in the Joint Declaration of Charaña in different contexts serves only to demonstrate that it is important to consider an instrument’s “actual terms”—not one word in isolation—in order to discern the objective intention of the parties.<sup>378</sup> Most recently, the Court emphasized the importance of analyzing the text as a whole in order to interpret any particular part thereof in its Judgment in *Somalia v. Kenya*.<sup>379</sup> As noted in Chapter 2 above, even using the word “agree” will not necessarily evidence an intention to create a legally binding agreement where the “language is suggestive of an aspirational arrangement rather than a legally binding agreement”, or where “that usage occurs in the context of other terms suggestive of the document being political and aspirational in nature”.<sup>380</sup>

6.11. In *Qatar v. Bahrain* the Court took into account the terms of the signed 1990 minutes in their entirety, together with the circumstances in which they were drawn up, in considering whether they constituted a binding international agreement. The Court referred to multiple factors, including that (i) the minutes referred explicitly to what “was agreed”, (ii) one of the matters agreed was to “reaffirm what was previously agreed between the two parties”, (iii) they entrusted the King of Saudi Arabia with the task of attempting to find a solution to the dispute during a period of six months, and (iv) they addressed the circumstances under which the ICJ could be seised of the matter after May 1991. When taken together with an earlier exchange of notes, the Court found that the parties had entered into an undertaking to refer “disputed matters” to the Court for

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<sup>377</sup> Joint Declaration of Charaña, 8 February 1975, **CCM Annex 174**, para 5.

<sup>378</sup> See, e.g., *Aegean Sea Continental Shelf*, para 96; and *Qatar v. Bahrain, Jurisdiction and Admissibility, 1994*, paras 23-30.

<sup>379</sup> *Somalia v. Kenya, Preliminary Objections*, paras 65 and 70-80.

<sup>380</sup> *Newfoundland and Labrador / Nova Scotia, First Phase*, paras 3.18, 7.3 and 7.5; and *Philippines v. China, Jurisdiction and Admissibility*, paras 242-243. See further paras 2.11-2.12 above.

resolution, which were defined using the “Bahraini formula” as accepted by Qatar.<sup>381</sup>

6.12. Bolivia attempts to apply the conclusion of the Court in *Qatar v. Bahrain* to the Joint Declaration of Charaña, on the basis that the Joint Declaration identified points of agreement.<sup>382</sup> Even if it were appropriate to assimilate “resolved” to “agreed”, which Chile does not accept, the analogy is flawed. In particular, the Court’s conclusion that the 1990 minutes constituted a binding international agreement was based on the *entire content* of those minutes, rather than the sole fact that they recorded points of agreement.<sup>383</sup>

(a) In contrast, read on its own or together with the remainder of the document, paragraph 4 of the Joint Declaration of Charaña records in aspirational and political language a decision to continue discussions. In particular, the references to “spirit of mutual understanding”, “constructive motivation”, “continue the dialogue”, “at various levels”, and “addressing the aspirations of the Bolivian and Chilean peoples” are all terms indicative of political and diplomatic interactions, rather than legally binding agreements.<sup>384</sup>

(b) Moreover, it is instructive to compare the language of paragraph 4 of the Joint Declaration with that used in Bolivia’s prayer for relief before the Court: that “Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean”.<sup>385</sup> The definitive language used by Bolivia before the Court is manifestly not reflected in paragraph 4 of the Joint Declaration (or elsewhere).

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<sup>381</sup> *Qatar v. Bahrain, Jurisdiction and Admissibility, 1994*, paras 19-32.

<sup>382</sup> Bolivia’s Reply, para 271.

<sup>383</sup> Crucially, and based on the content of the points of agreement reached—specifically, to refer the dispute concerning territorial rights and maritime areas to the Court—the Court found that the minutes “enumerate the commitments to which the Parties have consented” and therefore “create rights and obligations in international law for the Parties”: *Qatar v. Bahrain, Jurisdiction and Admissibility, 1994*, para 25.

<sup>384</sup> Joint Declaration of Charaña, 8 February 1975, **CCM Annex 174**, para 4.

<sup>385</sup> Bolivia’s Reply, Submissions, p 192, para (a).

2. *Chile's resumption of diplomatic relations with Bolivia did not create a binding obligation to negotiate sovereign access*

6.13. Bolivia argues that between 1962 and 1975 it conditioned resumption of diplomatic relations upon Chile complying with a “promise to negotiate sovereign access to the sea”.<sup>386</sup> In fact, Bolivia’s position on conditions for resumption of diplomatic relations shifted significantly during that period.

6.14. In February 1963, Bolivia sought a port enclave as a condition for the resumption of diplomatic relations.<sup>387</sup> It did not assert at that time that Chile was obliged to negotiate with it, nor was any agreement reached on Bolivia’s proposed terms.

6.15. Bolivia then places emphasis on its Consul’s report of 19 November 1970, reporting on dealings with the administration of Chilean President Frei and then President Allende (who took office on 3 November 1970).<sup>388</sup> That report suggests that the “conditions agreed to for a *possible* resumption of relations” included a simultaneous joint statement which made a general reference to “seeking formulas to resolve the issues that are of common interest”; and each of the two Governments would then make unilateral statements of their own formulation.<sup>389</sup> With respect to the latter, the document suggests that Bolivia could mention its objective “to negotiate with Chile a sovereign and own outlet to the Pacific”, together with other issues, and then request a meeting or written response from Chile on the matter.<sup>390</sup> Thus Bolivia’s internal report merely shows that, in preliminary discussions on resumption of diplomatic relations, Bolivia was considering making a unilateral reference to negotiations for sovereign access, and

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<sup>386</sup> Bolivia’s Reply, para 287. See also Bolivia’s Reply, paras 375-377.

<sup>387</sup> Note from the Minister of Foreign Affairs of Bolivia to the President of the OAS Permanent Council, 17 February 1963, **BR Annex 286**, p 1.

<sup>388</sup> Bolivia’s Reply, para 375.

<sup>389</sup> Report from the Consul General of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, 19 November 1970, **BR Annex 296**, p 2 (emphasis added).

<sup>390</sup> Report from the Consul General of Bolivia in Chile to the Minister of Foreign Affairs of Bolivia, 19 November 1970, **BR Annex 296**, p 3.

that it was considering making a subsequent request to Chile. It does not assist Bolivia.

6.16. Bolivia also emphasizes two meetings of 1971.

(a) At a meeting between the two States' Foreign Ministers on 14 April 1971, there was also discussion as to making declarations in two stages. The Bolivian record refers to "updating" the 1950 notes,<sup>391</sup> but does not suggest that they constituted an agreement or created any obligation to negotiate. Soon after, Bolivia's President Torres was asked at a press conference whether ties could be resumed if Chile "does not commit itself to repair Bolivia's unjust landlocked status"? His response was to express a belief in negotiation and constructive and honest dialogue.<sup>392</sup> There was no suggestion of Chile having accepted any binding obligation to negotiate on sovereign access, whether pursuant to the 1950 notes or on any other basis.

(b) Bolivia further relies on a document said to have been given to Chilean Foreign Minister Almeyda at a meeting held on 13 August 1971. Chile has no record of this being submitted, nor of a meeting on that date. The document records two alternative paragraphs of a joint declaration to resume relations: the first suggesting that the two States would "continue the negotiations agreed to" in the 1950 notes, and the second suggesting that the two States resolve to commence a demarche to negotiate sovereign access, with due regard to both States' interests.<sup>393</sup> There is nothing in the document or elsewhere to suggest that this was an approach Chile had agreed to.

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<sup>391</sup> Meeting held between the Foreign Ministers of Bolivia and Chile in San Jose, Costa Rica, drafted by Undersecretary of Foreign Affairs of Bolivia, 14 April 1971, **BR Annex 297**, p 2 (cited in Bolivia's Reply, para 376).

<sup>392</sup> Reproduced in Telex from the Consulate General of Chile in Bolivia to the Ministry of Foreign Affairs of Chile, 26 April 1971, **CR Annex 414**.

<sup>393</sup> Draft of the Joint Declaration submitted by the Consul General of Bolivia to Chile to the Minister of Foreign Affairs of Chile, 13 August 1971, **BR Annex 298**, para 2 (cited in Bolivia's Reply, para 367).



6.17. Less than a week after this alleged meeting, General Banzer led a military coup and assumed control of Bolivia's Government. Bolivia contends that, some two years later, on 11 September 1973, the very same day as the military coup in Chile, the two States agreed to discuss the possibility of a corridor, either with sovereignty or with a right of utilization.<sup>394</sup> Contemporaneous Chilean records indicate only that on 10 September the Bolivian Director of Integration of the Ministry of Foreign Affairs suggested a possible agenda for a future meeting, not that any agenda was agreed with Chile.<sup>395</sup>

6.18. Further, on 18 September 1973, just one week after the military coup in Chile, General Banzer invited the Chilean Consul General in La Paz to discuss the resumption of diplomatic relations. In that meeting General Banzer did not refer to the 1950 notes, nor to any extant obligation to negotiate arising from an "historical bargain" or otherwise, nor was any agenda said to be agreed or to be a condition for the resumption of diplomatic relations.<sup>396</sup>

6.19. Bolivia also places weight on the statement given by General Banzer to the UN General Assembly on 8 October 1975 (some months after the Joint Declaration of Charaña was signed) as supporting its claim that Bolivia conditioned resumption of diplomatic relations on a promise to negotiate sovereign access.<sup>397</sup> This is not tenable.

(a) On 4 February 1975, General Banzer had confirmed in terms that the resolution of Bolivia's landlocked situation was not a condition for the resumption

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<sup>394</sup> "Reserved Report on Port Negotiations with Allende", *Hoy* (Bolivia), 3 December 1983, **BR Annex 320**, p 939 (cited in Bolivia's Reply, para 377).

<sup>395</sup> Memorandum by the Consulate General of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 3 October 1973, **CR Annex 415**, para (b).

<sup>396</sup> Memorandum by the Consulate General of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 3 October 1973, **CR Annex 415**, para (a).

<sup>397</sup> Bolivia's Reply, para 287, citing Verbatim Record of the 2379th Plenary Meeting, 30th Session UN General Assembly, UN Doc A/PV.2379, 8 October 1975, **BR Annex 303**.

of diplomatic relations, stating to the press that: “The maritime reintegration is not a basic condition for resuming relations.”<sup>398</sup>

(b) General Banzer’s speech of 8 October 1975 suggests that Chile was only willing to resume relations “without preconditions”, and that Bolivia conceded that point. He said that, at Charaña, the two States had “decided to resume our relations with the express purpose of *studying* at governmental level the need for us to have our maritime legacy restored to us.”<sup>399</sup> There was no reference made to any “promise” or “commitment” binding on Chile, nor to the 1950 notes, the Trucco memorandum, nor any earlier understanding as a source of any obligation.

6.20. The evidence submitted by Bolivia as to the two States’ interactions between 1962 and 1975 does not demonstrate that Bolivia “kept the Notes of 1950 and the *Memorandum Trucco* of 1961 as existing commitments, in force and legally binding under international law.”<sup>400</sup> Nor does it establish that the “object and purpose of the 1975 Joint Declaration” was “Chile’s compliance of its promise to negotiate sovereign access to the sea”.<sup>401</sup>

3. *Subsequent statements of representatives of the two States do not support the existence of a legal obligation to negotiate sovereign access*

6.21. Bolivia seeks to construct a legal obligation by reference to subsequent Chilean statements describing the Joint Declaration.<sup>402</sup> As to this:

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<sup>398</sup> “Banzer claims Landlocked Situation, Not A Basic Condition”, *El Mercurio* (Chile), 5 February 1975, **CR Annex 417**.

<sup>399</sup> Verbatim Record of the 2379th Plenary Meeting, 30th Session UN General Assembly, UN Doc A/PV.2379, 8 October 1975, **BR Annex 303**, paras 79-80 (emphasis added).

<sup>400</sup> Bolivia’s Reply, para 374 (emphasis in original).

<sup>401</sup> Bolivia’s Reply, para 287. This is confirmed by the press communiqué issued by Bolivia after it unilaterally suspended diplomatic relations with Chile in 1978: it referred not to a promise or condition but to “the essential commitment that provides a *historical explanation* for resuming dialogue”: see Official Declaration of the Minister of Foreign Affairs of Bolivia breaking-off diplomatic relations with Chile, 17 March 1978, **CCM Annex 241**, para 5 (emphasis added).

<sup>402</sup> Bolivia places emphasis on a letter from General Pinochet which referred to “the repeated declarations I have made of the sincere and unchanging purpose of my Government to examine with yours a positive and lasting solution for the issue of Bolivia’s landlocked

(a) Bolivia does not explain how the statements relied upon could have the effect of creating a legal obligation when it is clear from the actual terms of the Joint Declaration that there is none. A suggestion that there was a “commitment” with Bolivia does not somehow establish that the Joint Declaration of Charaña created a legally binding obligation, as opposed to a non-binding political commitment, to negotiate.<sup>403</sup>

(b) Moreover, Bolivia omits context relevant to the statements relied upon,<sup>404</sup> or misrepresents them.<sup>405</sup>

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condition”: President of Chile’s Note of 30 September 1975, **BM Annex 70**, p 294, referred to in Bolivia’s Reply, para 283. That is clearly not language which reveals an intention to create a legal obligation to negotiate.

<sup>403</sup> The statements Bolivia purports to rely upon are in any event unclear: e.g., it is not clear that the summary statement published under the name of Chile’s Chancellor in 1994 referred to an “agreement” arising from the Joint Declaration of Charaña, rather than to the accepted guidelines for a negotiation, which Bolivia bypasses entirely: P. Carvajal Prado, *Charaña – An Agreement between Chile and Bolivia and the third party at odds* (1994), **BR Annex 340**, p 27. Likewise, Bolivia refers to a publication by three Chilean lawyers. It clearly states that any obligation was subject to an exchange of territories and to acceptance by a third party: R. Diaz Albonico, M.T. Infante Caffi et F. Orrego Vicuña, *Les négociations entre le Chili et la Bolivie relatives à un accès souverain à la mer* (1977), **BR Annex 313**, p 353. In any event, this publication of course cannot have the effect of creating or confirming the existence of an obligation to negotiate binding on Chile. Finally, any use of the term “commitment” by a Bolivian representative cannot be taken out of context to assert that there was a legal obligation to negotiate sovereign access: cf. Address by the President of Bolivia, 23 March 1978, **BR Annex 317**, p 32; and Public explanation made by the President of Bolivia in regard to the rupture of diplomatic relations with Chile, 30 March 1978, **BR Annex 318**, p 49, which states in general terms that “Chile walked away from its commitment”, but also emphasizes that “[n]o harm has been caused to [Bolivia]”.

<sup>404</sup> E.g., Bolivia cites part of a statement by the representative of Chile to the OAS in 1979, that: “In 1975, the Government of Chile committed, seriously and with the best good faith, to enter into a negotiation to give Bolivia a sovereign outlet to the Pacific Ocean.” See Bolivia’s Reply, para 286, citing Minutes of the 6th Plenary Meeting, 9th Regular Session of the OAS General Assembly, 24 October 1979, **BR Annex 319**, p 25. It omits the next sentence: “This negotiation was frustrated by Bolivia”. It also omits other relevant statements which make clear that the word “commitment” is not to be equated with “a legal obligation to negotiate sovereign access”: see, e.g., pp 13 and 24, clarifying that any Bolivian “aspiration” is not a “right” nor does it give rise to any “obligation”.

<sup>405</sup> E.g., in its Reply (para 285), Bolivia relies on a letter of February 1977 as referring to “the importance of the agreement reached in Charaña in 1975”. The letter does not suggest that there was any “agreement”, nor that the Joint Declaration gave rise to any legal obligation. It does refer to negotiations that took place, and states that efforts were made “after having

6.22. Bolivia is also unable to point to any statement of a Bolivian representative to the effect that the Joint Declaration of Charaña imposed a legal obligation to negotiate sovereign access on its signatories. On the contrary:

(a) As noted above, in December 1975, General Banzer said “the Act of Charaña does not include a categorical commitment to resolve Bolivia’s landlocked situation”.<sup>406</sup> In its Reply, Bolivia says that the word “categorical” contradicts the existence of any obligation *to grant* sovereign access, but not any obligation *to negotiate* sovereign access.<sup>407</sup> That reading is too narrow. General Banzer’s statement was made in response to a question from a Bolivian journalist who referred in turn to a statement by the Chilean Foreign Minister “that the Act of Charaña and the negotiations underway with Bolivia *did not constitute a commitment* by Chile to grant sea access to Bolivia *or* to resolve Bolivia’s landlocked situation.” Two alternative “commitments” were therefore put to Banzer: (a) a commitment to grant sovereign access to the sea; and (b) a commitment to “resolve” Bolivia’s situation. General Banzer agreed with the questioner that the Joint Declaration of Charaña contains neither an obligation to grant sovereign access nor an obligation to resolve—presumably through negotiations—Bolivia’s landlocked situation.<sup>408</sup>

(b) When Bolivia’s newly appointed Ambassador to Chile, Guillermo Gutiérrez Vea Murguía, arrived in Santiago in April 1975, he said that he would “try to comply ... with the spirit of Charaña, which is reflected in the agreement that gave place to a resumption of relations between our two countries after almost

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reached an agreement on the general terms of the negotiation”, which is obviously a reference to the accepted guidelines (which Bolivia bypasses entirely, as explained in **Section B** below): see Letter from the President of Chile to the President of Bolivia, 8 February 1977, **CCM Annex 217**, p 1281.

<sup>406</sup> “Negotiations will be held with Chile on the basis of territorial compensation”, *Presencia* (Bolivia), 29 December 1975, **CCM Annex 184**, p 1026; see also Chile’s Counter-Memorial, para 7.11(c).

<sup>407</sup> Bolivia’s Reply, para 284.

<sup>408</sup> “Negotiations will be held with Chile on the basis of territorial compensation”, *Presencia* (Bolivia), 29 December 1975, **CCM Annex 184**, pp 1025-1026 (emphasis added).

thirteen years”.<sup>409</sup> Similar language was used by Chilean representatives.<sup>410</sup> The language used by representatives of both States does not reveal any intention to create or confirm a legal obligation to negotiate sovereign access.<sup>411</sup>

4. *Chile’s publication of the Joint Declaration of Charaña did not indicate the creation of a legal obligation to negotiate sovereign access*

6.23. In its Memorial, Bolivia argued that the binding legal character of the Joint Declaration was evidenced by the fact that it was included in the Treaty Series of the Ministry for Foreign Affairs of Chile.<sup>412</sup> As Chile explained in its Counter-Memorial, this Chilean Ministry series contains a variety of documents, including Chilean internal documents which are not treaties and do not contain any legal obligations. Moreover, 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 so ratified or so treated by Bolivia either.<sup>413</sup>

6.24. In its Reply, Bolivia appears to accept that it did not ratify or treat the Declaration as a treaty. Bolivia continues to rely on Chile’s publication of the Joint Declaration, although it seems to have conceded that this does not establish that it is a treaty, nor that it otherwise has a binding legal character. Instead, Bolivia merely asserts that its inclusion indicates the “importance” of the

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<sup>409</sup> “Bolivia and Chile will try to materialize the spirit of Charaña, said Gutiérrez”, *Hoy* (Bolivia), 9 April 1975, **BR Annex 302**. See also Telegram from the US Secretary of State to the US Embassy in Bolivia, 15 February 1975, **CR Annex 418**, recording that after the Joint Declaration of Charaña the Bolivian Ambassador to the US told the US Secretary of State that “a realistic solution to this [landlocked] problem probably will not involve territorial concessions by its neighbors.”

<sup>410</sup> See, e.g., Statement of the Chilean Delegate to the OAS, 6 August 1975, **CCM Annex 176**, p 158.

<sup>411</sup> Bolivia asserts that the term “offer”, used by the Foreign Minister of Chile speaking at the UN General Assembly (see Verbatim Record of the 21st Plenary Meeting of the 32nd Session of the UN General Assembly, UN Doc A/32/PV.21, 5 October 1977, **CCM Annex 232**, para 101), “clearly embodied a legal commitment”: Bolivia’s Reply, para 152. The context of the statement does not suggest that there was any legal commitment; to the contrary, it suggests there was a mere expression of willingness to engage in discussions.

<sup>412</sup> Bolivia’s Memorial, paras 378 and 141.

<sup>413</sup> Chile’s Counter-Memorial, para 7.11(b).

Declaration.<sup>414</sup> A document's "importance" does not of course meet any criteria for the creation of a legal obligation.

6.25. Finally, Bolivia argues that the inclusion of the Joint Declaration in the category of "International Treaties and Inter-State Acts" in Chile's Rejoinder in the *Peru v. Chile* case is evidence that it is an international agreement.<sup>415</sup> Obviously little evidentiary weight is to be given to the categorization of a document in Chile's annex list in a different case, but in any event, the term "Inter-State Acts" does not denote that a document has treaty status, nor demonstrate that it creates any legal obligations. On the contrary, it stands in contra-distinction to "International Treaties".

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

6.26. 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. That proposal 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."<sup>416</sup>

6.27. Chile's counter-proposal for guidelines for negotiations was conveyed to Bolivia in writing on 19 December 1975.<sup>417</sup> The content of this counter-proposal had been conveyed to Bolivia orally in a meeting on 12 December, and was accepted by Bolivia at that time, as the basis for negotiations.<sup>418</sup> Bolivia further confirmed its acceptance of Chile's counter-proposal as "the basis for the

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<sup>414</sup> Bolivia's Reply, para 282.

<sup>415</sup> Bolivia's Reply, para 282.

<sup>416</sup> Aide Mémoire from the Bolivian Embassy in Chile to the Ministry of Foreign Affairs of Chile, 26 August 1975, **CCM Annex 177**, para 7.

<sup>417</sup> Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**.

<sup>418</sup> Memorandum by the Ministry of Foreign Affairs of Chile entitled "Course of the negotiation with Bolivia", 1978, **CR Annex 423**, p 5. See also Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 674/259/75, 9 December 1975, **BR Annex 305**, p 2.

agreement that our two countries are negotiating” in writing on 16 December 1975,<sup>419</sup> and General Banzer reaffirmed this acceptance through a public message two days later.<sup>420</sup>

6.28. The key elements to Chile’s counter-proposal were:<sup>421</sup>

(a) “the cession to Bolivia of a sovereign maritime coastline, linked to Bolivian territory through an equally sovereign territorial strip, would be considered”;

(b) “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 specified boundaries, including “the maritime territory comprised between the parallels of the end points of the coast that would be ceded”;

(c) the Chilean territory subject to this proposal would be in the province of Arica, and Chile rejected as “unacceptable, the cession of territory ... that could affect in any way the territorial continuity of the country”. This 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; and

(d) the “cession to Bolivia ... 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”.<sup>422</sup>

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<sup>419</sup> 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**. See also Memorandum by the Ministry of Foreign Affairs of Chile entitled “Course of the negotiation with Bolivia”, 1978, **CR Annex 423**, p 5.

<sup>420</sup> Message of President Banzer announcing that Chile’s Reply (19 December 1975) constitutes a globally acceptable basis for negotiations, 21 December 1975, **CCM Annex 181**, p 85.

<sup>421</sup> See further Chile’s Counter-Memorial, para 7.16.

<sup>422</sup> Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**, paras 4(c)-(f), (n) and 5.

6.29. In its Memorial, Bolivia argued that “the Parties reconfirmed their commitment to negotiate a sovereign access to the sea for Bolivia” through these guidelines for negotiation.<sup>423</sup> In its Reply, Bolivia appears to have accepted that this is not tenable, and now seeks only to emphasize that the two proposals “both contemplated that the object of the negotiation was the ‘cession to Bolivia of a sovereign maritime coast’”.<sup>424</sup> Thus Bolivia now relies on an alleged pre-existing obligation to negotiate sovereign access, rather than the proposals themselves.

6.30. This represents a significant shift in Bolivia’s case. Bolivia has been faced with a choice in terms of the presentation of its case: either to allege the existence of an obligation to negotiate by reference to the general (and non-binding) language of the Joint Declaration, or to rely on the more specific but inconveniently worded agreed guidelines, which are also non-binding, and which proceed on the basis of an exchange of territories, rather than a unilateral cession. Bolivia has opted for the former.<sup>425</sup> Presumably Bolivia has made this choice because continuing to rely on the Guidelines would be inconsistent with (i) its case on Chile’s alleged responsibility for the termination of negotiations in 1975-1978, since Bolivia’s ultimate refusal to exchange territories was in fact the principal reason the negotiations came to an end, (ii) the relief it now claims, which refuses to acknowledge the reciprocal interests that underlay the disparate episodes in which the two States were willing to discuss these issues (as reflected in the actual wording the two States used), and (iii) the “historical bargain” alleged to exist in Bolivia’s reformulated case.<sup>426</sup>

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<sup>423</sup> Bolivia’s Memorial, para 379.

<sup>424</sup> Bolivia’s Reply, para 274. See also Bolivia’s Reply, para 395.

<sup>425</sup> Although Bolivia nonetheless seeks to take advantage of Chile’s “admission” that the guidelines were “accepted” (see Bolivia’s Reply, para 186(e)), whilst ignoring the condition that Bolivia itself repeatedly described as the “fundamental basis” of the negotiations.

<sup>426</sup> The fact that both States were negotiating an exchange of territories, rather than a unilateral cession from Chile to Bolivia, is inconsistent with Bolivia’s novel claim that the two States have an uncompleted bargain, the first part of which was the cession of coastal territory from Bolivia to Chile in 1904, with only the second part, namely negotiation of a cession from Chile to Bolivia, still to be completed.



6.31. In its Reply, Bolivia criticizes the fact that Chile included the condition of territorial exchange in its proposed guidelines.<sup>427</sup> However, Bolivia has to accept that, from the first mention of this condition, in bilateral meetings in November and early December 1975, it did not rule out accepting it as an essential part of the negotiation guidelines.<sup>428</sup> Over the following days and months, Bolivia explicitly confirmed and then reaffirmed its acceptance of Chile's proposed guidelines, including the condition of territorial exchange.<sup>429</sup> On 28 December 1975, General Banzer described that requirement of territorial exchange as part of the "fundamental basis" of the negotiations, and stated that "any government will request an exchange of territories" and, to similar effect, that "the most logical thing is that [Chile] requests an exchange of territories".<sup>430</sup> The following day, he confirmed that non-territorial compensation "would not be appropriate".<sup>431</sup> On 31 December 1975, the Bolivian Foreign Minister indicated that Bolivia considered territorial compensation to be suitable and would propose the area to be exchanged, based on studies already underway.<sup>432</sup> In its Reply, Bolivia ignores

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<sup>427</sup> Bolivia's account of the facts in its Reply is again inconsistent with the facts as recorded in its own contemporaneous documents. Bolivia relies on a letter from its Ambassador to the Bolivian Minister of Foreign Affairs dated 18 November 1975, referring to an editorial from a Chilean newspaper which referred to "territorial compensations": Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 625/244/75, 18 November 1975, **BR Annex 304**. Bolivia contends that Chile introduced the condition of territorial exchange through the press, but Bolivia had been informed that territorial exchange would form a condition of Chile's proposed negotiating guidelines at least by 13 November 1975: see Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 674/259/75, 9 December 1975, **BR Annex 305**, pp 1-4.

<sup>428</sup> See Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 674/259/75, 9 December 1975, **BR Annex 305**, p 2. 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**.

<sup>429</sup> See, e.g., Message of President Banzer announcing that Chile's Reply (19 December 1975) constitutes a globally acceptable basis for negotiations, 21 December 1975, **CCM Annex 181**, p 85; and Message of President Banzer, 21 December 1975, in "Government 'globally' accepts Chilean response", *Los Tiempos* (Bolivia), 22 December 1975, **CCM Annex 183**.

<sup>430</sup> "Negotiations will be held with Chile on the basis of territorial compensation", *Presencia* (Bolivia), 29 December 1975, **CCM Annex 184**, pp 1019-1020.

<sup>431</sup> "Banzer: It will be the people who decide on the agreement with Chile", *Presencia* (Bolivia), 30 December 1975, **CCM Annex 185**, p 1037.

<sup>432</sup> "Foreign Minister Guzmán Soriano: We will give compensation that does not compromise our development", *Presencia* (Bolivia), 1 January 1976, **CCM Annex 187**, p 1053.

this evidence of its acceptance and confirmation of the condition of territorial exchange.

6.32. So far as territorial exchange was concerned, the only questions that were raised by Bolivia concerned clarification of whether the size of the area to be exchanged would take into account the maritime area out to 200 nautical miles, and Bolivia's request that it be permitted to identify the areas of Bolivian territory to be exchanged.

(a) For example, and as Bolivia now accepts, on 5 January 1976, in its instruction to the Bolivian mission in Chile, Bolivia confirmed that the Chilean counter-proposal was "an acceptable global basis of negotiations" and said Bolivia's "acceptance" of the condition of territorial exchange was *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."<sup>433</sup>

(b) In early March 1976, 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 countries", while noting that "our Government has not accepted" only 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

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<sup>433</sup> Communiqué from the Bolivian Ministry of Foreign Affairs on the Charaña Negotiations, 5 January 1976, **CPO Annex 54**, paras 3, 5 and 10 (emphasis added). See also Instructions from the Bolivian Ministry of Foreign Affairs to the Bolivian Ambassador to Chile, published in *Presencia* (Bolivia), 16 January 1976, **CCM Annex 189**, p 13, paras 3 and 4; and "Basic documents that substantiate the Bolivian-Chilean agreement in regard to the maritime issue" *El Diario* (Bolivia), 6 January 1976, **BR Annex 306**, pp 94-95. Bolivia places emphasis (see Bolivia's Reply, para 406) on the report of a statement by General Banzer in January 1976 to the effect that "Everything else is subject to negotiation", but the record of that statement suggests that General Banzer was seeking to go back on the acceptance of territorial compensation, which he had accepted explicitly in December 1975: see R. Prudencio Lizon, *History of the Charaña Negotiation* (2011), **BR Annex 366**, p 144.

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.<sup>434</sup>

(c) Those three issues alone had been identified by the Bolivian Ambassador in a letter to the Bolivian Minister of Foreign Affairs dated 19 February 1976.<sup>435</sup> Those same three points alone were mentioned by the Bolivian Ambassador in a statement reported on 15 March 1976.<sup>436</sup>

(d) On 3 May 1976 the Bolivian Minister of Foreign Affairs sent instructions from General Banzer to the Bolivian Ambassador. These stated:

“7.- With regard to the principle of exchange of territories, which Bolivia and Chile would carry out simultaneously, as a reciprocal contribution to an effective solution for the Bolivian landlocked condition, the following considerations must be borne in mind:

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<sup>434</sup> “Bolivia has not assumed definitive commitments with the Chilean Government”, *El Diario* (Bolivia), 11 March 1976, **CCM Annex 195** (emphasis added). 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 of Foreign Affairs was subsequently confirmed by the former Bolivian Ambassador, Guillermo Gutiérrez Vea Murguía: see extract of G. Gutiérrez Vea Murguía, *Diplomatic Negotiations with Chile* (1975), quoted in R. Prudencio Lizón, *History of the Charaña Negotiation* (2011), **CCM Annex 350**, p 360. Bolivia quotes selectively from this statement at para 410 of its Reply to give the impression that territorial exchange was one of the three issues which had not been agreed, but it is clear that territorial exchange had been accepted—only “the condition for an exchange of territories in return for patrimonial sea” had not been accepted: see R. Prudencio Lizón, *History of the Charaña Negotiation* (2011), **BR Annex 366**, p 192.

<sup>435</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 130/85/76, 19 February 1976, **BR Annex 307**, p 2.

<sup>436</sup> *La Tercera* (Chile), 15 March 1976, reproduced in R. Prudencio Lizón, *History of the Charaña Negotiation* (2011), **BR Annex 366**, p 192. Bolivia, at para 411 of its Reply, again quotes selectively from this document in order to give the impression that it did not accept the condition of territorial exchange; but when read in full it is clear that there was agreement on the condition of territorial exchange, but not on whether the maritime zone to be generated by the coastline to be ceded by Bolivia would be counted for the purpose of determining the size of the territory to be ceded by Bolivia to Chile in exchange. See also Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 204/136/76, 19 March 1976, **BR Annex 308**.

a) *Bolivia has only rejected, in a definite and categorical way, the proposal that the eventual exchange of territories ought to contemplate maritime areas, in any of their forms or extensions.*

b) Bolivia reserves its right to indicate the areas likely to be exchanged, which could be either continuous or discontinuous, and it believes it is even possible to opt for an arrangement reached by way of a general adjustment to the borders ... ”<sup>437</sup>

The instructions thus made clear that (i) Bolivia had only rejected inclusion of the maritime area in the calculation of the area to be exchanged, and (ii) Bolivia reserved the right to indicate the areas to be exchanged. As the discussions progressed in the course of 1976, both of these issues were resolved *in favour of* Bolivia.<sup>438</sup>

6.33. Bolivia’s position in its Reply is nonetheless that it accepted to negotiate “motivated by the conviction that Chile would eventually adjust its position”, and that “finding that the exchange of territories had become a rigid prerequisite for the Chilean Military Junta led to the failure of the negotiations.”<sup>439</sup> Bolivia cites no evidence for its position, and it is directly contrary to the contemporaneous record.

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

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

6.34. Throughout 1976 Bolivia repeatedly affirmed that it accepted that its transferring territory to Chile was a condition of any transfer from Chile to Bolivia. Accordingly, both States sought to identify areas that could be

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<sup>437</sup> Note from the Minister of Foreign Affairs and Worship of Bolivia to the Bolivian Ambassador to Chile, 3 May 1976, **BR Annex 310**, p 2 (emphasis added).

<sup>438</sup> See para 6.36 below.

<sup>439</sup> Bolivia’s Reply, para 380.

exchanged. They established a mixed permanent commission to identify the areas of Bolivian territory to be proposed to Chile for an exchange.<sup>440</sup>

6.35. Bolivia continued to confirm that it accepted the condition of territorial exchange, and confirmed it was also studying the areas to be proposed to Chile.<sup>441</sup> In September 1976, during meetings in La Paz, General Banzer confirmed to the Chilean Special Envoy, Gregorio Amunátegui that—

“he had ordered very advanced studies to locate and define the exchangeable territories, both from the [National Maritime Council] and a group of experts from the private sector known as PEGASO, that was constituted for that precise purpose.

The studies are concluded and the Government has already adopted a criterion regarding the possibility of exchange. They basically agree on compensating Chile for the territory that it cedes. They understand that it is within the exclusive power of Bolivia to indicate this territory.”<sup>442</sup>

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<sup>440</sup> A. Violand Alcázar, *Sovereign Return to the Sea: A Frustrated Negotiation* (2004), **CCM Annex 328**, p 211. See also 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**; and Final Minutes of the Inaugural Meeting of the Bolivian-Chilean Permanent Mixed Commission, 19 November 1976, **CCM Annex 208**.

<sup>441</sup> See 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; 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; “Bolivia will offer Chile a strip of land in the Department of La Paz”, *El Mercurio* (Chile), 26 September 1976, **CCM Annex 205**; and statement of Bolivia’s Foreign Minister, reproduced in Telex from the Chilean Embassy in Bolivia to the Ministry of Foreign Affairs of Chile, No 500, 20 September 1976, **CCM Annex 204**. See also “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**, paras 7-9; Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 130/85/76, 19 February 1976, **BR Annex 307**, p 3; Note from the Minister of Foreign Affairs of Bolivia to the Bolivian Ambassador to Chile, 3 May 1976, **BR Annex 310**, p 2; and “Memorandum of Conversation”, Bolivia, 7 June 1976, **CR Annex 419**, p 218.

<sup>442</sup> Report from Gregorio Amunátegui Prá to the President of Chile, October 1976, **CR Annex 420**, p 5.

6.36. At the same meetings, Chile confirmed its agreement that Bolivia could indicate the Bolivian territory to be exchanged, and that it could consist of a continuous strip or of discontinuous areas of territory. It also agreed to exclude the 200 nautical mile “patrimonial sea” from the area to be taken into account in determining the size of the territory to be exchanged.<sup>443</sup> Thus on the two issues raised by Bolivia, Chile was willing to make concessions, in good faith, demonstrating flexibility in its negotiating position.

6.37. The following month the Bolivian National Maritime Council reported that “great progress” had been made in the negotiations with Chile, and confirmed Bolivia’s acceptance of the condition of territorial exchange. It stated: “There is no mutilation, but an exchange instead. We will hand over a particular extension and will receive another one of the same extension, gaining access to the sea”.<sup>444</sup>

2. *On the basis of Bolivia’s acceptance of the negotiating guidelines, Chile consulted Peru*

6.38. Bolivia similarly ignores the contemporaneous record with respect to the consultations with Peru. On 19 December 1975, Chile wrote to Peru and asked if it agreed with “the cession requested by Bolivia”.<sup>445</sup> This was done on the explicit basis that “Bolivia has accepted the general terms” of Chile’s guidelines for negotiation.<sup>446</sup> There followed a period of consultations with Peru, including two

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<sup>443</sup> Report from Gregorio Amunátegui Prá to the President of Chile, October 1976, **CR Annex 420**, p 6. See also Ministry of Foreign Affairs of Chile, *History of the Chilean-Bolivian Negotiations 1975-1978*, [1978], **BR Annex 316**, pp 8-9; and “The National Maritime Council Points Out: Exchange of territories is the only realistic solution for Bolivia”, *La Tercera* (Chile), 1 November 1976, **CR Annex 421**.

<sup>444</sup> “The National Maritime Council Points Out: Exchange of territories is the only realistic solution for Bolivia”, *La Tercera* (Chile), 1 November 1976, **CR Annex 421**.

<sup>445</sup> 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**.

<sup>446</sup> 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. See also Ministry of Foreign Affairs of Chile, *History of the Chilean-Bolivian Negotiations 1975-1978*, [1978], **BR Annex 316**, p 8. For the avoidance of doubt, Chile does not accept Bolivia’s assertion that Peru “had not received a text previously agreed by Bolivia and Chile”: Bolivia’s Reply, para 422.

rounds of meetings.<sup>447</sup> Peru then made its own proposal, which was fundamentally different from that contemplated by the guidelines adopted by Bolivia and Chile, and by which Peru sought to acquire rights of its own in areas that were agreed in the 1929 Treaty of Lima to be Chilean.<sup>448</sup>

6.39. As noted in Chile's Counter-Memorial, after receiving Peru's proposal, the Special Envoy of Chile and General Banzer of Bolivia met to discuss it and agree on a response. At that meeting, General Banzer said that "he rejected the Peruvian proposal and understood perfectly Chile's position against [it]." General Banzer further confirmed that Chile had acted in good faith, indicating that "if negotiations failed, he would publicly acknowledge Chile's positive attitude" and "would start discussing alternative options with Chile with a realistic approach."<sup>449</sup>

6.40. In its Reply, Bolivia persists in its claim that Chile rejected Peru's proposal without considering it. Bolivia can only continue to make that claim by ignoring the contemporaneous evidence, which makes clear that Chile responded to Peru's proposal *after having discussed and agreed that approach with Bolivia*.

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<sup>447</sup> 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**; 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**; 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**; Joint Peruvian-Chilean Press Release, 23 April 1976, **CCM Annex 200**; Joint Peruvian-Chilean Press Release, 9 July 1976, **CCM Annex 201**; and Report of Representatives of Chile to the Minister of Foreign Affairs of Chile, 24 November 1976, **CCM Annex 210**, para 4.

<sup>448</sup> Official Communiqué of the Ministry of Foreign Affairs of Peru, No 30-76, 18 November 1976, **CCM Annex 207**. On the same day, Peru provided its proposal to Bolivia: 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**.

<sup>449</sup> Report of Ministry of Foreign Affairs of Chile on the meetings held by G. Amunátegui, Special Envoy of the President of the Republic of Chile, and President Banzer of Bolivia, 22 November 1976, **CCM Annex 209**.

6.41. 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. Consistently with what had been discussed and agreed with Bolivia, Chile rejected Peru's proposal and asked that Peru respond to the proposal that Chile had sent on 19 December 1975.<sup>450</sup> Peru never sent a reply to Chile's letter of 26 November 1976, although its Foreign Minister publicly defended its proposal and emphasized that its consent to the cession of a corridor from Chile to Bolivia was conditioned on the establishment of an area of shared sovereignty in Peru's favour.<sup>451</sup>

6.42. While in its Memorial, Bolivia accepted that the establishment of an area of shared sovereignty was a "condition" of Peru's proposal (together with other terms),<sup>452</sup> it now contends that Peru expressed "a sufficiently ample flexibility for negotiating" its proposal.<sup>453</sup> But the documents that Bolivia relies upon merely confirm that Peru's proposal of an area of shared sovereignty in its favour was an immovable condition for its consent to any cession. In particular:

(a) The Official Communiqué by which Peru gave its proposal to Chile (and Bolivia) records that "the proposal that the Peruvian Government formulates to the Chilean Government *shall serve as a basis for arriving*" to the agreement required by the 1929 Treaty of Lima and its Supplementary Protocol. It described the establishment of an area of shared sovereignty as a "*condition precedent ... which constitutes the fundamental basis of Peru's proposal*".<sup>454</sup>

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<sup>450</sup> Memorandum of the Ministry of Foreign Affairs of Chile, 26 November 1976, **CCM Annex 212**. See also Report of Representatives of Chile, to the Minister of Foreign Affairs of Chile, 24 November 1976, **CCM Annex 210**, paras 6-11.

<sup>451</sup> 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, **CCM Annex 211**, paras 3 and 6.

<sup>452</sup> Bolivia's Memorial, paras 152-153.

<sup>453</sup> Bolivia's Reply, para 415.

<sup>454</sup> Official Communiqué of the Ministry of Foreign Affairs of Peru, No 30-76, 18 November 1976, **CCM Annex 207**, paras 7-8 (emphasis added).



(b) Peru's Foreign Minister publicly confirmed that its consent was conditioned on acceptance of its proposal of an area of shared sovereignty, and that was the "basis" for its consent and "the sine qua non condition", such that if it were not accepted "there would be nothing more [Peru] could do".<sup>455</sup>

(c) Peru's response of 26 November 1976 confirmed that Peru would accept cession by Chile of a corridor to Bolivia "through the establishment of an area under shared sovereignty".<sup>456</sup> It did not then offer to withdraw that explicit and essential condition.

6.43. In the light of the contemporaneous documentary record, Bolivia's claim that Chile failed to make adequate efforts to secure Peru's consent must fail.

### 3. *Bolivia rejected the adopted guidelines for negotiations in December 1976*

6.44. As Chile explained in its Counter-Memorial,<sup>457</sup> less than a month after Chile's response to Peru, Bolivia abruptly and unilaterally announced that it was rejecting the negotiation guidelines, which had formed the basis on which negotiations had taken place over the preceding year. In his Christmas message to the Bolivian people, General Banzer asked Chile to withdraw its condition of

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<sup>455</sup> See in particular: "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**, pp 1205, 1207 and 1213-1214. Although Chile considers that greater weight should be given to the statements of Peru contemporaneous to its proposal, some of the same language is reflected in the statement of the Peruvian delegate to the UN General Assembly in 1977, recalling that Peru had presented a proposal which "included additional elements" and would serve as "a basis for negotiations": Verbatim Record of the 13th Plenary Meeting of the 32nd Session of the UN General Assembly, UN Doc A/32/PV.13, 29 September 1977, **CCM Annex 230**, para 145.

<sup>456</sup> 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, **CCM Annex 211**, para 6.

<sup>457</sup> Chile's Counter-Memorial, para 7.35.

territorial exchange.<sup>458</sup> This radical change in position was motivated by a change in public opinion in Bolivia.<sup>459</sup>

6.45. In its Reply, Bolivia contends that its rejection of the accepted negotiation guidelines—and in particular the condition of territorial exchange—was done “to foster the negotiation” and to “reconcile the positions of Chile and Peru”.<sup>460</sup> Bolivia does not even attempt to explain how its rejection could somehow reconcile the positions of Chile and Peru. Moreover, Bolivia ignores the evidence put forward by Chile—and confirmed by Bolivia’s own documents, submitted with its Reply—that establishes that Bolivia rejected the condition of territorial exchange because Bolivian public opinion had shifted against such an exchange.<sup>461</sup>

*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*

6.46. Following Bolivia’s abrupt change of position, the Chilean Foreign Minister and Bolivia’s Ambassador met in Santiago on 6 January 1977. In that meeting, Bolivia’s Ambassador confirmed that the primary reason for Bolivia’s abrupt change was “Bolivian internal politics” and confirmed that his instructions were “to continue negotiating without delay”. The Chilean Minister emphasized that Chile remained willing to negotiate on the basis of the guidelines, including an exchange of territories as an “indispensable” condition. Bolivia’s Ambassador said that he understood that Chile maintained the adopted guidelines for negotiations, and the two representatives agreed to continue discussions, with

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<sup>458</sup> Message from the President of Bolivia, 24 December 1976, **CCM Annex 214**, p 19.

<sup>459</sup> 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.

<sup>460</sup> Bolivia’s Reply, paras 424 and 427.

<sup>461</sup> See, e.g., Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 281/140/77, 7 April 1977, **BR Annex 314**, p 2. This document has been correctly translated and resubmitted by Chile as **CR Annex 422**. See also 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.

Bolivia's Ambassador expressing his "satisfaction with the fact that negotiations were continuing".<sup>462</sup>

6.47. There followed a series of bilateral meetings and exchanges in which Chile repeatedly affirmed that territorial exchange was an essential condition for continued negotiations, and on that basis, Bolivia expressed willingness to continue talks.<sup>463</sup>

6.48. In its Memorial, Bolivia relied upon exchanges in early 1977 whilst omitting the crucial fact that it accepted to continue negotiations on the explicit basis that territorial exchange was an "indispensable" condition and a "condition sine qua non".<sup>464</sup> In its Reply, Bolivia ignores the contemporaneous documentary evidence put forward by Chile, and obscures its own evidence of the same facts.

6.49. After three days of bilateral discussions in Santiago, on 10 June 1977 the Foreign Ministers of Bolivia and Chile issued a joint declaration recording that negotiations had been constructive and the two States "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." They reaffirmed "the need to pursue the negotiations from their current status, seeking to reach their proposed objective, in

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<sup>462</sup> 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, 5-9 and 13.

<sup>463</sup> See Chile's Counter-Memorial, paras 7.36-7.39, and 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; Letter from the President of Chile to the President of Bolivia, 8 February 1977, **CCM Annex 217**; Letter from the President of Bolivia to the President of Chile, 8 February 1977, **CCM Annex 218**; Letter from the Minister of Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, No 22, 15 April 1977, **CCM Annex 220**, paras V-VI and XI; and 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.

<sup>464</sup> See Bolivia's Memorial, paras 155-156. See also 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; and 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.

order to consolidate peaceful coexistence and broad comprehension that promotes understanding, as well as coordinated development in the zone.”<sup>465</sup>

6.50. In its Reply, Bolivia appears to have abandoned the attempt made in its Memorial to assimilate the 1977 joint declaration to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons,<sup>466</sup> but simply asserts that the declaration is “of particular importance” and “constitutes an additional commitment to negotiate a sovereign access”.<sup>467</sup> For the reasons explained in Chile’s Counter-Memorial (which are not answered in Bolivia’s Reply),<sup>468</sup> the 1977 declaration does not create or confirm a legal obligation to negotiate sovereign access.

6.51. In bilateral discussions that continued throughout 1977, Bolivia affirmed that negotiations were continuing on the basis of the guidelines adopted in 1975.<sup>469</sup> In its Reply, Bolivia does not address the contemporaneous evidence of this fact. Bolivia does mention the meeting between the Heads of State of Chile, Bolivia and Peru in Washington DC on 9 September 1977,<sup>470</sup> claiming that Bolivia “promoted” the meeting and that its “initiative” led to a meeting of the Foreign Ministers on 29 September 1977.<sup>471</sup> As to this:

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<sup>465</sup> Joint Declaration of the Foreign Ministers of Chile and Bolivia, 10 June 1977, **CCM Annex 222**, p 5.

<sup>466</sup> Cf. Bolivia’s Memorial, paras 381-382. See 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* 169, Article VI.

<sup>467</sup> Bolivia’s Reply, para 278.

<sup>468</sup> Chile’s Counter-Memorial, para 7.40.

<sup>469</sup> See Chile’s Counter-Memorial, para 7.41 and 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**.

<sup>470</sup> See Chile’s Counter-Memorial, para 7.42, and 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**.

<sup>471</sup> Bolivia’s Reply, para 430. As to the meeting of the Foreign Ministers of Chile, Bolivia and Peru, see Chile’s Counter-Memorial, para 7.44, and 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 88.

(a) Crucially, Bolivia ignores the fact that, after the tripartite meeting, Bolivia repeatedly confirmed that it was committed to a territorial exchange.<sup>472</sup>

(b) Bolivia also obscures the fact that Chile repeatedly expressed willingness to discuss Bolivia's aspirations, and suggested that the two States move forward by appointing Special Representatives to "activate the negotiations", as had been agreed at the meeting of the Foreign Ministers.<sup>473</sup> Bolivia did not respond to Chile for nearly a month, and it was only at that point that Bolivia signalled a retreat from the long-accepted basis for the negotiation.

(c) Bolivia suggests that the appointment of Special Representatives—to which it agreed in late September—had become impractical by late December. It does not explain now—and it did not explain at the time—why the situation had changed over the course of two months.<sup>474</sup>

6.52. Despite Bolivia's attempts to obstruct the negotiations, Chile indicated that it 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.<sup>475</sup>

6.53. As both Parties accept, on 10 March 1978, Chile's Foreign Minister received a confidential emissary of Bolivia, Mr. Willy Vargas. Bolivia's own

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<sup>472</sup> See Chile's Counter-Memorial, para 7.42; 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; 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; "Foreign Minister Patricio Carvajal, 'Our territory won't be sold or given away'", *La Segunda* (Chile), 17 September 1977, **CCM Annex 226**; and 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.

<sup>473</sup> Letter from the President of Chile to the President of Bolivia, 23 November 1977, **CCM Annex 234**. See also Verbatim Record of the 21st Plenary Meeting of the 32nd Session of the UN General Assembly, UN Doc A/32/PV.21, 5 October 1977, **CCM Annex 232**, para 101.

<sup>474</sup> Cf. Bolivia's Reply, para 432; and Letter from the President of Bolivia to the President of Chile, 21 December 1977, **CCM Annex 235**.

<sup>475</sup> Letter from the President of Chile to the President of Bolivia, 18 January 1978, **CCM Annex 236**.

contemporaneous report records that Chile's Foreign Minister reiterated that Chile's position on territorial exchange could not change, although compensation for maritime areas "would be negotiable between zero and three miles." It also records that Chile had appointed its Special Representative to push forward possible solutions, including with Peru, and urged Bolivia to do the same. 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 Bolivia's representative described as a "gradual approach".<sup>476</sup>

6.54. Bolivia places weight on a secondary source, published in 2011, which suggests that, upon his return to La Paz, Mr. Vargas "told [General Banzer] that the whole negotiation had been a complete failure".<sup>477</sup> In its Reply, and in reliance on the secondary account, Bolivia says that "[t]hese facts led to the assumption that, after three years of diplomatic exchanges, the negotiated formula had not made any progress, because of both Chile's refusal to adopt a constructive approach and its lack of diligence in negotiating Peru's consent."<sup>478</sup> That is contrary to the contemporaneous reports of the representatives of Bolivia and Chile who attended the meeting, which both indicate that the two States would consider and report back on their positions on the proposed interim solutions.<sup>479</sup> In any event, it is clear that the discussions on these interim solutions, as well as progress in negotiations on the basis of the accepted guidelines, were brought to an abrupt end by Bolivia a week later when it suspended diplomatic relations with Chile.

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<sup>476</sup> Confidential Report to the Minister of Foreign Affairs of Bolivia by Bolivia's Extraordinary Ambassador, 13 March 1978, **CCM Annex 237**, pp 2-5 and 7-8. See also p 10 with respect to the description that this was "an objective summary of the discussions that were held" and "the most accurate version possible of what happened." See also 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 2-5 and 10-13.

<sup>477</sup> R. Prudencio Lizon, *History of the Charaña Negotiation* (2011), **BR Annex 366**, p 347.

<sup>478</sup> Bolivia's Reply, para 435.

<sup>479</sup> Confidential Report to the Minister of Foreign Affairs of Bolivia by Bolivia's Extraordinary Ambassador, 13 March 1978, **CCM Annex 237**, p 8; and 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 13.

5. *Bolivia suspended diplomatic relations with Chile in March 1978 and has not resumed them since*

6.55. On 17 March 1978, Bolivia notified Chile that it was suspending diplomatic relations.<sup>480</sup> Bolivia has never since resumed diplomatic relations with Chile.

6.56. In its Reply, Bolivia asserts that, on the same day, through a press communiqué, it “reproached Chile for its failure to comply with the agreement to negotiate”.<sup>481</sup> However:

(a) Bolivia misrepresents the content of the communiqué: the words “agreement to negotiate” do not appear, and instead it refers to a “deci[sion] at a very high level and as an expression of a will for mutual understanding”, to “the spirit of the Charaña document”, and to “the essential commitment that provides a historical explanation for resuming dialogue”.<sup>482</sup> Bolivia’s notification to Chile of its suspension of diplomatic relations likewise refers only to willingness to “overcome problems and make progress with future actions”, which “is possible only where there is firm political will”; and to “the spirit that guided the meeting in Charaña.”<sup>483</sup>

(b) Chile’s responses also make clear that negotiations had not taken place pursuant to a legal obligation. Chile stated that it had “been reiterating its purpose to advance the negotiations aimed at satisfying Bolivia’s *aspiration* to have a sovereign outlet to the sea”,<sup>484</sup> and affirmed that, in the negotiations, it had

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<sup>480</sup> Letter from the President of Bolivia to the President of Chile, 17 March 1978, **CCM Annex 239**.

<sup>481</sup> Bolivia’s Reply, para 437.

<sup>482</sup> Official Declaration of the Minister of Foreign Affairs of Bolivia breaking-off diplomatic relations with Chile, 17 March 1978, **CCM Annex 241**, paras 2, 4 and 5.

<sup>483</sup> Letter from the President of Bolivia to the President of Chile, 17 March 1978, **CCM Annex 239**.

<sup>484</sup> Declaration of the Ministry of Foreign Affairs of Chile, 17 March 1978, **CCM Annex 240**, para 3 (emphasis added).

“proceeded with the seriousness that characterizes the management of its international relations”.<sup>485</sup>

6.57. Two months later, Bolivia sought to justify its rupturing of diplomatic relations before the UN General Assembly.<sup>486</sup> Chile repeated that it was open to resuming dialogue with Bolivia, but Bolivia did not accept Chile’s invitation.<sup>487</sup>

## D. Conclusions

### 1. *No obligation to negotiate arose or was confirmed during 1975-1978*

6.58. It is only on the basis of Bolivia’s mischaracterization of relevant facts and deliberate avoidance of others that Bolivia can claim that Chile was under a legal obligation to negotiate during the process following the Joint Declaration of Charaña.

6.59. As is clear from the relevant documents and exchanges seen in their proper context, 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 involving territory at Chile’s northern extremity, this willingness did not create or confirm any legal obligation.<sup>488</sup>

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<sup>485</sup> Declaration of the Government of Chile of 23 March 1978, **CCM Annex 242**.

<sup>486</sup> See Verbatim Record of the 5th Plenary Meeting of the 10th Special Session of the UN General Assembly, UN Doc A/S-10/PV.5, 26 May 1978, **CCM Annex 243**, paras 33-34; and Verbatim Record of the 9th Plenary Meeting of the 10th Special Session of the UN General Assembly, UN Doc A/S-10/PV.9, 30 May 1978, **CCM Annex 245**, paras 275-281.

<sup>487</sup> See Verbatim Record of the 6th Plenary Meeting of the 10th Special Session of the UN General Assembly, UN Doc A/S-10/PV.6, 26 May 1978, **CCM Annex 244**, para 328; Verbatim Record of the 9th Plenary Meeting of the 10th Special Session of the UN General Assembly, UN Doc A/S-10/PV.9, 30 May 1978, **CCM Annex 245**, paras 282-287; and Letter dated 5 June 1978 from the Permanent Representative of Chile to the UN addressed to the Secretary-General of the UN, UN Doc A/S-10/19, 6 June 1978, **CCM Annex 247**.

<sup>488</sup> See also paras 2.8-2.13 above.



2. *If any obligation arose in 1975-1978, it would have superseded and replaced any obligation arising from the 1950 notes*

6.60. If Bolivia's case on the creation of legal obligations by the Charaña process and by the 1950 notes were somehow to be accepted, then the later obligation arising from the Charaña process would necessarily have superseded the alleged earlier obligation arising from the 1950 notes. As explained in Chapter 2,<sup>489</sup> where a later agreement is intended to govern the matter that is the subject of an earlier agreement, or where a later agreement is incapable of being applied at the same time as an earlier agreement, the latter will supersede and terminate the former. Here, any obligation to negotiate on sovereign access that arose in the Charaña process would have been intended to govern the subject matter of the 1950 notes, i.e., on Bolivia's case, negotiations on sovereign access. Further, the two alleged agreements would have required contradictory things to occur: the 1950 notes would have required Bolivia to provide compensation of a non-territorial character,<sup>490</sup> whereas any agreement arising from the Charaña process would have required Bolivia to provide compensation of a territorial character.<sup>491</sup> This is a clear inconsistency, and further, the two alleged agreements could not be applied at the same time. If any obligation to negotiate arose by way of the 1950 notes (it did not) and also by way of the Charaña process (it did not), the latter obligation would have superseded and terminated the former obligation.

3. *Any obligation to negotiate arising from the Charaña process would have been discharged*

6.61. From 1975 to 1978, negotiations were pursued to the point of futility, and thus as far as possible.<sup>492</sup> Even if it could somehow be said that a legal obligation

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<sup>489</sup> See paras 2.50-2.53 above.

<sup>490</sup> See paras 5.4, 5.9(f) and 5.39 above; Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, **CR Annex 399**, p 2.

<sup>491</sup> See paras 6.27-6.28, 6.31-6.32 and 6.34-6.37 above; 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).

<sup>492</sup> Chile's position is that the correct standard would be whether there have been good faith, meaningful efforts to negotiate over a reasonable period of time. See para 2.55 above. Chile nonetheless applies the higher standard of "as far as possible" here because it is in any event met.

had arisen for Chile before or within the Charaña process—which it did not—it would therefore have been discharged, and thus ceased to exist.

6.62. As is clear from the contemporaneous documentary record, the negotiations from 1975 to 1978 demonstrate Chile’s negotiation in good faith over a sustained period. The negotiations reached an impasse when Bolivia changed its position on the condition of territorial exchange. Bolivia then terminated the negotiations, rupturing diplomatic relations with Chile. No obligation on Chile would have survived the termination of negotiations by Bolivia, much less continued to bind the two States for more than half a century into the future to negotiate again on the same topic.

6.63. Further negotiations on the basis contemplated in the Charaña process were futile from 1978, when it became clear that Bolivia would not return to the negotiating framework involving an exchange of territories and it terminated negotiations, whereas Chile insisted on the framework that had been accepted by both States, as it was entitled to do. Since further negotiations had become futile,<sup>493</sup> any obligation to negotiate would have been discharged and therefore terminated.

6.64. In its Reply, Bolivia argues that an obligation to negotiate created during the Charaña process still endures today.<sup>494</sup>

6.65. First, in reliance on the Chilean guidelines for negotiation, Bolivia asserts that Chile “establish[ed] a connection between the end of the obligation to negotiate and the conclusion of an agreement.”<sup>495</sup> This is untenable. The Chilean guidelines suggested that if and when a final agreement were reached, a “solemn testimony” would be given that this “represents the full and definite solution to the landlocked situation of Bolivia”. No reference was made to any obligation to

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<sup>493</sup> On futility and discharge, see further paras 2.58-2.59 above.

<sup>494</sup> Bolivia’s Reply, para 387.

<sup>495</sup> Bolivia’s Reply, para 390, citing Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, No 686, 19 December 1975, **CCM Annex 180**.

negotiate. This was merely setting out the proposed content of a potential future agreement; no such agreement was reached.

6.66. Secondly, Bolivia relies on “Chile entering a new phase of negotiations in the 1980s [as] further evidence that neither Chile nor Bolivia considered the obligation to negotiate extinguished.”<sup>496</sup> In support of that Bolivia cited a speech of the Minister of Foreign Affairs of Chile on 21 April 1987, which noted that the negotiations in the Charaña process “did not finally succeed for reasons ... which can in no way be attributed to Chile”. He then referred to a “new atmosphere” and to the statements made by the President of Bolivia “that the relations between the two countries needed a fresh approach.”<sup>497</sup> Far from suggesting that Chile was subject to any obligation, let alone an enduring obligation to negotiate on the terms under discussion from 1975 to 1978, this speech suggests that the negotiations that occurred during the Charaña process were definitively terminated, and the two States were considering a “fresh approach” to their relations. They were not proceeding on the basis of an historically continuous obligation to negotiate, as Bolivia alleges, but on the basis of different political considerations as they existed at different points in time.<sup>498</sup>

6.67. Thirdly, Bolivia relies on the statement of the Chilean delegate to the OAS on 31 October 1979, to the effect that he had indicated on prior occasions Chile’s willingness to negotiate with Bolivia on its aspiration to sovereign access.<sup>499</sup> Bolivia asserts that this statement is incompatible with extinguishment of any obligation to negotiate arising from the Charaña process.<sup>500</sup> But the fact that the Chilean delegate said he had on prior occasions “indicated Chile’s willingness to negotiate” does not support either (i) the existence of any legal obligation to

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<sup>496</sup> Bolivia’s Reply, para 391.

<sup>497</sup> Speech of the Minister of Foreign Affairs of Chile, 21 April 1987, **CCM Annex 291**, p 31.

<sup>498</sup> See also paras 7.26-7.27 below.

<sup>499</sup> Bolivia’s Reply, para 393 quoting Statement by the Chilean Representative at the 12th Plenary Session of the General Assembly of the OAS, on 31 October 1979, **BM Annex 204**, a more complete translation of which is at **CCM Annex 249** (see p 279).

<sup>500</sup> Bolivia’s Reply, para 393.

negotiate arising from any prior event or exchange, or (ii) the survival of any such obligation after such negotiations had come to an end.

6.68. Bolivia accepts that it terminated the negotiations in 1978 and that it ruptured diplomatic relations with Chile.<sup>501</sup> It attempts to attribute “the failure of the rounds of negotiations which took place between 1975 and 1978” to Chile,<sup>502</sup> but it can only do so because it fundamentally mischaracterizes the facts as to (a) the essential condition of territorial exchange and (b) Chile’s good-faith consultation with Peru, undertaken on the basis agreed with Bolivia. Those facts are supported by the contemporaneous documents of both States. They are fatal to Bolivia’s claim that Chile continues to be bound, more than 40 years later, to negotiate with Bolivia on sovereign access.

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<sup>501</sup> Bolivia’s Reply, para 437.

<sup>502</sup> Bolivia’s Reply, para 438.

## CHAPTER 7. FURTHER POLITICAL INTERACTIONS IN THE PERIOD PRECEDING THE RESTORATION OF DEMOCRACY IN CHILE

7.1. Having terminated bilateral negotiations on the topic of a possible transfer of sovereignty over territory and ruptured diplomatic relations with Chile in 1978, Bolivia thereafter sought political support for its aspirations from the General Assembly of the OAS. In the decade between 1979 and 1989, while Chile was diplomatically isolated under General Pinochet, the General Assembly of the OAS adopted eleven resolutions concerned with Bolivia's access to the sea.

7.2. Bolivia asks the Court to find that these resolutions, and Chile's conduct related to them, simultaneously confirmed and created a legally binding obligation for Chile. These were diplomatic statements and interactions in the framework of a regional political organization, none of which created or confirmed any legal obligation. Consistently with the purposes of the OAS, both States understood the issue to be political, not legal (**Section A**).

7.3. Bolivia separately relies on bilateral diplomatic interactions initiated by Bolivia in 1986 (the "Fresh Approach"). In these diplomatic discussions, Chile expressed willingness to reach practical solutions improving Bolivia's access to the sea as part of a broader political dialogue focused on improving bilateral relations. The Fresh Approach did not occur because of, and nor did it create, any legal obligation (**Section B**).

### **A. The OAS General Assembly Resolutions and conduct related to them neither confirmed nor created any obligation to negotiate on sovereign access**

7.4. Chile demonstrates below that none of the OAS resolutions confirmed, assumed or even mentioned the existence of any obligation to negotiate sovereign access to the sea (sub-section 1) and that it is incorrect to say that the combination of resolutions of a political character, and the conduct of Bolivia and Chile related to them, gave rise to any legal obligation to negotiate, whether by agreement or otherwise (sub-section 2).

1. *The OAS Resolutions did not confirm any prior obligation to negotiate*

7.5. In the Memorial, Bolivia posited that the eleven resolutions adopted by the OAS General Assembly from 1979 to 1989 concerning Bolivia's "maritime problem" created new obligations to negotiate and confirmed existing ones.<sup>503</sup> In its Reply, Bolivia now acknowledges that these resolutions were incapable of creating legal obligations.<sup>504</sup>

7.6. Bolivia nevertheless argues that the political resolutions adopted by the OAS General Assembly must be taken into account "for the purpose of assessing and interpreting existing agreements or unilateral acts of the Parties".<sup>505</sup> In support of its new position, Bolivia refers not to the limited powers of the General Assembly of the OAS, described by Chile at paragraphs 8.19-8.22 of the Counter-Memorial and uncontested by Bolivia, but to the different powers of the UN General Assembly and its resolutions.<sup>506</sup> That analogy is flawed.

7.7. None of the resolutions of the OAS General Assembly on which Bolivia relies referred to any of the earlier events that Bolivia now claims created a continuous obligation to negotiate. Nor did any of the resolutions of the OAS General Assembly or documents related to them mention or assume the existence of any such obligation:

(a) The first draft resolution prepared and circulated by Bolivia in 1979 confirms that there was no prior legal obligation to negotiate.<sup>507</sup> Neither Bolivia's

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<sup>503</sup> Bolivia's Memorial, p 55, Chapter II, Section III.B.h. heading. See also Bolivia's Memorial, paras 164 and 337.

<sup>504</sup> Bolivia's Reply, para 289.

<sup>505</sup> Bolivia's Reply, para 291.

<sup>506</sup> Bolivia's Reply, paras 290-293.

<sup>507</sup> First draft of the resolution on the maritime problem of Bolivia circulated by Bolivia at the 11th General Assembly of the OAS, 1979, **CR Annex 424**. At para 297 of its Reply, Bolivia refers to the statement of the sponsor of Resolution 426 of 1979 (Venezuela), which in addition to being a statement of neither Bolivia nor Chile was made by the same representative who insisted that the problem was "political in its origins and political in its consequences ... and political must be the resolution" (Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**, pp 369-370; see also Chile's Counter-Memorial, para 8.5).

“Report on the Maritime Problem of Bolivia” submitted to the OAS,<sup>508</sup> nor the discussion held in October 1979 in the OAS General Assembly even mention any alleged obligation to negotiate.<sup>509</sup> Bolivia did allege in the discussions that Chile had “offered Bolivia access to the Pacific Ocean on several occasions”,<sup>510</sup> and that Chile “was ready to negotiate the matter”.<sup>511</sup> There was no suggestion of any legal obligation, and just prior to the adoption of the 1979 Resolution, Bolivia’s representative confirmed that the resolution was only an “exhortation”, that did not create any legal obligation.<sup>512</sup>

(b) The subsequent resolutions adopted by the OAS General Assembly refer to a “continuing hemispheric interest”,<sup>513</sup> a “spirit of fraternity”,<sup>514</sup> a necessity<sup>515</sup> or a need<sup>516</sup> to find a solution to Bolivia’s land-locked situation. They resolved “to recommend” that Bolivia and Chile “open negotiations”<sup>517</sup> and “set in motion

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<sup>508</sup> Report on the Maritime Problem of Bolivia, 26 October 1979, **CR Annex 426**; and Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**, pp 357-369.

<sup>509</sup> Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**; and Minutes of the 12th Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**. Cf. Bolivia’s Memorial, paras 165-168.

<sup>510</sup> Report on the Maritime Problem of Bolivia, 26 October 1979, **CR Annex 426**, p 3; and Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**, p 360. See also fn 327 above.

<sup>511</sup> Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**, p 361.

<sup>512</sup> Minutes of the 12th Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, p 281.

<sup>513</sup> OAS, General Assembly resolutions 426 (31 October 1979), **CCM Annex 250**; 481 (27 November 1980), **CCM Annex 254**; 560 (10 December 1981), **CCM Annex 257**; 602 (20 November 1982), **CCM Annex 259**; 686 (18 November 1983), **CCM Annex 266**; 701 (17 November 1984), **CCM Annex 272**; 766 (9 December 1985), **CCM Annex 282**; 873 (14 November 1987), **CCM Annex 300**; 930 (19 November 1988), **CCM Annex 304**; and 989 (18 November 1989), **CCM Annex 306**.

<sup>514</sup> OAS, General Assembly resolutions 426 (31 October 1979), **CCM Annex 250**; 602 (20 November 1982), **CCM Annex 259**; 686 (18 November 1983), **CCM Annex 266**; 873 (14 November 1987), **CCM Annex 300**; 930 (19 November 1988), **CCM Annex 304**; and 989 (18 November 1989), **CCM Annex 306**.

<sup>515</sup> OAS, General Assembly, resolutions 426 (31 October 1979), **CCM Annex 250**; and 686 (18 November 1983), **CCM Annex 266**.

<sup>516</sup> OAS, General Assembly, resolution 602 (20 November 1982), **CCM Annex 259**.

<sup>517</sup> OAS, General Assembly, resolution 426 (31 October 1979), **CCM Annex 250**.

negotiations”.<sup>518</sup> They “urged” the two States to “initiate a dialogue”,<sup>519</sup> “begin a process of rapprochement and strengthening of friendship”,<sup>520</sup> “resume negotiations”,<sup>521</sup> or “engage in dialogue”.<sup>522</sup> In its resolutions, the General Assembly only reiterated “its interest in the success of the negotiations”,<sup>523</sup> or “its appeal to the governments of Bolivia and Chile that they resume dialogue”.<sup>524</sup> It resolved only “to voice its hopes for the success of this process of rapprochement”,<sup>525</sup> and “regret that the talks recently held between Chile and Bolivia have broken off”.<sup>526</sup> Aspirational language of this kind did not confirm the existence of, nor interpret, any prior obligation to negotiate.<sup>527</sup>

(c) The last OAS resolution on this topic, adopted by the OAS General Assembly in 1989, reaffirmed “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”.<sup>528</sup> This most recent resolution did not even refer to “sovereign access”.

(d) Bolivia also acknowledged at the time that Resolution 989 of 1989, and indeed all eleven resolutions adopted by the OAS General Assembly, were “limited to *recommending* negotiations between the Parties involved”.<sup>529</sup> That was

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<sup>518</sup> OAS, General Assembly, resolution 602 (20 November 1982), **CCM Annex 259**.

<sup>519</sup> OAS, General Assembly, resolution 481 (27 November 1980), **CCM Annex 254**; and OAS, General Assembly, resolution 560 (10 December 1981), **CCM Annex 257**.

<sup>520</sup> OAS, General Assembly, resolution 686 (18 November 1983), **CCM Annex 266**.

<sup>521</sup> OAS, General Assembly, resolution 873 (14 November 1987), **CCM Annex 300**; and OAS, General Assembly, resolution 930 (19 November 1988), **CCM Annex 304**.

<sup>522</sup> OAS, General Assembly, resolution 989 (18 November 1989), **CCM Annex 306**.

<sup>523</sup> OAS, General Assembly, resolution 701 (17 November 1984), **CCM Annex 272**.

<sup>524</sup> OAS, General Assembly, resolution 766 (9 December 1985), **CCM Annex 282**.

<sup>525</sup> OAS, General Assembly, resolution 816 (15 November 1986), **CCM Annex 287**.

<sup>526</sup> OAS, General Assembly, resolution 873 (14 November 1987), **CCM Annex 300**; and OAS, General Assembly, resolution 930 (19 November 1988), **CCM Annex 304**.

<sup>527</sup> *Philippines v. China, Jurisdiction and Admissibility*, para 243; and *Newfoundland and Labrador / Nova Scotia, First Phase*, paras 3.18 and 7.3.

<sup>528</sup> OAS, General Assembly, resolution 989 (18 November 1989), **CCM Annex 306**.

<sup>529</sup> Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 6 June 1990, **CCM Annex 307**, p 305 (emphasis added). See also Minutes of the 2nd



equally the understanding among OAS Member States.<sup>530</sup>

2. *Chile's conduct did not give rise to any new obligation to negotiate*

7.8. Bolivia alleges that the statements and conduct of Chile during the preparation and adoption of the OAS General Assembly resolutions reflected, crystallized or gave rise to an obligation to negotiate, both by way of agreement between the Parties and through unilateral statements. It further alleges that Chile's conduct somehow created a form of estoppel or "legitimate expectations", or involved acquiescence, which prevents Chile from subsequently denying the existence of an obligation to negotiate.<sup>531</sup> These allegations are without basis.

(a) *Chile did not consent, either expressly or by conduct, to the creation of an obligation to negotiate sovereign access*

7.9. Chile did not vote in favour of any of the OAS General Assembly resolutions on the topic of "Bolivia's Maritime Problem". It voted against seven of the resolutions, refused to participate in the vote concerning Resolution 602 of 1982, and did not oppose consensus on three occasions.<sup>532</sup>

7.10. Bolivia now asserts that Chile was not "against negotiations on the sovereign access to the sea",<sup>533</sup> but that it rejected resolutions on procedural grounds or because the topic of the resolutions was a matter for direct bilateral negotiations.<sup>534</sup> Whatever the explanation for Chile not voting for any of the

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Meeting of the General Committee of the OAS General Assembly, 19 May 1992, **CR Annex 437**, p 299.

<sup>530</sup> For instance, in 1982, Argentina, Peru and Uruguay referred to the OAS General Assembly resolution as a "recommendation" (Minutes of the 6th Meeting of the General Committee of the OAS General Assembly, 19 November 1982, **CR Annex 427**, pp 713, 719 and 720). In 1984, Peru and Paraguay referred to a "recommendation" and to an "exhortation" (Minutes of the 8th Plenary Meeting of the OAS General Assembly, 17 November 1984, **CCM Annex 271**, p 247).

<sup>531</sup> Bolivia's Reply, para 293 (quoting from B. Sloan, "General Assembly Resolutions Revisited (Forty Years Later)" (1987) 58 *BYIL* 39, p 65).

<sup>532</sup> Chile's Counter-Memorial, para 8.24.

<sup>533</sup> Bolivia's Reply, para 299.

<sup>534</sup> Bolivia's Reply, para 299.

resolutions, the simple fact that it did not is obviously the end of any argument that it could have become subject to any legal obligation if it did.

7.11. In its Reply, Bolivia places particular emphasis on Resolution 686 of 1983.<sup>535</sup> As with every other resolution, Chile did not vote in favour of it. It was adopted by consensus. Chile did not oppose that consensus, but appended a declaration.<sup>536</sup> Chile's absence of opposition to the consensus to adopt a political recommendation did not give rise to any legal obligation.

7.12. As a matter of principle, States are free to accept recommendations of international organizations as binding upon them. This was confirmed by the Permanent Court in *Railway Traffic between Lithuania and Poland*, which concerned a resolution issued by the Council of the League of Nations. However, the facts of that case are very different from the present one. There, Lithuania and Poland expressly declared that they accepted the terms of the resolution of the Council of the League of Nations.<sup>537</sup> Only after these declarations were made was the resolution adopted by the Council. The Permanent Court's conclusion that the two States were bound was clearly based on the intent of Lithuania and Poland expressed through their formal acceptance of the content of the resolution.<sup>538</sup>

7.13. Chile has not made any similar statement of acceptance with respect to Resolution 686 (or any other resolution adopted by the General Assembly) such that there is no basis for Bolivia to suggest that Chile *accepted* any legal obligation to act in accordance with the terms of any of those resolutions.

7.14. Even if agreement had been reached between Chile and Bolivia in the process of consultations on Resolution 686 (it was not), it would not have concerned an obligation to negotiate on the subject of granting Bolivia sovereign

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<sup>535</sup> Bolivia's Reply, paras 303-310.

<sup>536</sup> Chile's Counter-Memorial, para 8.24 and Minutes of the 7th Plenary Meeting of the OAS General Assembly, 18 November 1983, **CCM Annex 265**, p 268.

<sup>537</sup> Extract of the verbatim records of the Council of the League of Nations (10 December 1927), reproduced in *Railway Traffic between Lithuania and Poland*, p 235.

<sup>538</sup> *Railway Traffic between Lithuania and Poland*, p 116.

access to the Pacific Ocean. The text of the resolution was very different from the terms of the obligation that Bolivia asks the Court to recognize. It provided:

“Bolivia and Chile, for the sake of American brotherhood, ... *begin a process of rapprochement and strengthening of friendship of the Bolivian and Chilean peoples*, directed toward normalizing their relations and overcoming the difficulties that separate them—including, especially, a formula for giving Bolivia a sovereign outlet to the Pacific Ocean, on bases that take into account mutual conveniences and the rights and interests of all parties involved”.<sup>539</sup>

7.15. This is diplomatic language expressing a desire that two neighbouring States “begin a process of rapprochement and strengthening of friendship”. The process envisaged included “taking into account mutual conveniences and the rights and interests of all parties involved”.<sup>540</sup> There was no hint of any legal obligation to negotiate, whether pre-existing or newly-created. Nor was there any hint that what was envisaged was a negotiation concerning the modality by which Bolivia would receive that to which it was already entitled in accordance with a “nineteenth century historical bargain” that was yet to be fulfilled.

7.16. Chile recalled on several occasions that the political objective of this “process of rapprochement” was to re-establish friendly relations between the two countries to foster an atmosphere that would allow the holding of discussions on a range of issues, including Bolivia’s access to the sea. During the bilateral meeting held in New York on 1 October 1983, Chile described its understanding of the process envisaged by Resolution 686 as follows:

“Chile, aspiring to have normal relations with Bolivia, stated and outlined that, to achieve this, it had to resort to a constructive and imaginative dialogue. Chile could not undertake to resolve the maritime problem without restoring relations, however, it remarked that it was obvious that whatever subject to be discussed

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<sup>539</sup> OAS, General Assembly, resolution 686 (18 November 1983), **CCM Annex 266**.

<sup>540</sup> See also paras 1.3(d), 3.11, 4.5-4.8, 5.9-5.12, 5.14(d), 5.39, 6.4 and 6.26 above.

between Bolivia and Chile in formalized relations included a solution to the maritime problem.”<sup>541</sup>

7.17. Bolivia relies on its record of this meeting to allege that Chile and Bolivia together “affirm[ed] their commitment to seek solutions”.<sup>542</sup> As Bolivia’s record demonstrates, it was Bolivia that proposed that the two States “affirm their commitment”. Chile, in response, indicated that it had “already shown its willingness” and expressed agreement with Bolivia’s proposal only as regards “a strategy to seek a harmonious transition from the multilateral field to the bilateral field ... [and] that both countries would seek agreements on general principles and explore solutions satisfactory to both countries in relation to the maritime issue”.<sup>543</sup> This was diplomatic language concerning a political process. Neither Chile nor Bolivia understood this process to involve any legal obligation to conduct negotiations on sovereign access. Chile and Colombia reiterated the same position in the General Committee of the OAS General Assembly.<sup>544</sup>

7.18. Chile chose not to oppose consensus in the OAS General Assembly precisely because it understood the aim and effect of the resolution to be

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<sup>541</sup> Report of the Permanent Representative of Bolivia to the UN, regarding the meeting between the Ministers of Foreign Affairs of Bolivia and Chile, 1 October 1983, **CCM Annex 262**, p 2. This understanding was shared by the Secretary-General of the OAS, who described the resolution as an agreement in principle and as “a fundamental basis for an eventual solution of that issue and an important beginning of the renewal that Bolivia and Chile exhort, so that in a spirit of American fraternity they initiate the process of rapprochement and strengthening of the friendship between the Bolivian and Chilean peoples, in order to normalize their relations, overcome the difficulties that separate them and find a formula that makes it possible to grant Bolivia a sovereign outlet to the Pacific Ocean, consulting the reciprocal conveniences and the rights and interests of the Parties involved”: “Orfila praises Colombia’s initiative in regard to Bolivia’s landlocked condition”, *Ultima Hora* (Bolivia), 21 November 1983, **BR Annex 321**. Cf. Bolivia’s Reply, para 303.

<sup>542</sup> Bolivia’s Reply, para 305, referring to Report of the Permanent Representative of Bolivia to the UN, regarding the meeting between the Ministers of Foreign Affairs of Bolivia and Chile, 1 October 1983, **CCM Annex 262**, p 4.

<sup>543</sup> Report of the Permanent Representative of Bolivia to the UN, regarding the meeting between the Ministers of Foreign Affairs of Bolivia and Chile, 1 October 1983, **CCM Annex 262**, p 4.

<sup>544</sup> Minutes of the 4th Meeting of the General Committee of the OAS General Assembly, 18 November 1983, **CCM Annex 264**, p 368 (Chile) and p 371 (Colombia).

limited.<sup>545</sup> In its Reply, Bolivia points to extracts of a contemporaneous statement by Chile which it says confirms that “Chile agreed on the core of the Resolution, i.e. negotiations on sovereign access to the sea.”<sup>546</sup> As those extracts in fact demonstrate, Chile expressed support for the operative part of the resolution because it “did not reaffirm the validity of the referenced OAS resolutions that internationalized the problem”.<sup>547</sup> In the same document, Chile recalled “the stance [it had] maintained since Bolivia broke off diplomatic relations with Chile in 1978”, namely that “the establishment of diplomatic relations must precede the maritime negotiations.”<sup>548</sup> This does not in any way suggest that Chile accepted any legal obligation to negotiate on sovereign access.

7.19. Although Bolivia at times expressed a different understanding of the process and issued statements to the effect that resumption of diplomatic relations with Chile was conditional upon the two States first agreeing to negotiate on sovereign access to the sea,<sup>549</sup> Chile did not accept this view of the process and of the content of Resolution 686. To the contrary, Chile consistently expressed the view that the process of rapprochement was aimed at re-establishing friendly relations between Bolivia and Chile.<sup>550</sup>

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<sup>545</sup> 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 Minutes of the 4th Meeting of the General Committee of the OAS General Assembly, 18 November 1983, **CCM Annex 264**, p 372.

<sup>546</sup> Bolivia’s Reply, para 307.

<sup>547</sup> 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 (para E).

<sup>548</sup> 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 (paras E and F).

<sup>549</sup> Official Message from the Embassy of Chile in Peru to the General Directorate for Foreign Policy of Chile, 21 December 1983, **CR Annex 429**; Minutes of the 3rd Meeting of the General Committee of the OAS General Assembly, 15 November 1984, **CR Annex 432**, p 369; Official Message from the Consulate General of Chile in Bolivia to the Directorate of Bilateral Affairs of the Ministry of Foreign Affairs of Chile, 26 June 1984, **CR Annex 430**; and Official Record of the 18th Plenary Meeting, 39th Session of the UN General Assembly, UN Doc A/39/PV.18, 3 October 1984, p 360, para 17.

<sup>550</sup> Cable from General Augusto Pinochet to President Belisario Betancur of Colombia, 30 November 1983, **CCM Annex 268**; Official Message from the Embassy of Chile in

7.20. Bolivia also argues that by unilateral statements made in relation to the other resolutions adopted by the General Assembly, Chile undertook a legal obligation to negotiate sovereign access to the sea.<sup>551</sup> This is unsupported by the statements upon which Bolivia relies, in which, at most, Chile expressed its “willingness to negotiate a solution with Bolivia”,<sup>552</sup> and said that it was “willing[] to address matters with Bolivia that are of common interest”,<sup>553</sup> or was “in favor of engaging in dialogue with Bolivia”.<sup>554</sup> It referred to its “attitude of willingness”<sup>555</sup> and explained that it did not have “any concerns about initiating a process of rapprochement”<sup>556</sup> that, ultimately, might facilitate discussions

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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**; Letter from the President of Colombia to the President of Chile, 18 November 1983, **CR Annex 428**; Aide Memoire “Meeting held with Chancellor Jaime del Valle”, 26 April 1984, **BR Annex 325**, para 5; Minutes of the 3rd Meeting of the General Committee of the OAS General Assembly, 15 November 1984, **CR Annex 432**, pp 369-370; 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, pp 148-150; and Draft Chilean-Bolivian Joint Communiqué, 1986, **CR Annex 434**. In its Reply Bolivia relies on **BR Annex 326** in support of its argument that Chile and Bolivia considered Resolution 686 to be binding (Bolivia’s Reply, para 310). As this document shows, however, Chile ultimately refused to sign the joint communiqué as a result of statements made by Bolivia in the UN General Assembly, which contradicted Chile’s understanding of the process: see Report from the Ministry of Foreign Affairs of Bolivia concerning the Bolivian-Chilean Negotiations between 1983 and 1984, 9 November 1984, **BR Annex 326**, para 6; see also Minutes of the 2nd Plenary Meeting of the OAS General Assembly, 12 November 1984, **CR Annex 431**, pp 8-9; and Minutes of the 3rd Meeting of the General Committee of the OAS General Assembly, 15 November 1984, **CR Annex 432**, pp 370 and 372.

<sup>551</sup> Bolivia’s Reply, paras 299-301.

<sup>552</sup> Minutes of the 12th Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, p 279.

<sup>553</sup> Minutes of the 3rd Meeting of the General Committee of the OAS General Assembly, 12 November 1986, **CCM Annex 285**, p 319.

<sup>554</sup> 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**, point 7.

<sup>555</sup> 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, p 148.

<sup>556</sup> Minutes of the 4th Meeting of the General Committee of the OAS General Assembly, 18 November 1983, **CCM Annex 264**, p 369.

concerning Bolivia's access to the sea within a suitable political framework. This is a long way from language capable of generating any legal obligation to negotiate by way of unilateral statement.<sup>557</sup>

*(b) No obligation to negotiate was created in the context of the OAS resolutions through acquiescence, estoppel or on the basis of "legitimate expectations"*

7.21. Bolivia suggests that a State can become bound by a resolution through acquiescence,<sup>558</sup> as though States are somehow required to protest non-binding resolutions to avoid being bound by their terms. Even if acquiescence were apposite to this case<sup>559</sup> (which it is not), Bolivia has not demonstrated that (i) there was any relevant silence on the part of Chile, (ii) Chile's silence amounted to tacit consent to the assumption of a legal obligation, or (iii) the content of any obligation created through acquiescence was to negotiate on sovereign access.

7.22. Bolivia further argues that Chile's conduct gave rise to legitimate expectations on the part of Bolivia, which Bolivia acted on, thereby estopping Chile from denying the existence of the alleged obligation to negotiate.<sup>560</sup>

(a) Bolivia relies in particular on "the terms and intent of the resolution, especially the fact that it is worded in precise legal language", which it says is "particularly important", to the creation of its "legitimate expectations".<sup>561</sup> As is plain from the description of the resolutions above,<sup>562</sup> their terms plainly did not constitute a representation capable of creating a legal obligation through estoppel or legitimate expectations, or some combination of the two.

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<sup>557</sup> See paras 2.16-2.19 above.

<sup>558</sup> Bolivia's Reply, para 293.

<sup>559</sup> See paras 2.34-2.37 above.

<sup>560</sup> Bolivia's Reply, paras 293-294. Bolivia mischaracterizes the requirements for estoppel and for legitimate expectations, when it refers to acting on its own legitimate expectation rather than on the representation purportedly made by Chile: see para 2.27 above.

<sup>561</sup> Bolivia's Reply, para 294.

<sup>562</sup> See above, para 7.7.

(b) Bolivia also suggests that “strong advocacy of a recommendation may give rise to the expectations that those who strongly support the recommendatory resolution will act accordingly”.<sup>563</sup> That is a proposition without foundation in law, and also without any correlation to the facts of this case. Chile never expressed support, let alone “strong support”, for the OAS General Assembly resolutions. To the contrary, Chile took the position that none of the OAS General Assembly resolutions gave rise to any legal obligations. For instance, with respect to Resolution 426, Chile put on the record that—

“in accordance with the legal rules indicated, this resolution does not obstruct it or bind it or obligate it in any way”.<sup>564</sup>

7.23. Nothing on which Bolivia relies shows a clear and unequivocal representation made by Chile that it would at all times and in all circumstances negotiate with Bolivia to grant it a sovereign access to the sea. It would have been entirely unreasonable for Bolivia to have sought to rely to its detriment—and Bolivia has not attempted to prove either that it did rely on any representation by Chile or that it would have been reasonable to do so—on the recommendatory exhortations of a political organization or any conduct related to them. Bolivia’s attempt to invoke the concepts of estoppel and legitimate expectations to create a legal obligation from Chile’s conduct at the OAS fails not only as a threshold matter of law, for reasons discussed in Chapter 2, but also because on the facts Bolivia simply has not and could not satisfy the elements required to establish a legal obligation through one of these “doctrines” on which it relies.<sup>565</sup>

### 3. Conclusion

7.24. None of the resolutions adopted by the General Assembly of the OAS suggested the existence of any prior legal obligation to negotiate. Chile’s conduct in respect of those resolutions is moreover incapable of creating any legal

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<sup>563</sup> Bolivia’s Reply, para 294, referring to B. Sloan, “General Assembly Resolutions Revisited (Forty Years Later)” (1987) 58 *BYIL* 39, p 123.

<sup>564</sup> Minutes of the 12th Plenary Meeting of the OAS General Assembly, 31 October 1979, **CCM Annex 249**, p 279.

<sup>565</sup> See paras 2.20-2.33 above and 9.13-9.28 below.



obligation, whether through unilateral declarations, on the basis of acquiescence or estoppel, or as a result of “legitimate expectations”.

7.25. In 1989, the OAS General Assembly adopted its last resolution on the topic of Bolivia’s access to the sea. In 2012, when Bolivia hosted the General Assembly, the OAS did not issue a resolution on this issue and there was no suggestion by the Bolivian Minister at the time that Chile was under any obligation to negotiate with Bolivia.<sup>566</sup> That only became the focus for the purpose of this litigation.

**B. Chile did not consent to any obligation to negotiate on sovereign access during the “Fresh Approach”**

7.26. In its Reply, Bolivia incorrectly describes the “Fresh Approach” initiated in 1986 by the new Bolivian President, Víctor Paz Estenssoro, as the continuation of historical negotiations on the topic of Bolivia’s maritime problem.<sup>567</sup> As its name indicates, the Fresh Approach was a “new bilateral approach”,<sup>568</sup> and it was perceived as such by both Chile and Bolivia.<sup>569</sup>

7.27. Chile and Bolivia entered into a process of discussions and agreed on a list of 30 issues of interest aimed at building closer relations between the two

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<sup>566</sup> Instead, the Minister referred to Bolivia’s Constitution, which he said “establish[ed] the unwaivable and imprescriptible *right to territory* that gives it access to the Ocean and its maritime space”: Minutes of the 4th Plenary Meeting of the OAS General Assembly, 5 June 2012, **CCM Annex 363**, p 203 (emphasis added). On the role of Bolivia’s Constitution see paras 8.13-8.32 below.

<sup>567</sup> Bolivia’s Reply, paras 440-446.

<sup>568</sup> Bolivia’s Memorial, para 180.

<sup>569</sup> Speech of the Minister of Foreign Affairs of Chile, 21 April 1987, **CCM Annex 291**, p 31 (“A new atmosphere began to emerge at the beginning of last year, particularly due to the positive statements made to the press by the President of Bolivia, Víctor Paz Estenssoro, who highlighted that the relations between the two countries needed a fresh approach, recognizing with great objectivity that both nations complement each other economically”). See also “Foreign Minister Del Valle: ‘Chile and Bolivia Must Seek a Rapprochement’”, *El Mercurio* (Chile), 25 February 1986, **CCM Annex 283**.

neighbouring States.<sup>570</sup> Bolivia's Minister of Foreign Affairs acknowledged at the time that:

“In the talks held between the Foreign Ministers of Chile and Bolivia in 1986, important aspects of rapprochement and understanding between these two Governments have been found, favoring the fundamental progress towards the solution of multiple *common issues*, which have been considered in an institutional form within a bi-national commission that has begun its work in the city of La Paz and will continue with the same tasks this coming December in Santiago.”<sup>571</sup>

Bolivia did not at the time suggest that the “Fresh Approach” was the continuation “of Chile’s undertakings” that existed “since the nineteenth century”.<sup>572</sup> Nor, at any time prior to the submission of the Reply, did Bolivia ever suggest that the Fresh Approach confirmed or created any legal obligation binding on Chile.

7.28. In its Reply, Bolivia refers to limited extracts of the speech of the Chilean Foreign Minister in an attempt to show that the discussions were a continuation of the Charaña process.<sup>573</sup> The passages of this speech to which Bolivia does not refer make clear, however, that the Minister referred to historical attempts to find a negotiated solution to Bolivia’s “maritime problem” (including during the Charaña process) in order to observe that they had failed, not that they were being continued or that they created any enduring legal obligation.<sup>574</sup>

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<sup>570</sup> Minutes of the 3rd Meeting of the General Committee of the OAS General Assembly, 12 November 1986, **CCM Annex 285**, p 319.

<sup>571</sup> Communiqué of the Minister of Foreign Affairs of Bolivia, 13 November 1986, **BR Annex 332**, pp 23-24 (emphasis added).

<sup>572</sup> Bolivia’s Reply, para 197.

<sup>573</sup> Bolivia’s Reply, paras 390-391.

<sup>574</sup> Speech of the Minister of Foreign Affairs of Chile, 21 April 1987, **CCM Annex 291**, pp 30-31. He said: “It should not go without saying that Chile has always been willing to have an open and friendly dialogue with Bolivia and has tried to give, in its relations with your country, a creative and positive meaning. This conduct has been repeated several times throughout our history and I cannot but mention that we strongly believe that Chile cannot be blamed for the failure of several negotiation instances.” Specifically concerning the Charaña process he stated: “An understanding began to be outlined, which did

7.29. Nor was there any suggestion that the process commenced in 1986 gave rise to any new legally binding obligation to negotiate, as Bolivia now also asserts. In support of this allegation, Bolivia seeks to rely on communiqués issued by Chile and Bolivia in November 1986, which it says recorded the “existence of an agreement to start formal negotiations”.<sup>575</sup> Neither communiqué, however, demonstrated any intention to be legally bound.<sup>576</sup> This is further confirmed by the fact that during a meeting held in April 1987 in Montevideo, Bolivia did not mention any obligation of the kind that it now posits.<sup>577</sup> Nor did the joint press release issued by Bolivia and Chile after the Montevideo meeting refer to any obligation to negotiate. To the contrary, Chile and Bolivia explained that the meeting had been agreed in “the spirit of mutual rapprochement” 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”.<sup>578</sup>

7.30. Chile did not enter into the process of rapprochement in 1987 because of any legal obligation to do so. It did so as part of a broader dialogue to improve bilateral relations with its neighbour. As the Chilean representative said before the OAS Assembly following the Montevideo meeting:

“Chile did indeed begin talks with Bolivia at its request and in consideration of proposals formulated by the President of that country with respect to its willingness to consider, bilaterally, all initiatives of mutual interest. A particular influence on Chile’s decision to agree to these talks was the so-called ‘fresh’ or ‘new focus’ that President Paz Estenssoro wanted to single out in his new approach to relations with Chile.

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not finally succeed for reasons that are not appropriate to analyze right now but which can in no way be attributed to Chile.”

<sup>575</sup> Bolivia’s Reply, para 443, referring to Communiqué of the Minister of Foreign Affairs of Bolivia, 13 November 1986, **BR Annex 332**; and Communiqué of the Minister of Foreign Affairs of Chile, Jaime del Valle, 13 November 1986, **BR Annex 333**.

<sup>576</sup> See paras 2.8-2.19 above.

<sup>577</sup> See Speech of the Minister of Foreign Affairs of Bolivia, 21 April 1987, **CR Annex 435**.

<sup>578</sup> Press Release from the Foreign Ministers of the Republics of Bolivia and Chile, 23 April 1987, **CCM Annex 294**, p 1.

It is not accurate to say that Chile agreed to those talks owing to any explicit recommendations contained in OAS resolutions. As it has been expressed, Chile does not recognize OAS jurisdiction in this matter.

It should also be remembered that the joint press release, agreed upon in Montevideo by the Ministers of Foreign Affairs of Chile and Bolivia, did not mention any OAS resolution.”<sup>579</sup>

Chile’s good faith desire to enter into a diplomatic process with Bolivia to improve their relations is obviously insufficient to establish the existence of a legal obligation.<sup>580</sup>

7.31. In its Reply, Bolivia does not pursue the allegation made in its Memorial that Chile breached any obligation to negotiate through the circumstances in which the Fresh Approach ended, instead concentrating on the supposed sudden breach and repudiation in 2011.<sup>581</sup> Bolivia’s case thus now proceeds on the basis that there were negotiations in the Fresh Approach, they reached an impasse, but the obligation to negotiate persisted. Although Chile was under no legal obligation to do so, it entered into a meaningful dialogue with Bolivia in good faith.<sup>582</sup> Chile ultimately considered that Bolivia’s proposals for cession of Chile’s sovereign territory were contrary to Chile’s interests. Because Bolivia refused to continue discussions on any basis other than the transfer of Chilean territory to Bolivia, the interests of the two States were mutually irreconcilable and the process was therefore at an end. Had there been any obligation to negotiate, which there was not, it would accordingly have been discharged.<sup>583</sup> When this episode ended, Bolivia did not suggest that Chile had acted contrary to any international obligation, as it no doubt would have done if it had considered Chile to be bound by any relevant obligation.

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<sup>579</sup> Minutes of the 4th Meeting of the General Committee of the OAS General Assembly, 12 November 1987, **CR Annex 436**, p 358.

<sup>580</sup> See para 2.22 above; cf. Bolivia’s Reply, para 444.

<sup>581</sup> Concerning which see paras 8.18-8.32 in the next chapter.

<sup>582</sup> Chile’s Counter-Memorial, paras 8.38-8.41.

<sup>583</sup> See paras 2.54-2.59 above.

## *Conclusion*

7.32. When President Paz Estenssoro of Bolivia initiated the “Fresh Approach”, he made no reference to any existing obligation to negotiate and no reference to historical events. In particular, he made no reference to the 1950 diplomatic notes which were exchanged just before his first term as President of Bolivia and which Bolivia now asserts gave rise to such an obligation.<sup>584</sup> The “Fresh Approach” was neither a continuation of any continuous historical process nor capable of creating any legal obligation. It was a process of rapprochement that did not progress because Bolivia’s insistence on negotiating a transfer of sovereignty over territory, and Chile’s considered refusal to accept proposals based on a transfer of sovereignty over territory, meant that the two States had irreconcilable interests.

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<sup>584</sup> “Foreign Minister Del Valle: ‘Chile and Bolivia Must Seek a Rapprochement’”, *El Mercurio* (Chile), 25 February 1986, **CCM Annex 283**; Chile’s Counter-Memorial, paras 8.32-8.33.



## CHAPTER 8. CONSTRUCTIVE ENGAGEMENT AFTER THE RESTORATION OF DEMOCRACY IN CHILE

8.1. Bolivia has changed its case regarding the legal significance of the bilateral engagement that occurred following the restoration of democracy in Chile in 1990. In its Memorial, Bolivia alleged that, from 1987 onwards, Chile was in breach of a pre-existing obligation to negotiate on sovereign access. This was on the basis that although the engagement that occurred from that time onwards concerned improved access to the sea for Bolivia, it did not concern transfer of sovereignty over territory.<sup>585</sup> Bolivia now alleges in its Reply that an obligation to negotiate sovereign access continued to be created during this same period, and was breached in 2011. The position Bolivia took in its Memorial was factually accurate, in the sense that since 1990 none of the proposals negotiated would have provided for any transfer of sovereignty over territory, but the legal arguments Bolivia sought to make based on those facts were defective, as explained in Chile's Counter-Memorial. Bolivia's reformulated position is deeply flawed as a matter of both fact and law.

(a) There is no credible basis on which a legal obligation to negotiate could be said to have arisen, or to have been confirmed, in the decades following 1990, whether through the Algarve Declaration, the 13-Point Agenda, or otherwise. Until Bolivia's Reply, neither State had ever asserted that anything in these recent decades created any obligation to negotiate. In now doing so for the first time, Bolivia omits even to mention the text of the instruments on which it purports to rely (**Section A**).

(b) Bolivia abandoned engagement on practical initiatives and seised the Court because of its own recently-adopted Constitution and political imperatives, claiming an obligation to negotiate sovereign access (**Section B**).

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<sup>585</sup> See Bolivia's Memorial, e.g., paras 443, 445, 446 and 448.

## A. No legal obligation was created or confirmed between 1990 and 2011

8.2. In its Memorial, Bolivia's position was that no event after 1990 gave rise to an obligation to negotiate.<sup>586</sup> Bolivia now asserts that an obligation to negotiate was created during this most recent period.<sup>587</sup> Consistent with the position that Bolivia took in its Memorial, it is clear that no obligation to negotiate was created after 1990. Neither Chile nor Bolivia even once asserted from 1990 until 2011 that they were under any legal obligation to negotiate on sovereign access to the sea. It was only in 2011, having already announced that it would commence this case, that Bolivia wrote a letter to the Court in the context of the *Peru v. Chile* dispute asserting the existence of such an obligation.<sup>588</sup>

### 1. The 2000 Algarve Declaration

8.3. Bolivia asserts that "both Parties agreed in the 2000 Algarve Declaration to negotiate sovereign access",<sup>589</sup> but declines to bring to the attention of the Court the terms of that Declaration, which nowhere say any such thing. Issued by way of joint press release, the Declaration stated:

"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, 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 ...

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<sup>586</sup> No event after 1990 was discussed in the Section of Bolivia's Memorial addressing the alleged "Process of Formation of the Chilean Obligation". See Bolivia's Memorial, paras 291-387.

<sup>587</sup> In the Chapter of its Reply dealing with the "Acts and Conduct Expressing Chile's Intention to Negotiate Sovereign Access to the Sea", Bolivia includes a Section on "The undertakings post-1990". See Bolivia's Reply, Chapter 5, Section G.

<sup>588</sup> Letter from the Minister of Foreign Affairs of Bolivia to the Registrar of the International Court of Justice, 8 July 2011, **CPO Annex 65**. See also Chile's response: Letter from the Ministry of Foreign Affairs of Chile to the Ministry of Foreign Affairs of Bolivia, 8 November 2011, **CR Annex 451**, p 1 of the original: "No antecedent mentioned in the letter of 8 July 2011 allows the inference of a recognition of the existence of an obligation to negotiate sovereign access to the sea, or of an alleged right of sovereign access to the sea". On Bolivia's decision to commence this case, see para 8.13 below.

<sup>589</sup> Bolivia's Reply, para 316.



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.”<sup>590</sup>

It is impossible to find in this language evidence of any intention to create any legal obligation.

8.4. Rather than relying on or even referring to the terms of the Declaration, Bolivia instead relies on three documents from 2006, some six years after the Declaration was made:

(a) First, Bolivia refers to a newspaper article that reports the Chilean Foreign Minister as stating that Chile did “not exclude” an eventual outlet to the sea with “sovereign rights” as a “possibility”.<sup>591</sup> That plainly did not acknowledge any legal obligation, and also did not concern a transfer of sovereignty over territory.<sup>592</sup> Indeed, a later paragraph (which Bolivia omitted from its translation) reports that Chile’s Foreign Minister “insisted that ‘there is no reason’ to modify the 1904 treaty, which fixed the border between the two countries and enshrined the loss of the Bolivian littoral”.<sup>593</sup>

(b) Secondly, after alleging that the Algarve Declaration had a “binding” character, Bolivia refers to a statement delivered by the Chilean Foreign Minister

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<sup>590</sup> Joint Press Release issued by Bolivia and Chile, 22 February 2000, **CCM Annex 318**, paras 2 and 5.

<sup>591</sup> Bolivia’s Reply, para 316, citing **BM Annex 132**. In that annex, Bolivia mistranslates “*una eventual salida al mar de Bolivia con derechos de soberania*” as “a possible *sovereign access* to the sea for Bolivia” (emphasis added). The correct translation in full is: “‘We do not exclude it. As a possibility, no’, said Foxley when asked about an eventual outlet to the sea with *sovereign rights* for Bolivia”, as now provided in **CR Annex 444**, “Chilean Foreign Affairs Minister does not exclude a sovereign outlet to the sea for Bolivia”, *El Universal* (Venezuela), 16 April 2006, p 1 (emphasis added).

<sup>592</sup> Bolivia distinguishes “sovereignty” from “sovereign rights”, and regards the latter as involving matters such as “legislative and judicial attributions, and administration and executive power” without a transfer of sovereignty over territory. See Bolivia’s Reply, para 464.

<sup>593</sup> “Chilean Foreign Affairs Minister does not exclude a sovereign outlet to the sea for Bolivia”, *El Universal* (Venezuela), 16 April 2006, **CR Annex 444**, p 1.

before the OAS in 2006.<sup>594</sup> He noted that Chile “has clearly demonstrated its willingness to work bilaterally with Bolivia on this broad agenda” and had expressed “its willingness to continue moving forward and holding talks on the basis of the spirit of Algarve”.<sup>595</sup> This cannot be said to have acknowledged any legal obligation, still less one concerning sovereign access to the sea.

(c) Thirdly, Bolivia refers to a further newspaper article<sup>596</sup> that recounts a press conference in which the Chilean Vice-Minister of Foreign Affairs referred to being “fully aware of the commitment assumed several years ago to talk with an agenda without exclusions”.<sup>597</sup> He was here plainly referring to the political commitment made by Chile in the Algarve Declaration, and, contrary to Bolivia’s suggestion, he did not make any reference to “negotiations”.<sup>598</sup> The Declaration itself, quoted above, plainly did not create or recognize any legal obligation, and this subsequent reference back to it could not do so either.

8.5. That the Algarve Declaration neither created nor confirmed any legal obligation—and that neither Chile nor Bolivia thought that it did—is clear from the Bolivian Foreign Minister’s statement before the OAS in 2002. He referred to the Algarve Declaration and added that Bolivia’s new President had “confirmed my country’s decision to keep that *option* of dialogue as a *State policy*.”<sup>599</sup>

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<sup>594</sup> Bolivia’s Reply, para 461.

<sup>595</sup> Minutes of the 4th Plenary Meeting, 36th Regular Session of the OAS General Assembly, 6 June 2006, **BR Annex 358**, pp 204-205.

<sup>596</sup> Bolivia’s Reply, para 316, citing “Chile agrees to include the Bolivia’s outlet issue in the agenda”, *Diario Libre*, 18 July 2006, **BM Annex 135**.

<sup>597</sup> “Chile accepts to include outlet to the sea for Bolivia in the agenda”, *Diario Libre* (Dominican Republic), 18 July 2006, **CR Annex 445**, p 2 of the original. Contrary to Bolivia’s assertion, this was not said by the Chilean Foreign Minister.

<sup>598</sup> Bolivia mistranslates “*de hablar*” as “to engage in negotiations”. Chile has resubmitted **BM Annex 135** as “Chile accepts to include outlet to the sea for Bolivia in the agenda”, *Diario Libre* (Dominican Republic), 18 July 2006, **CR Annex 445**.

<sup>599</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 4 June 2002, **CCM Annex 324**, p 196 (emphasis added).

## 2. *The 2006 13-Point Agenda*

8.6. Bolivia refers to the 13-Point Agenda as having a “binding nature”.<sup>600</sup> Bolivia again alleges this without reference to its terms. The 13-Point Agenda was also announced in a press release and also plainly did not create any legal obligation:

“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.”<sup>601</sup>

8.7. Bolivia again attempts to make its case by relying not on the relevant document, but on subsequent statements. Bolivia thus relies on a statement made by the Chilean Foreign Minister before the OAS in 2007, that “an agenda was defined without exclusions with thirteen points”.<sup>602</sup> This cannot sensibly be said to amount to an acknowledgement of any legal obligation.

8.8. Point 6 of the 13-Point Agenda was the “maritime issue”. Bolivia does not allege that any of the other twelve items on the agenda created any legal obligation or explain how or why the two States would have created a legal obligation with respect to one agenda item only. A further difficulty for Bolivia is the fact that Point 6 was described as the “maritime issue”, not “sovereign access”. Bolivia attempts to overcome this difficulty by claiming that “‘the maritime issue’ clearly refers to ‘sovereign access’”,<sup>603</sup> and that this “new terminology ... referred to the long-standing problem of the sovereign access”.<sup>604</sup> To say that “maritime issue” means “sovereign access” is not a serious

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<sup>600</sup> Bolivia’s Reply, para 462.

<sup>601</sup> Joint Press Release issued by Bolivia and Chile, 18 July 2006, **CCM Annex 336**, p 2507.

<sup>602</sup> Bolivia’s Reply, para 462, citing Minutes of the 4th Plenary Meeting, 37th Regular Session of the OAS General Assembly, 5 June 2007, **BR Annex 361**, p 133.

<sup>603</sup> Bolivia’s Reply, para 315.

<sup>604</sup> Bolivia’s Reply, para 458.

proposition, and none of the four points that Bolivia advances in support of it can be sustained.

(a) First, Bolivia refers to “declarations of the Presidents of the two countries of December 2005”.<sup>605</sup> In these letters (not “declarations”), the Presidents were not discussing the meaning of the phrase “maritime issue”. The letters did not concern the drafting of the 13-Point Agenda, which was not agreed until some seven months later.

(b) Secondly, Bolivia refers to a “declaration” of the Chilean Foreign Minister in June 2007.<sup>606</sup> In this newspaper article (not “declaration”), Chile’s Foreign Minister was reported as having been asked concerning the 13-Point Agenda: “is the sea for Bolivia included?” He replied: “Yes, it is point 6”.<sup>607</sup> “Sea for Bolivia” is an imprecise colloquial term used in a journalist’s question, the Minister’s answer to which cannot be equated to his taking a position on “sovereign access”, still less a legally binding one.

(c) Thirdly, Bolivia refers to the “fact that Point 6 of the Agenda entitled ‘Maritime issue’ is distinct from Point 3 on ‘Free transit’”.<sup>608</sup> It does not follow from this that “maritime issue” means “sovereign access”. Point 3 of the 13-Point Agenda, “free transit”, was concerned with the implementation of Article VI of the 1904 Peace Treaty,<sup>609</sup> and the implementation of subsequent arrangements on free transit.<sup>610</sup> To this end, matters such as the conditions in the ports of

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<sup>605</sup> Bolivia’s Reply, para 315, citing President of Bolivia’s Note, 14 December 2005, **BM Annex 80**; and **BM Annex 81**. The translation in **BM Annex 81** is incorrect, and Chile has resubmitted that document as Note from the President of Chile to the President of Bolivia, December 2005, **CR Annex 443**.

<sup>606</sup> Bolivia’s Reply, para 315, citing “The surveys reflect that a high percentage of the Chileans do not agree with the proposal ‘Sea for Bolivia’”, *El Mercurio*, 24 June 2007, **BM Annex 136**.

<sup>607</sup> “The surveys show that a high percentage of the Chilean population does not agree with the proposal ‘sea for Bolivia’”, *El Mercurio* (Chile), 24 June 2007, **CR Annex 446**, p 2 of the original. The translation of this document exhibited as **BM Annex 136** is incorrect.

<sup>608</sup> Bolivia’s Reply, para 315. See also Bolivia’s Reply, paras 457-458.

<sup>609</sup> See Treaty of Peace and Amity, 20 October 1904, **CCM Annex 106**, Article VI.

<sup>610</sup> See Chile’s Counter-Memorial, paras 3.21-3.38.

Antofagasta and Arica,<sup>611</sup> the treatment of dangerous cargo,<sup>612</sup> port rates<sup>613</sup> and the enabling of the port of Iquique<sup>614</sup> were discussed under Point 3. Point 6, the “maritime issue”, was concerned with Bolivia’s desire to improve its access to the sea.<sup>615</sup> There is no basis for saying that it was agreed that this was to be “sovereign access”.

(d) Fourth, Bolivia argues that “within the OAS, the terminology used has been ‘the Maritime Problem of Bolivia’ or ‘Bolivia’s maritime issue’. The formula used in the 13-Point Agenda echoes these formulas”.<sup>616</sup> The OAS documents use the expression “maritime *problem*” (“*el problema marítimo*”), not “maritime issue” (“*tema marítimo*”),<sup>617</sup> and do not support Bolivia’s contention that when Bolivia and Chile adopted the term “maritime *issue*” in their later bilateral interactions, they meant “sovereign access”. “Sovereign access” and “maritime issue” are plainly different expressions with different meanings, and the 13-Point Agenda involved no legal obligation to negotiate with respect to either of them.

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<sup>611</sup> See, e.g., Minutes of the 19th Meeting of the Political Consultations Mechanism, 21 November 2008, **CCM Annex 342**, p 2641.

<sup>612</sup> See, e.g., Minutes of the 17th Meeting of the Political Consultations Mechanism, 19 October 2007, **CCM Annex 339**, p 2565.

<sup>613</sup> See, e.g., Minutes of the 16th Meeting of the Political Consultations Mechanism, 18 May 2007, **CCM Annex 338**, p 2529.

<sup>614</sup> See, e.g., Minutes of the 18th Meeting of the Political Consultations Mechanism, 17 June 2008, **CCM Annex 341**, p 2605.

<sup>615</sup> See para 8.31 below.

<sup>616</sup> Bolivia’s Reply, para 315. See also Bolivia’s Reply, fn 687.

<sup>617</sup> In support of its assertion to the contrary, Bolivia cites thirteen of its annexes. These are the documents cited in Bolivia’s Reply, fns 469, 470 and 687. Nine of these documents nowhere use the phrase “maritime issue”. Four do (**BM Annexes 193, 196, 203 and 206**), but only because Bolivia incorrectly translates “*problema*” as “issue”, rather than “problem”. For the official English versions of **BM Annexes 193 and 196**, which only use the phrase “maritime problem”, see OAS, General Assembly, resolution AG/RES. 560 (XI-O/81), Report on the Maritime Problem of Bolivia, 10 December 1981, **CCM Annex 257**; and OAS, General Assembly, resolution AG/RES. 701 (XIV-O/84), Report on the Maritime Problem of Bolivia, 17 November 1984, **CCM Annex 272**. For correct translations of **BM Annexes 203 and 206**, see Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 26 October 1979, **CCM Annex 248**; and Minutes of the 4th Meeting of the General Committee of the OAS General Assembly, 18 November 1983, **CCM Annex 264**.

3. *Engagement between Bolivia and Chile concentrated on practical initiatives, not on any obligation to negotiate sovereign access arising from nineteenth century history*

8.9. After the restoration of democracy in Chile, Bolivia and Chile were determined not to concentrate on nineteenth century history, but on a new start in their relationship and new practical approaches. Before the OAS in 1990, the Bolivian Foreign Minister stated that—

“we must not continue to approach this problem [Bolivia’s confinement] with the outdated, tired mentality of the 19<sup>th</sup> century. Rather, we should discuss it from the perspective of *the new understanding that must open the way to the 21<sup>st</sup> century, in keeping with the changes of our time*”.<sup>618</sup>

8.10. Similarly, the Chilean Foreign Minister stated that:

“Approaching our relations among our Latin American nations in a spirit suited to the 19<sup>th</sup> century would mean reviving tense quarrels among neighbors that, with their burden of confrontations, animosities, and mistrust, have until now delayed the possibility of a more fraternal, prosperous, and developed Latin America. *Approaching relations among our nations from a future-oriented perspective, on the other hand, means leaving in the past everything that has placed us in opposition to one another*”.<sup>619</sup>

8.11. Further, before the UN General Assembly in 1998, Bolivia stated: “If we want to find new, different solutions in keeping with the times, we can no longer remain mired in the juridical, diplomatic and military logic of the past”.<sup>620</sup>

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<sup>618</sup> Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 6 June 1990, **CCM Annex 307**, p 305 (emphasis added).

<sup>619</sup> Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 6 June 1990, **CCM Annex 307**, p 306 (emphasis added).

<sup>620</sup> Verbatim Record of the 21st Plenary Meeting, 50th Session of the UN General Assembly, UN Doc A/53/PV.21, 30 September 1998, **BR Annex 343**, p 18.

8.12. In the two documents on which Bolivia relies in this period, the Algarve Declaration and the 13-Point Agenda, there is no reference to any of the historical events, whether from the nineteenth or the twentieth century, that Bolivia now asserts gave rise to an ongoing obligation to negotiate.<sup>621</sup> Indeed there was no reference to “sovereign access” in either document. As Chile noted in its Counter-Memorial, between 1990 and 2011, Bolivia never once asserted that a legal obligation to negotiate on sovereign access existed.<sup>622</sup> Bolivia responded in its Reply that Chile’s allegation was “plainly false”,<sup>623</sup> but did not accompany that claim by reference to any document from after 1990 and before 2011 in which Bolivia asserted or Chile recognized the existence of any obligation to negotiate sovereign access to the sea.<sup>624</sup> Bolivia says that since 1990 “Bolivia recalled

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<sup>621</sup> See, e.g., *Newfoundland and Labrador / Nova Scotia, First Phase*, para 7.6, regarding it as “a striking feature of the negotiating history that none of the participants invoked earlier agreements as binding or formally protested at departures from them” which could “only be explained as based on a shared understanding that any eventual agreement would have to be formalized” and that had not yet occurred.

<sup>622</sup> See, e.g., Chile’s Counter-Memorial, para 1.5.

<sup>623</sup> Bolivia’s Reply, para 453.

<sup>624</sup> See Bolivia’s Reply, fn 674. In the five documents cited in that footnote, it is evident that Bolivia did not consider an obligation to negotiate to exist. See Minutes of the 2nd Meeting of the General Commission, 22nd Regular Session of the OAS General Assembly, 19 May 1992, **BR Annex 336**, pp 301 and 303 (describing negotiation as being the “most appropriate” and “most efficient” means to overcome differences between the two States, describing dialogue as an “ideal recourse” for seeking solutions, and stating that it is “completely open” to enter into “frank, friendly and brotherly talks”); Minutes of the 3rd Meeting of the General Commission, 23rd Regular Session of the OAS General Assembly, 9 June 1993, **BR Annex 338**, pp 274-275 (stating that Bolivia “promotes” negotiations as the “most efficient means” to satisfy its demand for an outlet to the sea and describing dialogue as the “most appropriate recourse” for seeking solutions); Verbatim Record of the 21st Plenary Meeting, 50th Session of the UN General Assembly, UN Doc A/53/PV.21, 30 September 1998, **BR Annex 343**, p 18 (stating that “now is the time for economic integration and a *political* solution for access to the ocean” (emphasis added)); Minutes of the 4th Plenary Meeting, 29th Regular Session of the OAS General Assembly, 8 June 1999, **BR Annex 345**, pp 196-197 (referring to the “historical justice” behind Bolivia’s claim, and stating that Bolivia “proposes” to commence negotiations within “the framework of a remarkable agreement of political cooperation and economic integration” and in keeping with the “spirit” of the 1979 OAS Resolution); and Verbatim Record of the 20th Plenary Meeting, 54th Session of the UN General Assembly, UN Doc A/54/PV.20, 1 October 1999, **BR Annex 346**, p 10 (stating that Bolivia has “decided” to insist on calling for dialogue, the terms of which were not yet defined but, in the Minister’s “opinion”, should encompass the complete range of the States’ relations and identify ways for “economic, cultural and political cooperation”).

Chile's commitment on several occasions"<sup>625</sup> but does not actually refer to any such occasion, because there is none.

**B. These proceedings are a function of a change in position by Bolivia**

8.13. After having said in January 2011 that there were no deadlines for resolving the maritime issue,<sup>626</sup> in February 2011 Bolivia's President issued an ultimatum, stating: "I will wait until 23 March for a concrete proposal that may act as a basis for a discussion".<sup>627</sup> On 23 March 2011, the Bolivian President then 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 our 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".<sup>628</sup>

8.14. This was prompted by the Bolivian Constitution, adopted in 2009, under which the Executive was required to "denounce and, if necessary,

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<sup>625</sup> Bolivia's Reply, para 13.

<sup>626</sup> "Bolivia and Chile open dialogue to discuss outlet to the sea", *La Razón* (Bolivia), 18 January 2011, **CCM Annex 352**, p 2882. See also "Bolivia and Chile engage in formal dialogue on maritime outlet", *Página Siete* (Bolivia), 18 January 2011, **CCM Annex 353**, p 2885: "Choquehuanca said that there are no deadlines to reach an agreement".

<sup>627</sup> "Evo requests Chile to submit a maritime proposal before 23 March for discussion", *Agencia Efe* (Spain), 17 February 2011, **CCM Annex 356**, p 2899. See also Minutes of the 4th Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**, p 158 ("the President of my country asked the Chilean President, publicly and in a respectful and fraternal context, to submit a proposal 'by 23 March'"); and "The Unknown offer from Piñera to Bolivia", *La Tercera* (Chile), 11 January 2015, **BR Annex 369**, p 1523, reporting that at the end of February 2011, the Bolivian Vice-Minister for Foreign Affairs "warned" the Special Representative of the Chilean Foreign Minister that "there was little time left and that if there was no concrete progress, Morales would bang his fist on the table [and leave the negotiations]".

<sup>628</sup> Speech delivered by President Evo Morales, 23 March 2011, **CCM Annex 358**, p 2911. See also "The Unknown offer from Piñera to Bolivia", *La Tercera* (Chile), 11 January 2015, **BR Annex 369**, p 1523: "the Bolivian Government demanded a written proposal from Chile. Chile argued that an agreement had to be reached first and then a proposal could be formally submitted, otherwise, what was left in writing by Chile would be claimed in the future by La Paz. Without a formal and written proposal, on March 23rd, in the speech of the Day of the Sea, Morales announced the filing of the claim before The Hague. The time for Chile and Bolivia to explore solutions, apparently, was closed".



renegotiate those international treaties that are contrary to the Constitution”,<sup>629</sup> including those contrary to Bolivia’s self-proclaimed “unwaivable and imprescriptible right over the territory giving access to the Pacific Ocean”.<sup>630</sup>

8.15. Accordingly, before the OAS General Assembly in 2012, the Bolivian Foreign Minister “demand[ed] the Government of the Republic of Chile to renegotiate the 1904 Treaty”.<sup>631</sup> He further stated that Bolivia made “the specific proposal of renegotiation, under the framework of our Political Constitution”.<sup>632</sup> The following day, the Bolivian Vice-Minister of Foreign Affairs was reported as stating: “We are asking for a renegotiation as required by our Constitution”.<sup>633</sup>

8.16. The Constitution required the Executive to take action: “Within 4 years of its appointment”,<sup>634</sup> which was by December 2013. With this deadline approaching, on 6 February 2013 the Bolivian Senate specified that the Executive could fulfill the relevant duty not only by renegotiating treaties, but also by challenging such treaties before international tribunals.<sup>635</sup> 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

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<sup>629</sup> Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **CR Annex 447**, Ninth Transitional Provision.

<sup>630</sup> Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **CR Annex 447**, Article 267(1).

<sup>631</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 5 June 2012, **CCM Annex 363**, p 204.

<sup>632</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 5 June 2012, **CCM Annex 363**, p 219.

<sup>633</sup> “Bolivia demands at OAS that Chile renegotiate the 1904 Treaty”, *La Razón* (Bolivia), 6 June 2012, **CCM Annex 364**, p 2977.

<sup>634</sup> Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **CR Annex 447**, Ninth Transitional Provision.

<sup>635</sup> 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 3013 and 3015.

Constitution of the State, and most certainly this will be done with the 1904 Treaty.”<sup>636</sup>

Two months later, in April 2013, Bolivia filed its Application with the Court.

8.17. Once Bolivia had decided to commence this case for reasons concerned with its Constitution and its domestic politics, it then formulated its legal theory. The difficulty for Bolivia is that this legal theory is unconnected to the reality of the interactions between the two States in the preceding decades, during which neither State created, confirmed or even mentioned any legal obligation to negotiate, and during which what was negotiated was not any transfer of sovereignty over coastal territory.

8.18. The result has been that Bolivia is literally making up its case, and changing it, as these proceedings unfold. Bolivia has changed its case not only on the formation of the obligation to negotiate it asserts, as explained in Section A, but also on its breach. In its Memorial, Bolivia alleged two breaches, over extended periods of time: (i) “degradation of the negotiation terms” *from 1895 to 1978*,<sup>637</sup> and (ii) a refusal by Chile to negotiate sovereign access *since 1987*.<sup>638</sup> Now, Bolivia argues that it was in 2011 that Chile breached and “repudiated” the alleged obligation to negotiate.<sup>639</sup> On Bolivia’s new case, up to 2011 the two

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<sup>636</sup> “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 2993. 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*” (“The 1904 Treaty has never been considered as being contrary to the Constitution”); and CR 2015/19, 6 May 2015, pp 45-46, paras 21-22.

<sup>637</sup> See Bolivia’s Memorial, paras 400-439. See especially Bolivia’s Memorial, para 410: “The starting point is the 1895 Transfer Treaty”.

<sup>638</sup> See Bolivia’s Memorial, paras 440-486. See especially Bolivia’s Memorial, para 465, claiming that: “Since 1987” Chile has stated “its categorical refusal to engage in any negotiation over a sovereign access”. See also, e.g., Bolivia’s Memorial, paras 17, 443, 469 and 475.

<sup>639</sup> Bolivia’s Reply, para 352.

States were acting in compliance with any obligation to negotiate to which Bolivia now regards them as having been subject.<sup>640</sup>

8.19. Rather than addressing the role of its own Constitution, which Bolivia did not once mention in its Reply, Bolivia emphasizes its assertion that a “repudiation” by Chile in 2011 “forced Bolivia to resort to the Court”.<sup>641</sup> Bolivia asserts this breach and repudiation twelve times in its Reply.<sup>642</sup> In support of these twelve assertions, Bolivia cites only four annexes,<sup>643</sup> none of which supports Bolivia’s allegation.

8.20. Three of the annexes are irrelevant. They date respectively from 1994, 2004 and 2008.<sup>644</sup> None of them could possibly be construed as containing any repudiation of any obligation to negotiate. The fourth annex, which is from 2011, is Chile’s letter to Bolivia reacting to the letter that Bolivia sent to the Court in the *Peru v. Chile* proceedings.<sup>645</sup> Bolivia’s letter to the Court was the first time since democracy was restored in Chile in 1990 that Bolivia had claimed that Chile was subject to any legal obligation to negotiate.<sup>646</sup> Chile responded that it was subject to no such obligation.<sup>647</sup> Chile did not, however, refuse to continue the joint study

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<sup>640</sup> See, e.g., Bolivia’s Reply, para 476.

<sup>641</sup> Bolivia’s Reply, para 472. See also Bolivia’s Reply, paras 13 and 382.

<sup>642</sup> Bolivia’s Reply, paras 13, 88, 116, 124, 319, 340, 346, 348, 349, 352, 382 and 472.

<sup>643</sup> See Bolivia’s Reply, fns 123 and 708.

<sup>644</sup> See Statement by the Under-Secretary of Foreign Affairs of Chile at the 2nd Session of the General Commission of the General Assembly of the OAS, 7 June 1994, **BM Annex 218**; Statement by the Foreign Affairs Minister of Chile at the 4th Plenary Session of the General Assembly of the OAS, 8 June 2004, **BM Annex 226**; and Statement by the Foreign Affairs Minister of Chile at the 4th Plenary Session of the General Assembly of the OAS, 3 June 2008, **BM Annex 228**.

<sup>645</sup> Bolivia’s Reply, fn 123, citing **BM Annex 82**. The translation in **BM Annex 82** is incorrect, and Chile has resubmitted that document as Letter from the Ministry of Foreign Affairs of Chile to the Ministry of Foreign Affairs of Bolivia, 8 November 2011, **CR Annex 451**.

<sup>646</sup> See para 8.12 above.

<sup>647</sup> See Letter from the Ministry of Foreign Affairs of Chile to the Ministry of Foreign Affairs of Bolivia, 8 November 2011, **CR Annex 451**, p 1 of the original: “No antecedent mentioned in the letter of 8 July 2011 allows the inference of a recognition of the existence of an obligation to negotiate sovereign access to the sea, or of an alleged right of sovereign access to the sea”.

of feasible practical initiatives to improve Bolivia's access to the sea that was then ongoing.<sup>648</sup>

8.21. For the sake of completeness, Chile notes that in addition to citing these four annexes, Bolivia's Reply refers to paragraphs of its Memorial that cite three other pieces of evidence.<sup>649</sup> None of them assists Bolivia either.

8.22. First, in its Memorial Bolivia claimed that Chile "suddenly cancelled" the Political Consultation Mechanism (*PCM*) meeting planned to take place in November 2010 and "pulled out of further negotiations".<sup>650</sup> As Chile explained in its Counter-Memorial, that is misleading and does not acknowledge that it was decided that diplomatic dialogue at the ministerial level would continue in replacement of the PCM.<sup>651</sup> In its Reply, Bolivia now acknowledges that decision.<sup>652</sup>

8.23. Secondly, in its Memorial,<sup>653</sup> Bolivia also claimed that Chile left "no doubt" that it had "renounced" its obligation to negotiate when the President of

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<sup>648</sup> In its Application, Bolivia also referred to a statement by the Chilean Foreign Minister before the UN General Assembly in 2012. See Bolivia's Application, para 29. The Foreign Minister stated that "Bolivia has no right to claim access to the sea". He also made clear, however, that Chile was willing to discuss practical initiatives to improve Bolivia's access to the sea, stating "Chile has continued to convey to Bolivia its readiness for brotherly dialogue, based on full respect for the treaties in force, which provide significant benefits for both peoples. It is in the hands of Bolivia to accept that invitation". The Foreign Minister also stated that "there are no outstanding border issues" between the States: Statement by the Minister of Foreign Affairs of Chile, 67th Session of the UN General Assembly, A/67/PV.15, 28 September 2012, **CR Annex 453**, p 41. On the final point, see paras 8.23-8.25 below.

<sup>649</sup> See Bolivia's Memorial, paras 215-219, cross-referenced in Bolivia's Reply, fn 530.

<sup>650</sup> Bolivia's Memorial, para 215.

<sup>651</sup> See Chile's Counter-Memorial, paras 9.20-9.21. See also Minutes of the 4th Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**, p 165: "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".

<sup>652</sup> Bolivia's Reply, para 467. Bolivia's only response was to say that this further dialogue was "the consequence" of the cancellation of the PCM. See Bolivia's Reply, para 466. That is not correct (see fn 651 above) but, even if it were, that would be irrelevant, since dialogue continued.

<sup>653</sup> See Bolivia's Memorial, para 217.

Chile stated in the UN General Assembly in September 2011 that “there are no territorial issues pending between Chile and Bolivia”.<sup>654</sup>

8.24. The artificiality of Bolivia’s position is evident from the fact that Chile has frequently expressed the same position, without ever before provoking any reaction from Bolivia that Chile had breached or repudiated any obligation to negotiate. For example, before the OAS, Chile has stated: (i) in 1993, that the statements of the Bolivian Foreign Minister “compel us to reiterate what Chile has invariably upheld: territorial issues with Bolivia have been resolved” in the 1904 Peace Treaty;<sup>655</sup> (ii) in 1998, “the government of Chile has frequently stated that it considers that territorial issues and sovereignty between Chile and Bolivia were definitively resolved” in the 1904 Peace Treaty;<sup>656</sup> (iii) in 2000, “[t]here is no territorial dispute between Chile and Bolivia, since all matters of territorial sovereignty were definitively settled” with the 1904 Peace Treaty;<sup>657</sup> (iv) in 2001, “[w]e also reiterate that there are no pending territorial or border issues between Chile and Bolivia. The Treaty of Peace and Amity, signed in 1904, fixed the border between our countries and constitutes the permanent basis on which our bilateral relations are based”;<sup>658</sup> (v) in 2002, “[w]e reiterate that there is no territorial dispute between Chile and Bolivia”;<sup>659</sup> (vi) in 2003, “[a]gain, we wish to reiterate that there is no territorial dispute between Chile and Bolivia”,<sup>660</sup> and

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<sup>654</sup> Statement by the President of the Republic of Chile, 22 September 2011, **BM Annex 164**, p 593. In paragraph 217 of its Memorial, Bolivia misquotes **BM Annex 164** (as stating that there are no “outstanding border disputes”).

<sup>655</sup> Minutes of the 3rd Meeting of the General Commission, 23rd Regular Session of the OAS General Assembly, 9 June 1993, **BR Annex 338**, p 275.

<sup>656</sup> Minutes of the 3rd Plenary Meeting of the OAS General Assembly, 2 June 1998, **CCM Annex 316**, p 91.

<sup>657</sup> Minutes of the 4th Plenary Meeting, 30th Regular Session of the OAS General Assembly, 6 June 2000, **BR Annex 348**, p 168.

<sup>658</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 5 June 2001, **CR Annex 441**, p 141.

<sup>659</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 4 June 2002, **CCM Annex 324**, p 197.

<sup>660</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 10 June 2003, **CR Annex 442**, p 140.

(vii) in 2004, that the 1904 Peace Treaty “put an end to any dispute or situation between our countries”.<sup>661</sup>

8.25. Bolivia has never alleged that any of these statements by Chile breached or repudiated any obligation to negotiate. Indeed, Bolivia did not allege that Chile was under any obligation to negotiate at the time of these statements. Rather, Bolivia argued that its position was “based on *historical, political, and economic* considerations that no-one can undermine”,<sup>662</sup> not *legal* considerations.<sup>663</sup>

8.26. Thirdly, in its Memorial Bolivia claimed that in the OAS in June 2011 the Chilean Foreign Minister “bluntly responded that Chile ‘is not in a position to grant Bolivia a sovereign access to the Pacific Ocean’”.<sup>664</sup> What the Foreign Minister said was that: (i) Chile was not in a position to cede territory; but (ii) Chile was willing to continue to discuss practical initiatives that would have improved Bolivia’s access to the sea. Chile’s Foreign Minister quoted Bolivia’s declaration in its 2009 Constitution of its “unwaivable and imprescriptible *right over the territory* giving access to the Pacific Ocean”,<sup>665</sup> and stated that:

“Bolivia’s claim that it must obtain a useful and sovereign access to the Pacific Ocean through territory that is an integral and indivisible part of Chile and that was legally recognized as such by the Treaty of 1904, *as such claim was set forth in Bolivia’s new Constitution*, which I have already mentioned, unfortunately cannot be accepted by my country or by the international legal system. Chile has indicated very clearly that it is not in a position

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<sup>661</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 8 June 2004, **CCM Annex 332**, p 166.

<sup>662</sup> Minutes of the 3rd Plenary Meeting of the OAS General Assembly, 2 June 1998, **CCM Annex 316**, p 89 (emphasis added).

<sup>663</sup> See Chile’s Counter-Memorial, para 10.2. See also Minutes of the 4th Plenary Meeting of the OAS General Assembly, 5 June 2001, **CR Annex 441**, pp 142-143 (Chile) and p 144 (Bolivia).

<sup>664</sup> Bolivia’s Memorial, para 218, quoting **BM Annex 232**, p 846. Chile resubmitted a more complete version of **BM Annex 232** as Minutes of the 4th Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**.

<sup>665</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**, p 164 (emphasis added).

to grant Bolivia sovereign access to the Pacific Ocean, much less without any compensation.”<sup>666</sup>

Although ruling out any transfer of sovereignty over territory, Chile’s Foreign Minister stated multiple times in the same speech that Chile remained willing to discuss practical initiatives that would have improved Bolivia’s access to the sea.<sup>667</sup>

8.27. Bolivia did not contemporaneously consider Chile’s position to be a repudiation of anything, since Bolivia continued the discussions in which it was engaged with Chile. For example, on 28 July 2011, the Presidents of the two States met and, as recorded in the Chilean minutes of that meeting, Chile’s 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”.<sup>668</sup> Chile’s President—

“reiterated that a concrete proposal had been made in December [2010], 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”<sup>669</sup>

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.<sup>670</sup> As is clear from the above quote, two premises of these talks

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<sup>666</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**, p 166 (emphasis added).

<sup>667</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 7 June 2011, **CCM Annex 359**, p 166.

<sup>668</sup> Chilean Minutes of the Meeting between the Presidents of Chile and Bolivia, 28 July 2011, **CCM Annex 360**, para 3.3.

<sup>669</sup> Chilean Minutes of the Meeting between the Presidents of Chile and Bolivia, 28 July 2011, **CCM Annex 360**, para 4.

<sup>670</sup> Chilean Minutes of the Meeting between the Presidents of Chile and Bolivia, 28 July 2011, **CCM Annex 360**, paras 4.3 and 5.

were “No sovereignty” and that a “solution” be found to change the Bolivian constitutional provision declaring Bolivia’s “right” to “territory giving access to the Pacific Ocean”.<sup>671</sup> Chile set this out in its Counter-Memorial,<sup>672</sup> and Bolivia did not respond in its Reply.

8.28. Chile was not in a position to grant a transfer of sovereignty over its territory and made this clear. Again, the artificiality of Bolivia’s claim of repudiation in 2011 is evident from the fact that Chile had said this on other occasions since 1990.

8.29. Before the OAS in 1996, the Chilean Foreign Minister stated that: “Chile is willing to discuss new modalities of access to the sea for Bolivia, provided that *imaginative formulas* are used that *do not mean cessation of sovereignty by Chile*”.<sup>673</sup> Similarly, before the OAS in 1997, the Foreign Minister stated that Chile has “granted Bolivia the largest and most extensive facilities for access to the sea. Chile is willing to continue down the same path, but *cannot under any circumstances include the cession of territorial sovereignty*.”<sup>674</sup>

8.30. Before the OAS in 2008, the Chilean Foreign Minister stated that the maritime issue—

“is a question of exploring, constructively and creatively, formulas that make possible a better access to the Pacific Ocean for Bolivia, Chile reserving its legal and political positions on the matter. Therefore, *the goal of this process cannot be a sovereign outlet to the sea, because if that were the case, my country would not have agreed to include this item in the agenda.*”<sup>675</sup>

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<sup>671</sup> Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **CR Annex 447**, Article 267(1).

<sup>672</sup> Chile’s Counter-Memorial, para 9.25.

<sup>673</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 4 June 1996, **CR Annex 438**, p 83 (emphasis added).

<sup>674</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 3 June 1997, **CR Annex 439**, p 187 (emphasis added).

<sup>675</sup> Minutes of the 4th Plenary Meeting of the OAS General Assembly, 3 June 2008, **CCM Annex 340**, p 166 (emphasis added).



8.31. Chile had repeatedly stated that it was willing to consider “practical” and “realistic” ways to improve Bolivia’s access to the sea, not a transfer of sovereignty over territory. The minutes of the final three PCM meetings—minutes agreed between Bolivia and Chile—use the terms “constructive and realistic”,<sup>676</sup> “realistic and practical”,<sup>677</sup> and “feasible and useful”.<sup>678</sup> As recorded in the PCM minutes from 2007 and 2008, “taking into account the conditions prevailing in Chile and Bolivia”, the two States concurred that there was a need “to keep the bilateral dialogue constructive” and focus on “criteria that were shared”.<sup>679</sup> They recorded their “realistic and future-oriented approach”.<sup>680</sup> Contrary to the allegations Bolivia now makes, since 1990 no proposal on which the two States conducted negotiations provided for the transfer to Bolivia of sovereignty over coastal territory.

(a) In its Reply, Bolivia claimed that in 1990 the Chilean Foreign Minister had stated that he was willing to “cede” an enclave in Pisagua, in which Bolivia would be able to “exert sovereignty”.<sup>681</sup> The Chilean Foreign Minister explicitly stated that what was discussed was “an enclave in the Port of Pisagua, *without altering in any way our sovereignty*”.<sup>682</sup> This enclave was rejected by Bolivia.<sup>683</sup>

(b) Negotiations between 2001 and 2003 regarding a non-sovereign, Special Economic Zone for Bolivia on Chile’s coast reached an advanced stage, with the text of a draft agreement being agreed.<sup>684</sup> Here, the interests of the two States—including Bolivia’s interest in improving its access to the sea and the

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<sup>676</sup> Minutes of the 20th Meeting of the PCM, 30 June 2009, **CCM Annex 344**, p 2695.

<sup>677</sup> Minutes of the 21st Meeting of the PCM, 13 November 2009, **CCM Annex 346**, p 2747.

<sup>678</sup> Minutes of the 22nd Meeting of the PCM, 14 July 2010, **CCM Annex 348**, p 2787.

<sup>679</sup> Minutes of the 17th Meeting of the PCM, 19 October 2007, **CCM Annex 339**, pp 2571 and 2573.

<sup>680</sup> Minutes of the 18th Meeting of the PCM, 17 June 2008, **CCM Annex 341**, p 2611.

<sup>681</sup> Bolivia’s Reply, para 448.

<sup>682</sup> E. Silva Cimma, *The Last Patience* (2012), **CR Annex 452**, p 35 (emphasis added).

<sup>683</sup> “Silva Cimma’s disclosure on Aylwin, Pinochet and boundary issues”, *El Mercurio* (Chile), 21 July 2012, **BR Annex 367**, pp 1511 (“Bolivians did not care for the offer of Pisagua as an enclave”) and 1513 (“They did not care for it”).

<sup>684</sup> See Chile’s Counter-Memorial, paras 9.10-9.12.

economic interests of both States—were complementary. However, as stated in Chile’s Counter-Memorial, and not contested in Bolivia’s Reply, Bolivia ultimately chose to reject this agreement.<sup>685</sup>

(c) As also set out in Chile’s Counter-Memorial, during the first administration of President Bachelet (2006-2010), the two States discussed a potential non-sovereign coastal enclave for Bolivia.<sup>686</sup> In its Reply, Bolivia does not contest that the enclave would have been on territory that remained under the sovereignty of Chile. Bolivia does claim that it would have had “sovereign rights”, including “legislative and judicial attributions, and administration and executive power” in the enclave, and that this would have been an interim arrangement pending a “definitive solution” that “would include sovereignty”.<sup>687</sup> The document that Bolivia cites in support of this claim is undated, has no identified author and appears to have been created for political purposes internal to Bolivia.<sup>688</sup> It should be given no weight. The other documents that Bolivia has annexed relating to these discussions confirm that the proposal under consideration would have involved far less extensive rights for Bolivia.<sup>689</sup>

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<sup>685</sup> Chile’s Counter-Memorial, para 9.12; and Bolivia’s Reply, para 457.

<sup>686</sup> Chile’s Counter-Memorial, para 9.19.

<sup>687</sup> Bolivia’s Reply, para 464.

<sup>688</sup> Content of the talks held between the Delegations of Chile and Bolivia regarding point 6 of the Agenda of the 13 Points: Maritime Issue, **BR Annex 362**, cited in Bolivia’s Reply, fn 697.

<sup>689</sup> See, e.g., **BR Annex 363**, a correct translation of which has been resubmitted as “The Bolivian enclave that Piñera stopped” and “The formula that is most suitable for the President”, *La Tercera* (Chile), 5 December 2010, **CR Annex 448**, pp 3 and 5 of the original (“There were two non-negotiable conditions for the Chilean Government: the solution had to be without a cession of sovereignty and it could not divide Chilean territory”, emphasized a former Minister of Bachelet”, and “it was contemplated to build a port for the export of iron and lithium minerals from Bolivia and a tourist zone. ... They asked that they be authorized to build an urban axis in the enclave, adjacent to the industrial sector”); **BR Annex 364**, a correct translation of which has been resubmitted by Chile as “Moreno and the enclave: ‘Alternatives that divide the country are not beneficial’”, *La Tercera* (Chile), 6 December 2010, **CR Annex 449**, p 1 of the original (“The Bolivian government was asking for about 400 km<sup>2</sup>, a wharf to export minerals, and the possibility of building an urban and tourism zone there”); and **BM Annex 143**, a correct and complete translation of which has been resubmitted by Chile as “Bachelet offered 28 km to Bolivia”, *El Deber* (Bolivia), 6 February 2011, **CR Annex 450**, pp 1-2 of the original (“there was no talk of sovereignty”,

(d) Following a change in government in Chile, at a meeting in December 2010 the new Chilean President made a “concrete proposal” to the Bolivian President, involving two options: first, a non-sovereign coastal enclave to the north of Arica and, secondly, an industrial development hub.<sup>690</sup> Bolivia acknowledges this in its Reply, stating that “in February 2011, Chile held informal talks with Bolivia, related to an access to the sea *without sovereignty* through an enclave located on the beach of Las Machas, on the northern front of Arica” (that is, the first option).<sup>691</sup>

8.32. In the context of Bolivia’s Constitutional provisions of recent vintage, and Bolivian domestic politics, the Bolivian Government considered it politically expedient not to continue the constructive engagement on practical initiatives, but instead to seise the Court in pursuit of a transfer of sovereignty over coastal territory, in the full knowledge that this was not something that Chile could grant,<sup>692</sup> and was not what the two States had negotiated over the course of the decades since Chile returned to democracy.

8.33. Following the engagement between Bolivia and Chile during this period, it ultimately became apparent that Bolivia’s interests and Chile’s interests were irreconcilable.<sup>693</sup> Chile made clear that it was not in a position to transfer sovereignty over territory.<sup>694</sup> Although the two States had engaged constructively on practical initiatives that did not provide for any transfer of sovereignty over

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and “the proposal had to contemplate the terrain to construct a city, an airport and its roads, ports and an ample beach to sunbathe and make business”).

<sup>690</sup> See Chile’s Counter-Memorial, para 9.20. This “concrete proposal” is referred to in Chilean Minutes of the Meeting between the Presidents of Chile and Bolivia, 28 July 2011, **CCM Annex 360**, para 4.

<sup>691</sup> Bolivia’s Reply, para 469 (emphasis added).

<sup>692</sup> Including because democratic constraints in Chile made, and make, any such transfer untenable. As stated in one of the documents exhibited by Bolivia (**BM Annex 143**, but in a sentence Bolivia did not translate): “Surveys reflect that 80 percent of Chileans do not support the cession of territory with sovereignty” to Bolivia. See “Bachelet offered 28 km to Bolivia”, *El Deber* (Bolivia), 6 February 2011, **CR Annex 450**, p 3 of the original.

<sup>693</sup> See para 2.59 above.

<sup>694</sup> See paras 8.26-8.30 above.

territory, Bolivia created for itself a constitutional duty to pursue and achieve such a transfer. In addition to the provisions already quoted above,<sup>695</sup> the Bolivian Constitution declares that the “effective solution of the maritime dispute through peaceful means and the *full exercise of sovereignty over that territory* constitute permanent and unwaivable objectives of the Bolivian State.”<sup>696</sup> As stated by the President of Bolivia: “It is the duty of our Government to comply with our constitutional mandate”.<sup>697</sup> The Bolivian Government having taken the decision to seek to fulfil this duty, further negotiations became futile.<sup>698</sup>

### Conclusion

8.34. It is clear from the terms of the 2000 Algarve Declaration and the 2006 13-Point Agenda that neither State considered that any kind of legal obligation to negotiate was being created in those instruments and that no form of continuous legal obligation to negotiate was being carried over from an earlier time. Those documents proceeded on the basis of the political desire that then existed to look for new practical initiatives that did not concern sovereignty over territory.

8.35. Bolivia seised the Court in April 2013 due to the December 2013 deadline it set for itself in its Constitution of 2009. Bolivia abandoned bilateral engagement on practical initiatives, and resolved to pursue a transfer of sovereignty over territory, knowing that Chile could not grant it.

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<sup>695</sup> See para 8.14 above.

<sup>696</sup> Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **CR Annex 447**, Article 267(2) (emphasis added).

<sup>697</sup> Speech delivered by President Evo Morales, 23 March 2011, **CCM Annex 358**, p 2909.

<sup>698</sup> See paras 2.58-2.59 above.

## CHAPTER 9. NO LEGAL OBLIGATION WAS CREATED BY AN ACCUMULATION OF CONDUCT

9.1. Bolivia's inability to identify any credible source for an obligation to negotiate in the individual episodes on which it relies has led Bolivia to argue that, irrespective of whether any of those individual episodes gave rise to an obligation to negotiate,<sup>699</sup> the cumulative effect of Chile's conduct over more than a century did just that.<sup>700</sup>

9.2. Bolivia asserts that there has been a "cumulative course of conduct over time",<sup>701</sup> that has been both "consistent and continuous",<sup>702</sup> and has "since the nineteenth century"<sup>703</sup> been motivated by the Parties' unfulfilled "historical bargain".<sup>704</sup> Bolivia argues that this constitutes "a distinct legal basis of the obligation to negotiate, based either on Chile's intent or on the doctrines of estoppel and legitimate expectations."<sup>705</sup> This is all plainly without foundation either in fact or in law.

9.3. This chapter first demonstrates that, as a matter of fact, there was no consistent and continuous course of conduct recognizing any obligation to negotiate on sovereign access (**Section A**). It then explains that Chile's conduct could not have created any legal obligation through any of the methods on which Bolivia relies, namely an intention to be bound by international law (**Section B**), estoppel (**Section C**), legitimate expectations (**Section D**) or acquiescence (**Section E**).

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<sup>699</sup> Bolivia oscillates in its Reply between this being an additional argument and an alternative argument. Compare, e.g., paras 6 and 319 (referring to an alternative argument) with paras 13, 155, 160 and 162 (framing the argument as an additional basis for the alleged obligation, which would of course then pose the issue of one obligation superseding and terminating another, addressed at paras 2.50-2.53 above).

<sup>700</sup> Bolivia's Reply, para 162, and also paras 2, 6, 13, 27, 147, 155, 160, 166 and 176.

<sup>701</sup> Bolivia's Reply, para 162.

<sup>702</sup> Bolivia's Reply, paras 13, 141, 177 and 198.

<sup>703</sup> Bolivia's Reply, para 197.

<sup>704</sup> Bolivia's Reply paras 8, 13, 142, 188 and 197-198. On the "historical bargain", see Chapter 3 above.

<sup>705</sup> Bolivia's Reply, para 155. See further Bolivia's Reply, paras 160 and 176.

**A. There was no consistent and continuous course of conduct recognizing any obligation to negotiate concerning sovereign access**

9.4. Each episode of engagement on which Bolivia now relies occurred at a different point in time, in different circumstances and had a different content. Bolivia ignores material differences between these episodes in an attempt to fit more than a century of disparate conduct into its new legal argument, which relies on those facts being consistent and continuous.

9.5. This contrived consistency and continuity between the different historical episodes is a consequence of Bolivia's changing case, rather than the actual practice between the Parties over time. This is clear not least from the fact that, in its Memorial, Bolivia argued that from 1895 to 1978 there was a progressive degradation of negotiation terms, and since 1987 a refusal by Chile to negotiate on sovereign access, both of which constituted breaches of the obligation to negotiate alleged.<sup>706</sup> In the Reply, by contrast, Bolivia argues that there was consistent and continuous conduct from prior to 1895 through to 2011, but divided into five periods "all of which are linked to the original historical bargain and the commitment that it generated on the part of Chile"<sup>707</sup> to negotiate with Bolivia concerning sovereign access to the Pacific Ocean. For Bolivia, the very same collection of facts which in the Memorial constituted breaches of an obligation to negotiate, through a progressive degradation of negotiation terms, and ultimately a refusal to negotiate from 1987 onwards, is now said in the Reply to constitute a consistent and continuous course of conduct that created and reaffirmed one coherent legal obligation to negotiate sovereign access, with which the two States were in compliance up until 2011.

9.6. The discontinuity and differences between the various interactions on Bolivia's access to the sea at specific points in time are plain:

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<sup>706</sup> See Bolivia's Memorial, para 3 and Chapter III, Sections I ("Degradation of the Negotiations Terms") and II ("The Refusal of Chile to Negotiate a Sovereign Access to the Sea and its Consequences"), especially paras 410, 430, 434, 443-448, 465, 469 and 475.

<sup>707</sup> Bolivia's Reply, para 198.

(a) In the negotiations leading to the apportionment of sovereignty over territory in the 1904 Peace Treaty, Chile indicated that it was not willing to concede a port to Bolivia and Bolivia abandoned its claim to a port so as to obtain “much-needed communication routes”, which it regarded as “compensation for an element of progress that was being eliminated by another that could be provided”.<sup>708</sup>

(b) Sixteen years later, the 1920 minutes explicitly stated that they did not “create rights or obligations” and preserved the States’ “respective interests” in further diplomatic efforts.<sup>709</sup> In subsequent statements, Chile indicated only that it would be pleased to listen to and discuss any proposal Bolivia might make concerning means of better facilitating its development, including improving its access to the sea.<sup>710</sup> These events took place against the background of Bolivia seeking the revision of the settlement agreed in the 1904 Peace Treaty, not by reference to any unfulfilled “historical bargain” that Bolivia now alleges preceded and survived the 1904 Peace Treaty.

(c) Decades later, in its 1950 note Bolivia sought that Chile “formally enter into a direct negotiation to satisfy the fundamental need of Bolivia to obtain its own sovereign access to the Pacific Ocean”, but Chile was not willing to accede to this. Chile was open to negotiating, but on different terms, expressed in its note of 20 June 1950 and not accepted by Bolivia.<sup>711</sup> Chile’s note also made clear that Chile would have to obtain compensation that effectively took into account its interests. At the time Chile was attracted by the possibility of using the waters of Bolivia’s northern highlands, particularly Lake Titicaca, for irrigation and hydroelectric power production.<sup>712</sup> When, 13 years later, with no negotiations having taken place, Bolivia first suggested that the 1950 notes constituted a

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<sup>708</sup> See para 3.3(d) above.

<sup>709</sup> See para 4.5 above.

<sup>710</sup> See paras 4.15-4.16, 4.18, 4.20-4.22 and 4.29 above.

<sup>711</sup> See paras 5.3-5.6 and 5.9 above.

<sup>712</sup> See paras 5.4, 5.14(d) and 5.23 above.

“commitment”, Chile rejected that characterization and repeated that rejection again in 1967, following which Bolivia did not respond.<sup>713</sup>

(d) The Charaña process that took place from 1975-1978 was equally a product of its own circumstances. It began with Bolivia resuming diplomatic relations with Chile and ended with Bolivia rupturing them again. After taking power in their respective countries, the military regimes in both Bolivia and Chile expressed a political willingness to “consider” a territorial exchange.<sup>714</sup> Generals Banzer and Pinochet conducted the only actual negotiations to take place since the 1904 Peace Treaty that contemplated addressing Bolivia’s “landlocked situation”<sup>715</sup> through Bolivia obtaining sovereignty over coastal territory. Crucially, this was to be in return for Bolivia transferring to Chile sovereignty over territory of equal size, not pursuant to the unfulfilled nineteenth century “historical bargain” that Bolivia has now contrived.<sup>716</sup> This was a political negotiation conducted between two military regimes that was defined by and confined to its particular circumstances. That an impasse was reached and Bolivia ruptured diplomatic relations is hardly consistent with Bolivia now saying that there was a continuous course of conduct. Further, to the extent that any obligation arose by way of the 1950 notes (it did not) and the Charaña process (which it also did not), the latter would have superseded the earlier.<sup>717</sup> The latter obligation would then have been discharged by the meaningful, sustained, good faith negotiations carried out within the Charaña process, that were pursued as far as possible.<sup>718</sup> Bolivia ignores entirely the effect that this discharge of any putative obligation, and Bolivia again rupturing diplomatic relations, has on its contrived argument regarding a continuous course of conduct.

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<sup>713</sup> See paras 5.31 and 5.33-5.34 above.

<sup>714</sup> See para 6.59 above.

<sup>715</sup> See para 6.4 above.

<sup>716</sup> As to which see paras 6.18, 6.28(d), 6.31-6.32 and 6.34-6.37 above.

<sup>717</sup> See paras 6.60 and 2.50-2.53 above.

<sup>718</sup> See paras 6.60 and 2.54-2.59 above.



(e) The OAS resolutions concerning Bolivia's "maritime problem"<sup>719</sup> were political recommendations to the States concerned that did not proceed on the basis that there was a pre-existing obligation to negotiate arising from the diplomatic conduct in the 1920s, the 1950 notes, the Charaña process or from any unfulfilled "historical bargain".<sup>720</sup> In debates before the OAS in 1987 and 1988, Chile again rejected Bolivia's reference to a pre-existing obligation to negotiate sovereign access to the sea, and Bolivia again did not respond.<sup>721</sup> Equally, Bolivia's suggestion of continuity is disproved both by the fact that there has not been an OAS resolution on the subject since 1989, and by the "Fresh Approach", in which the two States engaged in what was specifically designed as a break from the past, not as an historically continuous process.<sup>722</sup> Those discussions ended in 1987 after Bolivia declined to continue on any basis other than the transfer of Chilean territory to Bolivia, and Chile made clear its considered decision that it could not pursue such a result.<sup>723</sup>

(f) In 1990, with democracy restored in Chile, both Bolivia and Chile recognized the "outdated, tired mentality of the 19th century" and the need to commence discussions from a new and "future-oriented perspective ... leaving in the past everything that has placed us in opposition to one another".<sup>724</sup> This is the opposite of Bolivia's case before the Court, which alleges without foundation that the two States have been proceeding on the basis that further compensation is still owing to Bolivia for having recognized Chile's sovereignty over all territory to the West of the boundary they agreed in the 1904 Peace Treaty. In these most recent decades following 1990, the relevant discussions focused on practical arrangements to further improve Bolivia's access to the sea, not transfer of sovereignty over territory.<sup>725</sup> If there had been an obligation to negotiate by accumulation of episodes, linked through time by the implementation of an

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<sup>719</sup> See paras 7.5-7.7 above.

<sup>720</sup> See para 7.15 above.

<sup>721</sup> See para 5.20 above.

<sup>722</sup> See para 7.26 above.

<sup>723</sup> See para 7.31 and Chile's Counter-Memorial, paras 8.39-8.41.

<sup>724</sup> See paras 8.9-8.12 above.

<sup>725</sup> See para 8.31 above.

“historical bargain” having arisen in the nineteenth century, one would expect in the most recent practice to see (i) reference back to the “historical bargain”, (ii) documents recording the enduring existence of such an obligation, and (iii) both States proceeding on the basis that they were subject to such an obligation.<sup>726</sup> Instead one sees in the bilateral conduct over the most recent decades (i) a focus on new ideas rather than history, (ii) not a single assertion by either State from 1990 to 2011 of the existence of an obligation to negotiate, and (iii) in the Algarve Declaration and 13-Point Agenda, language that is broadly framed and overtly political, that does not refer to any previous exchanges or to sovereign access, and is incapable of creating or confirming any legal obligation.

9.7. The existence of these different episodes of engagement as a matter of fact does not support Bolivia’s assertion that there has been a “*continuity of Chile’s undertakings to negotiate sovereign access to the sea since the nineteenth century*”.<sup>727</sup> Chile has neither consistently nor continuously recognized any legal obligation, by way of “undertaking” or otherwise, to negotiate with Bolivia concerning sovereign access to the sea.

**B. Any repetition of expressions of political willingness did not demonstrate an intention to be legally bound**

9.8. Bolivia’s case that an accumulation of Chile’s statements manifested an intention by Chile to be bound by law to negotiate on sovereign access even if no one statement did so<sup>728</sup> overlooks not only that political willingness cannot be equated with the intent to create a legal obligation,<sup>729</sup> but also that the repetition of

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<sup>726</sup> *Newfoundland and Labrador / Nova Scotia, First Phase*, para 7.6, regarding it as “a striking feature of the negotiating history that none of the participants invoked earlier agreements as binding or formally protested at departures from them” which could “only be explained as based on a shared understanding that any eventual agreement would have to be formalized” and that had not yet occurred.

<sup>727</sup> Bolivia’s Reply, para 197 (emphasis added).

<sup>728</sup> Bolivia’s Reply, e.g., paras 6, 155 and 178.

<sup>729</sup> See paras 2.8-2.12 above.

a statement that does not involve an intention to be bound by international law cannot, through repetition, establish such an intention.<sup>730</sup>

9.9. Bolivia concedes that “mere diplomatic exchanges do not necessarily give rise to legal obligations”,<sup>731</sup> but considers that the diplomatic exchanges in this case, and an accumulation of them, should be treated differently from other ones because of the “specific historical context”<sup>732</sup> in which Bolivia says that Chile’s willingness should be interpreted.<sup>733</sup> This “context” is made up of three parts (i) the “historical bargain”,<sup>734</sup> (ii) “continuity of Chile’s undertakings to negotiate sovereign access to the sea”,<sup>735</sup> and (iii) the “exceptional and consequential”<sup>736</sup> subject-matter under discussion.

9.10. First, as demonstrated in Chapter 3, there is no such “historical bargain”. This is reinforced by each of Chapters 4 to 8, which explain the significant potential compensation envisaged for Chile in its engagements with Bolivia in the 1950s and 1970s,<sup>737</sup> and the statements in all of the different episodes that condition any diplomatic efforts on the taking into account of the respective interests of *both* Parties.<sup>738</sup> The Parties were not proceeding on the basis that Chile had already received its side of a bargain in the form of Bolivia recognizing Chile’s sovereignty over coastal territory in 1904, while Bolivia was yet to receive its side of the bargain.

9.11. Secondly, without the “historical bargain”, Bolivia is deprived of the foundation on which it seeks to manufacture continuity and consistency between

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<sup>730</sup> Chile’s Counter-Memorial, para 4.10; and para 2.12 above. See also *Philippines v. China, Jurisdiction and Admissibility*, para 244: “Repetition of aspirational political statements across multiple documents does not *per se* transform them into a legally binding agreement.”

<sup>731</sup> Bolivia’s Reply, para 181.

<sup>732</sup> Bolivia’s Reply, para 177.

<sup>733</sup> Bolivia’s Reply, para 178.

<sup>734</sup> See, e.g., Bolivia’s Reply, para 142.

<sup>735</sup> See, e.g., Bolivia’s Reply, para 197.

<sup>736</sup> Bolivia’s Reply, para 181.

<sup>737</sup> See paras 5.14(d), 5.23 and 6.28(d) above.

<sup>738</sup> See paras 1.3(d), 3.5-3.20, 4.5, 5.9, 5.14(d), 5.39, 6.2(b), 6.26, 7.15 and 8.31-8.33.

the discrete and different episodes on which it relies. It is in turn that continuity and consistency, which it cannot establish, through which Bolivia seeks unsuccessfully to find an intention to be bound by international law to negotiate on sovereign access.

9.12. Thirdly, Bolivia claims that “Chile’s willingness to enter into formal negotiations with Bolivia, on a matter as exceptional and consequential as sovereign access to the sea” is “exactly why” that willingness “expresses a commitment rather than a mere offer to talk.”<sup>739</sup> Bolivia’s logic is backwards. It is when the stakes are highest that States, if they wish to be bound, make that plain. Such an intention cannot be assumed. It must be manifest. Chile’s careful language in its exchanges with Bolivia demonstrates that it did not intend to bind itself under international law.

### **C. No legal obligation was created by estoppel**

9.13. Relying on contrived notions of continuity, Bolivia asserts the existence of a single representation by Chile, maintained throughout time from some unspecified point prior to 1895, which forms the basis of an estoppel said to take effect for the first time in 2011.<sup>740</sup> Leaving aside that the starting point in the nineteenth century is flawed, the absence of any “continuity of Chile’s undertakings to negotiate sovereign access” in the different episodes throughout the twentieth century,<sup>741</sup> and that in 2011 it was Bolivia that changed its position, prompted by its own Constitution,<sup>742</sup> it is clear that no legal obligation arose by way of estoppel, for three reasons:

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<sup>739</sup> Bolivia’s Reply, para 181.

<sup>740</sup> Bolivia’s Reply, para 340. Bolivia refers to Chile having made “clear and consistent representations” that amount, in essence, to one single and very specific representation: “that there was a need to find a solution to Bolivia’s landlocked status, and that Chile was willing to do so and for negotiations to be held in order to grant Bolivia a sovereign access to the Pacific Ocean”: Bolivia’s Reply, para 342.

<sup>741</sup> See paras 9.4-9.7 above. Cf. Bolivia’s Reply, para 197.

<sup>742</sup> See paras 8.13-8.16 above.

- (a) first, estoppel does not operate where, as here, it is manifest that there was no intent to create a legal obligation;
- (b) secondly, even if estoppel had room to operate, its elements would not be satisfied, as Bolivia did not rely, let alone reasonably and to its detriment, on any representation by Chile; and
- (c) thirdly, even if the elements of estoppel were satisfied (which they cannot be), Chile has not acted inconsistently with or denied the truth of any prior statement or representation it has actually made.

9.14. First, where there is certainty that there is no obligation because it is clear that a State has not expressed an intent to be legally bound, estoppel has no room to operate.<sup>743</sup> As Chapters 3 to 8 have shown, Chile did not express an intention to create a legal obligation to negotiate at any point over the course of a century. This is reinforced by Chile's refutation in 1963, 1967, 1987 and 1988 of Bolivia's attempts to characterize Chile's diplomatic willingness as a "commitment".<sup>744</sup> The mere fact that Bolivia asserted the existence of a "commitment" because it served its political interests to do so at those points in time cannot manufacture the objective uncertainty required for estoppel to operate. This is particularly so in light of the fact that Bolivia (i) never claimed between 1884 and 1963 that Chile's willingness to negotiate had any legal value, (ii) did not respond to Chile's rejection in 1967, 1987 or 1988 of Bolivia's suggestion that the 1950 notes had a legally binding character and (iii) did not at any time following the restoration of democracy in Chile in 1990 again assert that Chile's willingness to negotiate had any legal value until 2011, after it had announced that it would bring this case in accordance with the Bolivian Government's constitutional imperative to do so. It is objectively certain that Chile had no intention to be legally bound to negotiate. Estoppel therefore cannot operate.

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<sup>743</sup> See para 2.21 above; and Separate Opinion of Judge Fitzmaurice, *Temple of Preah Vihear, Merits*, p 63.

<sup>744</sup> See paras 5.20, 5.31 and 5.33-5.34 above.

9.15. Secondly, even if estoppel were relevant, the elements of estoppel would not be satisfied.<sup>745</sup> Bolivia has not proven and is unable to prove that there was a clear and unequivocal statement or representation by Chile, that Bolivia relied to its detriment on that representation, and that any such reliance was reasonable in the circumstances.

9.16. Bolivia has not shown that there was a clear and unequivocal statement or representation maintained by Chile over the course of more than a century that, at all times and in all circumstances, it would engage in negotiations with Bolivia on the topic of a potential grant to Bolivia of sovereign access to the sea. As shown in Section A of this chapter, and throughout this Rejoinder, the language used in the various statements and documents on which Bolivia now relies was different. One thing that they all had in common is that none of them resembles the terms of Bolivia's prayer for relief. Each statement was the intentional result of careful drafting demonstrating differences in the scope of Chile's political willingness at particular points in time, and also differences in the use of key terms with varying meanings ("port problem" / "landlocked situation" / "maritime problem" / "maritime issue"<sup>746</sup>). Chile referred to being "willing to hear"<sup>747</sup> proposals and being "open"<sup>748</sup> to engage with Bolivia "with the utmost spirit of conciliation"<sup>749</sup> or "friendship"<sup>750</sup> to explore potential ways to further improve Bolivia's access to the sea. This is fundamentally different from clearly and unequivocally stating that, at all times and in all circumstances, Chile would negotiate on the topic of a potential grant to Bolivia of sovereign access to the sea. Chile had not

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<sup>745</sup> See para 2.20 above.

<sup>746</sup> See para 9.6(b)-9.6(f) above.

<sup>747</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 737/472, 3 August 1950, **CCM Annex 147**. See also Statement by the President of Chile regarding the port negotiations, 29 March 1951, **BR Annex 278**, p 19 ("willingness to give an ear").

<sup>748</sup> Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, **CR Annex 399**, p 2.

<sup>749</sup> 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**.

<sup>750</sup> Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950, **CR Annex 399**, p 2.

“consistently made it fully clear”<sup>751</sup> that it would engage in negotiations, still less ones with the scope or “specific objective”, now posited by Bolivia.<sup>752</sup> It is therefore not possible to draw the clear and unequivocal inference that Bolivia seeks. This was particularly the case after Chile’s explicit rejection in 1963 and 1967, and again in 1987 and 1988, of Bolivia’s belated assertions that the 1950 notes had legal value.<sup>753</sup> There is no basis on which Bolivia can credibly argue that there was any single representation maintained over time that was clear and unequivocal, or that a collection of different representations somehow amounts to a clear and unequivocal representation by accumulation that arose in the late nineteenth century and continued to exist up until 2011.

9.17. Bolivia also cannot demonstrate that it changed its position to its detriment or suffered prejudice in reliance on the representation the existence of which it alleges. It unsuccessfully seeks to demonstrate detrimental reliance in three ways.<sup>754</sup>

9.18. First, Bolivia argues that: “For more than a century Bolivia has, with the deliberate encouragement of Chile, adhered to the agreement to negotiate a solution to its land-locked status”.<sup>755</sup> This adherence is premised, Bolivia suggests, on its “historical bargain” whereby it claims to have given up its coastal territories in the 1904 Peace Treaty on the basis of a (non-existent) collateral promise that it would later be entitled to negotiate with Chile to obtain sovereign access to the sea further North, on land to the West of the complete boundary agreed between them. Bolivia’s signing of the 1904 Peace Treaty was not a detrimental or prejudicial change in position in reliance on any Chilean statement concerning sovereign access pre-dating 1904, and cannot have been in reliance on

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<sup>751</sup> *Cameroon v. Nigeria, Preliminary Objections*, para 57.

<sup>752</sup> Bolivia’s Reply, para 230.

<sup>753</sup> See paras 5.20, 5.31 and 5.33-5.34 above.

<sup>754</sup> In addition to the three examples of purported reliance, Bolivia also refers to “a change in the relative positions of the parties, worsening that of the one, or improving that of the other, or both” (Bolivia’s Reply, para 346) but provides no evidence of how Bolivia’s position was worsened and no example of how either State’s position was improved as a result of any reliance by Bolivia on any representation it alleges.

<sup>755</sup> Bolivia’s Reply, para 346.

statements made after 1904 to which Bolivia points. In fact, as Chile has demonstrated,<sup>756</sup> the 1904 Peace Treaty reflected a comprehensive settlement, carefully negotiated over a number of years in which Bolivia renounced its coastal territory and its claim to a port in return for the significant benefits conferred on it in the 1904 Peace Treaty. That the present Bolivian Government might regret the choices made by one of its predecessors and enshrined in a peace treaty does not convert those earlier choices into detrimental reliance for the purposes of now pleading estoppel. At the time of the 1904 Peace Treaty, Bolivia considered not that there was a collateral obligation to negotiate, but that the 1904 Peace Treaty “encompasses all of our issues.”<sup>757</sup>

9.19. Secondly, Bolivia regards as “very detrimental” the fact that for “many years, Bolivia has put a great deal of effort into these negotiations, and sovereign access to the sea has been put at the heart of its foreign policy with Chile, on the basis of Chile’s promises”.<sup>758</sup> Bolivia’s continued engagement in diplomatic and political discussions with its neighbour on an issue that has been a long-standing component of their bilateral relations cannot constitute a detrimental or prejudicial change in position.<sup>759</sup>

9.20. Thirdly, Bolivia states that “the absence, so far, of any sovereign access to the sea means that Bolivia still suffers from its landlocked condition.”<sup>760</sup> The continuation of the *status quo* established by the 1904 Peace Treaty in the form of Bolivia not being sovereign over coastal territory cannot constitute the detriment necessary to establish estoppel precisely because it involves no change in position, still less a change made in reliance on any representation by Chile. That Bolivia may now consider its current position detrimental to it does not mean that it has

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<sup>756</sup> See Chapter 3 above and Chapter 3 of Chile’s Counter-Memorial.

<sup>757</sup> Chile’s Counter-Memorial, para 3.6, quoting Bolivia, Congressional Record, 2 February 1905, **CPO Annex 30**, p 119.

<sup>758</sup> Bolivia’s Reply, para 348.

<sup>759</sup> See *Pedra Branca*, para 228; and *Bay of Bengal*, para 125.

<sup>760</sup> Bolivia’s Reply, para 348.



changed its position to its detriment as a result of a representation by Chile, as would be necessary to establish estoppel.

9.21. The next element of estoppel that Bolivia cannot show is that any reliance to its detriment on a representation by Chile, if established, would have been objectively reasonable in the circumstances. This is so for four reasons.

9.22. First, Bolivia purports to have relied on documents that show Chile's general political willingness to listen to Bolivia, including regarding the improvement of its access to the sea, as a basis for a very specific "obligation to negotiate in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean".<sup>761</sup> Reliance on general expressions of political and diplomatic willingness framed in qualified and carefully chosen language and accompanied by an explicit reservation of Chile's interests<sup>762</sup> as a basis for the specific legal obligation that Bolivia postulates would be entirely unreasonable.<sup>763</sup>

9.23. Secondly, the only actual negotiations on transferring sovereignty over territory that took place since the 1904 Peace Treaty—the Charaña process—did not produce an agreement on such a transfer, and the Court has consistently recognized that "[i]f no agreement is reached, neither party can be held to ... suggested concessions" made during negotiations.<sup>764</sup> It would therefore be unreasonable for Bolivia to rely, as it now claims to have done, on any statements

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<sup>761</sup> Bolivia's prayer for relief: Bolivia's Reply, p 192, para (a).

<sup>762</sup> See para 9.6(a)-9.6(f) above. In considering whether various declarations of Germany gave rise to estoppel in *North Sea Continental Shelf*, the Court regarded as definitive the fact that any inference taken from the aggregate conduct of Germany "would immediately be nullified" by the fact that Germany reserved its position as soon as delimitation work began (paras 32-33).

<sup>763</sup> See para 2.24 above; and *ELSI*, para 54. Bolivia seeks to distinguish *ELSI* on the basis that the present case involved "a great number of consistent statements, declarations, agreements, over the course of more than a century" rather than a mere failure to mention something during "somewhat desultory diplomatic exchanges" as described in *ELSI* (Bolivia's Reply, para 342). Any factual differences between the two cases do not detract from the position of principle recognized by the Court, that there are clear difficulties in drawing conclusions from exchanges that are being pursued at the diplomatic level.

<sup>764</sup> *El Salvador/Honduras: Nicaragua Intervening*, para 73; *Qatar v. Bahrain, Jurisdiction and Admissibility*, 1994, para 40.

made or documents produced during those negotiations as a basis for obligations said to endure beyond their termination.

9.24. Thirdly, Chile's engagement in the Charaña process would have discharged any possible obligation that might be said to have existed prior to that process or have been created during it,<sup>765</sup> making it again manifestly unreasonable for Bolivia to rely to its detriment on statements or documents that preceded 1978 as the basis for an obligation said to endure beyond the failure of the Charaña process in that year.

9.25. Fourthly, in the 1960s and again in the 1980s, Chile refuted Bolivia's characterization of Chile's statements as constituting a basis for any legal obligation.<sup>766</sup> Following such refutation, it would have been objectively unreasonable for Bolivia to continue to rely on Chile's statements as creating the very legal obligation that Chile had explicitly rejected.<sup>767</sup>

9.26. The final point concerning estoppel is that even if Bolivia could establish that all of its elements were satisfied (which it manifestly cannot) it could not demonstrate that Chile has acted inconsistently with or denied the truth of any representation that Chile made. The specific content of any representation is crucial to the scope of any obligation that might arise by operation of estoppel, and that content must be found in the documents on which Bolivia relies. Chile's conduct would need to be measured against what Chile actually said, not against the prayer for relief that Bolivia has invented.

**D. No legal obligation was created by the “doctrine” of legitimate expectations**

9.27. As addressed in Chapter 2, there is no “doctrine” of legitimate expectations in international law as it applies between States.<sup>768</sup> Even if there

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<sup>765</sup> See paras 6.60-6.68 and 2.50-2.59 above.

<sup>766</sup> See paras 5.20, 5.31 and 5.33-5.34 above.

<sup>767</sup> See also *North Sea Continental Shelf*, para 33.

<sup>768</sup> See paras 2.26-2.33 above.

were, Bolivia fundamentally misunderstands how it would operate. Bolivia argues that—

“even if none of the multiple agreements and declarations made by Chile expressed an intention to be bound, *quod non*, Chile’s repeated representations over more than a century created legitimate expectations for Bolivia, on which Bolivia relied, thus giving rise to legally binding obligations for Chile.”<sup>769</sup>

The Reply further asserts that the “frustration of Bolivia’s legitimate expectations” is for “Chile to refuse today (as it has since 2011) any negotiation with Bolivia on sovereign access to the sea” and that this frustration of expectations “is very detrimental to Bolivia”.<sup>770</sup>

9.28. By proceeding on the basis that Bolivia is entitled to rely on its own expectations, rather than on a representation made by Chile, and that the frustration of Bolivia’s expectations is itself the detriment, Bolivia rather transparently attempts to circumvent the requirement to show reasonable reliance to Bolivia’s detriment or Chile’s benefit on a representation made by Chile, which would be necessary for the purpose of establishing either estoppel or legitimate expectations.<sup>771</sup> Moreover, as noted above regarding estoppel, there is no basis on which there could have been any reliance, let alone to Bolivia’s detriment or Chile’s benefit, or that any reliance could have been reasonable in the circumstances. Bolivia’s heavy emphasis in its Reply on an argument as obviously baseless as its case on legitimate expectations indicates both the weakness of Bolivia’s case and Bolivia’s awareness of that weakness.

#### **E. No legal obligation was created by acquiescence**

9.29. While not explicitly stated to be a basis of its argument that a cumulative course of conduct gave rise to a legal obligation to negotiate, Bolivia deploys

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<sup>769</sup> Bolivia’s Reply, para 6. See also Bolivia’s Reply, paras 159(b) and 159(e).

<sup>770</sup> Bolivia’s Reply, para 348. See also Bolivia’s Reply, para 319.

<sup>771</sup> See paras 2.20(c)-2.20(d) and 2.31 above.

acquiescence as one of a number of the “large variety of sources”<sup>772</sup> for the obligation to negotiate and refers to acquiescence in its argument concerning a course of conduct giving rise to estoppel. It does so by attempting to compare the present case to the *Anglo-Norwegian Fisheries* case.<sup>773</sup> In that case the Court held that the United Kingdom acquiesced in the application by Norway of a particular system for the measurement of the extent of Norway’s territorial sea because of the United Kingdom’s failure to protest for more than 60 years, in circumstances where the United Kingdom knew of Norway’s method and was greatly interested in fisheries in the area. Bolivia asserts that, in the present case, both States are “greatly interested” in the issue of sovereign access, that Chile knew of the situation to which it was acquiescing—framed as “the effect its declarations and promises would have for Bolivia in terms of ‘legitimate expectations’”—and that the situation “could only be strengthened with the passage of time”.<sup>774</sup>

9.30. Bolivia does not, however, identify and explain the circumstances that called for protest in order to preserve pre-existing rights, identify any relevant silence on the part of Chile, or demonstrate how any such silence could amount to tacit consent to the creation of a legal obligation to negotiate.<sup>775</sup> There has been no general situation of juridical silence. On the contrary, Chile has been deliberate and careful in its use of qualified and conditional language, and on the isolated historical occasions on which Bolivia has asserted the existence of an obligation to negotiate, Chile has rejected those assertions.<sup>776</sup>

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<sup>772</sup> Bolivia’s Reply, para 27.

<sup>773</sup> Bolivia’s Reply, paras 343-344.

<sup>774</sup> Bolivia’s Reply, para 344.

<sup>775</sup> See para 2.35 above; *Pedra Branca*, para 121; *Anglo-Norwegian Fisheries*, pp 136-139; I. MacGibbon, “The Scope of Acquiescence in International Law” (1954) 31 *BYIL* 143, p 143 (acquiescence is “used to describe the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights: it is not intended to connote the forms in which a State may signify its consent or approval in a positive fashion”); R. Jennings and A. Watts, *Oppenheim’s International Law* (9th edn, 1996), pp 1193-1195; and J. Crawford, *Brownlie’s Principles of Public International Law* (8th edn, 2012), pp 419-420.

<sup>776</sup> See paras 5.20, 5.31 and 5.33-5.34 above.

9.31. Acquiescence is a principle concerned with *silence* or *inaction*. Acquiescence can give rise to an estoppel, but only insofar as a State that acquiesces in a loss of rights is then estopped from denying the loss of such rights.<sup>777</sup> Bolivia has not shown and cannot show that Chile has acquiesced in the creation of a legal obligation. On no reasonable interpretation of the factual record can Chile be said to have acquiesced in the existence of a legally binding obligation to negotiate on the topic of a potential grant to Bolivia of sovereign access to the sea.

### Conclusion

9.32. Bolivia's reliance on a postulated accumulation of different non-binding exchanges in an attempt to manufacture a legal obligation highlights the weakness of its case, as does its attempt to rely on multiple legal theories, applied in an incoherent manner, to an even greater number of different facts. Chile's willingness to engage with Bolivia at different points in time, even when viewed cumulatively as Bolivia seeks to do, demonstrates good neighbourliness combined with Chile's concern for Chile's own interests as they stood at those particular points in time, not a binding legal obligation to negotiate to fulfill an incomplete historical bargain enduring since the nineteenth century.

9.33. Bolivia's contention to the contrary would create a false dilemma. Bolivia argues that after the War of the Pacific, "Chile could have made it clear that ... it would not negotiate sovereign access to the sea ... and that Bolivia must resign itself to being a landlocked State."<sup>778</sup> According to Bolivia, because Chile expressed a political willingness to and did negotiate, its actions created a legally binding obligation.<sup>779</sup> Bolivia claims that international law gave Chile a binary choice, either (i) to forever refuse to negotiate, or (ii) to express a willingness to engage with its neighbour on a matter of concern to that neighbour, and thereby

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<sup>777</sup> See Separate Opinion of Judge Fitzmaurice, *Temple of Preah Vihear, Merits*, p 62; *Interpretation of the air transport services agreement*, p 64; and *Gulf of Maine Area*, para 130.

<sup>778</sup> Bolivia's Reply, para 182.

<sup>779</sup> Bolivia's Reply, para 182.

create a legally binding obligation to negotiate. Between these two choices lies diplomacy, allowing both States to engage in *legally non-binding* political and diplomatic exchanges for the purpose of harmonizing and otherwise improving their relations, and fostering international cooperation. Bolivia's position seeks to convert diplomatic discourse into a source of legal obligation. That would alter States' settled expectations about the freedom with which they can and should conduct their diplomatic activity and engage peacefully on difficult issues over time. It would give them a choice between a heightened risk of incurring legal obligations, on the one hand, and disengagement and inactivity, on the other.

## CHAPTER 10. CONCLUSIONS AND SUBMISSION

### A. Bolivia's prayer for relief

10.1. Bolivia asks the Court to adjudge and declare that:

“(a) Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean;

(b) Chile has breached the said obligation; and

(c) Chile must perform the said obligation in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean.”<sup>780</sup>

10.2. Although Bolivia's Reply constitutes the third in a series of different iterations of its case,<sup>781</sup> Bolivia has retained its prayer for relief in identical form since its Application. On any version of the case that it has put to the Court, there is a vast gulf between the plain words of the instruments on which Bolivia relies and the obligation to which it claims Chile is subject. Bolivia has made a claim to the Court in terms that it knows it has no prospect of obtaining, and changed its case at every opportunity, in the hope of obtaining anything at all, which it could then use as a political tool, internally in Bolivia, and against Chile in their political relations. This is not a case where the Court can find a solution that will meet the needs of both Parties. Bolivia has made a claim that is unsustainable and which it knows to be unsustainable, and its claims must be dismissed in their entirety.

### B. Summary of Chile's case

10.3. Chile has never manifested an objective intention to be bound by international law to negotiate with Bolivia on the question of whether Bolivia might be granted sovereign access to the Pacific Ocean. The documents and diplomatic statements on which Bolivia relies, taken alone or as part of a cumulative course of conduct, did not create any legal obligation to negotiate.

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<sup>780</sup> Bolivia's Reply, p 192.

<sup>781</sup> See paras 1.5-1.7 above.

(a) There was no “historical bargain” that had already been struck prior to and separate from the 1904 Peace Treaty, which then survived that treaty. No legal obligation to negotiate on a new arrangement following the 1904 Peace Treaty can be said to have been created prior to it and to have persisted after it.

(b) The 1920 Minutes stated explicitly that they did not create any legal obligation. This is entirely consistent with the other terms of the Minutes, which do not evidence an intention to create a legal obligation. The events subsequent to those Minutes equally did not establish or reflect any legal obligation to negotiate sovereign access to the sea. This includes the Kellogg Proposal of 1926, on which Bolivia continues to place great emphasis, and which was a US proposal addressed to Chile and Peru, which they did not accept, not an agreement between Chile and Bolivia.

(c) The 1950 diplomatic notes did not evidence an objective intention to create or confirm a legal obligation to negotiate sovereign access to the sea for Bolivia. Even if Chile was subject to an obligation to negotiate as a result of these notes (it was not), any obligation (i) would have been limited to an obligation of conduct defined by the terms of the notes, (ii) would have involved compensation for Chile, and (iii) would have been discharged by the negotiations that took place from 1975-1978. In any event, if the 1950 notes and the documents relating to the Charaña process each gave rise to binding agreements (which they did not), the later agreement would necessarily have superseded and terminated any agreement arising out of the 1950 exchange of notes. Although the 1950 notes excluded an exchange of territories, the Charaña process proceeded on precisely that basis.

(d) As the historical record of the period between 1975 and 1978 shows, the two States did not create or confirm any obligation to negotiate sovereign access during the Charaña process. In any event, there is no evidence that Chile breached any such obligation. The Charaña process does no more than demonstrate Chile’s negotiation in good faith within a political framework at a particular point in time when both States were controlled by military regimes. It also shows Bolivia’s unilateral withdrawal from that political process and rupturing of diplomatic



relations with Chile. If Chile assumed an obligation to negotiate during this period (it did not), that obligation was discharged by 1978 because negotiations had been pursued as far as possible.

(e) The resolutions of the OAS General Assembly concerned with Bolivia's access to the sea were political recommendations that did not refer to there being, nor proceed on the basis that there was, nor confirm, any pre-existing obligation to negotiate. Nor did the conduct of the Parties in connection with these non-binding resolutions involve any acceptance of any legal obligation. In stark contrast to Bolivia's case on continuity, there has not been a single OAS resolution on the subject since 1989.

(f) There is no credible basis on which any event following the restoration of democracy in Chile in 1990 could be said to have confirmed or created any obligation to negotiate. This period involved constructive engagement between the two States on a range of matters, including improvements to Bolivia's access to the sea. Engagement on this topic ended not because of any breach or repudiation by Chile of any obligation to negotiate, but because Bolivian politics, and Bolivia's Constitution, led Bolivia to seek "sovereign" access to the sea. Bolivia knew from decades of engagement that this was not something to which Chile would agree, and so it commenced this case in order to pursue it by other means.

10.4. Having failed to establish that any individual episode on which it relies created any legal obligation, Bolivia has also failed to establish that an accumulation of them did so, whether through an intention to create a legal obligation, or by way of the inapt principles of estoppel, legitimate expectations and acquiescence on which Bolivia also relies.

10.5. Chile has over time been willing to listen to and at times engage with Bolivia, as a neighbouring country, on improving Bolivia's access to the sea, but Chile has never undertaken a legal obligation to negotiate concerning a potential grant to Bolivia of sovereign access to the sea.

### **C. Chile's Submission**

10.6. Chile concludes this Rejoinder 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.

Claudio Grossman

Agent of the Republic of Chile

15 September 2017

## APPENDIX A

### **THE 1895 TREATIES ARE WHOLLY WITHOUT EFFECT SUCH THAT NEITHER THEY NOR THEIR CONTENT CAN FORM A BASIS FOR ANY ENDURING “BARGAIN” OR “UNDERSTANDING”**

A.1. Bolivia argues that: “Chile is wrong in asserting that Bolivia bases its claim on the Transfer Treaty of 1895, and erroneously claims that this Treaty did not enter into force ‘by agreement’ of the Parties.”<sup>782</sup>

(a) As to whether Bolivia based its claim on the 1895 Transfer Treaty, the Court need do no more than consult the relevant passages from Bolivia’s Memorial, two of which appear at paragraph 3.1 of this Rejoinder, and more complete references to which are collected at paragraphs 2.6 to 2.8 of Chile’s Counter-Memorial. Bolivia must now be regarded as having rightly abandoned those parts of its Memorial.

(b) As to the circumstances in which the 1895 Transfer Treaty did not enter into force, Bolivia says that: “Final approval was left pending not with Bolivia’s consent, but rather by Chile’s failure to comply with its commitments.”<sup>783</sup> That is an inaccurate account of history and, because it is combined with Bolivia’s reliance on the content of the 1895 Transfer Treaty as embodying the “historical bargain” the existence of which Bolivia now asserts, in this appendix Chile explains in further detail how and why the 1895 Treaties came to be regarded by both States as “wholly without effect”.

#### **A. The three 1895 Treaties**

A.2. On 18 May 1895, Bolivia and Chile signed the three 1895 Treaties.

(a) The 1895 Treaty of Peace and Amity had only three substantive articles, only the first of which is relevant.<sup>784</sup> It provided for the cession from Bolivia to

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<sup>782</sup> Bolivia’s Reply, para 53.

<sup>783</sup> Bolivia’s Reply, fn 51.

<sup>784</sup> Treaty of Peace and Amity, 18 May 1895, **CCM Annex 103**, Article 1.

Chile of territory over which Chile already had control, stretching from the Loa River southwards to the 23rd parallel of latitude. It also maintained the boundary between the two States as established in Article II of the 1884 Truce Pact, including between the Province of Tarapacá, ceded from Peru to Chile in 1883, to the West, and Bolivia, to the East. At the time of the 1895 Treaties the territories of Tacna and Arica were under Chile's control, but the 1895 Treaties did not delimit any boundary between Tacna and Arica, to the West, and Bolivia, to the East. This contrasts to the full delimitation later adopted in the 1904 Peace Treaty, as illustrated in the figure below.

(b) The 1895 Transfer Treaty was the second treaty signed that day. It provided in Article I that:

“If, as a consequence of the plebiscite due to take place pursuant to the Treaty of Ancón [signed in 1883 between Chile and Peru] or through direct arrangements, the Republic of Chile acquires dominion and permanent sovereignty over the territories of Tacna and Arica, it undertakes to transfer them to the Republic of Bolivia in the same form and covering the same extent in which it acquires them ...”<sup>785</sup>

The 1895 Transfer Treaty also provided, in Article IV, that in the event that Chile could not obtain “Tacna and Arica”, Chile would instead cede to Bolivia “the Vitor cove up to the Camarones ravine, or another analogous one”.<sup>786</sup>

(c) The third treaty signed on 18 May 1895 was a Treaty of Commerce that is not material to the present dispute.<sup>787</sup>

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<sup>785</sup> Treaty on Transfer of Territory, 18 May 1895, **CPO Annex 3**, Article I.

<sup>786</sup> Treaty on Transfer of Territory, 18 May 1895, **CPO Annex 3**, Article IV.

<sup>787</sup> Treaty of Commerce, 18 May 1895, **CPO Annex 15**.



For illustrative purposes only

A.3. The two States entered into four Protocols relating to the 1895 Treaties. Nothing turns on the first two,<sup>788</sup> but Congressional approval of the latter two, described immediately below, was a condition for the entry into force of all of the 1895 Treaties.

**B. The decision of Bolivia’s Congress not to approve the 1895 Treaties led to the 1895 and 1896 Protocols**

A.4. The Bolivian Congress objected to the 1895 Treaties on the grounds that any transfer of sovereignty over Tacna and Arica from Peru to Chile was uncertain and that Vítor Cove would be insufficient.<sup>789</sup> Bolivia’s Congress thus insisted on a protocol that was signed by both States on 9 December 1895 (the **1895 Protocol**).<sup>790</sup> The 1895 Protocol would have made the 1895 Transfer Treaty and the 1895 Treaty of Peace and Amity “an indivisible whole”.<sup>791</sup> It would have made Bolivia’s definitive cession to Chile of territory over which Chile already had control (contemplated by the 1895 Treaty of Peace and Amity) conditional upon Chile delivering to Bolivia, within two years, a port on the Pacific coast (contemplated by the 1895 Transfer Treaty).<sup>792</sup>

A.5. The terms of the 1895 Protocol, however, never acquired any legal force. Article IV of the 1895 Protocol gave rise to a disagreement between the two States. It stated that if Chile did not obtain Tacna and Arica, and instead had to deliver Vítor Cove to Bolivia, the “obligation undertaken by Chile will not be regarded as fulfilled, until it cedes a port and zone that fully satisfies the current and future needs of Bolivian trade and industry”.<sup>793</sup>

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<sup>788</sup> Protocol on Debts, 28 May 1895, **CPO Annex 16**; and Protocol on the Scope of the Treaty on Transfer of Territory, 28 May 1895, **CPO Annex 17**.

<sup>789</sup> A. Crespo Gutiérrez, *The Treaties Signed with Chile in 1895* (1975), **CR Annex 416**, pp 46-47.

<sup>790</sup> A. Crespo Gutiérrez, *The Treaties Signed with Chile in 1895* (1975), **CR Annex 416**, pp 58-60 and 68.

<sup>791</sup> 1895 Protocol, 9 December 1895, **CPO Annex 4**, Article 1.

<sup>792</sup> 1895 Protocol, 9 December 1895, **CPO Annex 4**, Article 2.

<sup>793</sup> 1895 Protocol, 9 December 1895, **CPO Annex 4**, Article 4.

A.6. In January 1896, concerns were expressed in the Chilean Congress about the “vague” and “unclear” wording of Article IV of the 1895 Protocol.<sup>794</sup> It was said that Article IV “hands us over completely to the will of that country”,<sup>795</sup> and was “not a clarification of the treaties, but is instead a new feature” which left “the application of the treaties” to “the discretion of Bolivia”<sup>796</sup> and “will cause us countless difficulties”.<sup>797</sup> It was further said that because of Clause 4 of the 1895 Protocol “the treaties are a dead letter”.<sup>798</sup> Chile’s Congress did not approve the 1895 Protocol.

A.7. On 30 April 1896 the two States concluded a further protocol (the **1896 Protocol**),<sup>799</sup> which contained a provision “setting the meaning and scope” of Article IV of the 1895 Protocol.<sup>800</sup> It identified the objective characteristics that a port transferred from Chile to Bolivia would need to possess to be “sufficient to fulfill the needs of trade”.<sup>801</sup>

A.8. The 1896 Protocol further provided that: “The Government of Chile will request congressional approval of the aforementioned Protocol of 9 December with the previous clarification, as soon as the Legislature of Bolivia has approved the latter.”<sup>802</sup> The agreed process was therefore that Chile’s Congress would only be asked to consider the 1895 Protocol and the 1896 Protocol once Bolivia’s Congress had approved the 1896 Protocol.

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<sup>794</sup> Record of the Chamber of Deputies of Chile, 17 January 1896, **CPO Annex 23**, pp 385 and 397.

<sup>795</sup> Record of the Chamber of Deputies of Chile, 16 January 1896, **CPO Annex 22**, p 363.

<sup>796</sup> Record of the Chamber of Deputies of Chile, 17 January 1896, **CPO Annex 23**, pp 387-389.

<sup>797</sup> Record of the Chamber of Deputies of Chile, 17 January 1896, **CPO Annex 23**, p 391.

<sup>798</sup> Record of the Chamber of Deputies of Chile, 17 January 1896, **CPO Annex 23**, p 387.

<sup>799</sup> 1896 Protocol, 30 April 1896, **CPO Annex 8**.

<sup>800</sup> 1896 Protocol, 30 April 1896, **CPO Annex 8**, p 123, Clause 2; and see A. Crespo Gutiérrez, *The Treaties Signed with Chile in 1895* (1975), **CR Annex 416**, p 72.

<sup>801</sup> 1896 Protocol, 30 April 1896, **CPO Annex 8**, p 123, Clause 1.

<sup>802</sup> 1896 Protocol, 30 April 1896, **CPO Annex 8**, p 123, Clause 3.

**C. The 1896 exchange of notes pursuant to which the 1895 Treaties were rendered “wholly without effect”**

A.9. Bolivia regarded the 1895 Protocol as necessary to the acceptability of the 1895 Treaties. Chile regarded the 1896 Protocol as necessary to the acceptability of the 1895 Protocol. At the same time that the 1896 Protocol was signed, the two States therefore agreed by an exchange of notes that the 1895 Treaties having any effect would be contingent upon both the 1895 Protocol and the 1896 Protocol being approved by the Congress of each State.

A.10. On 29 April 1896 (the day before the 1896 Protocol was signed), Bolivia sent a note to Chile referring to the 1896 Protocol “drawn up by us as a preliminary to the exchange of the ratifications of the Treaties of May [1895]”.<sup>803</sup> Later the same day, Chile sent a note to Bolivia stating:

“as was expressed in our last conference, the failure by either of the Congresses to approve of the Protocol of 9 December [the 1895 Protocol] or the clarification we made to it [the 1896 Protocol] would imply a disagreement upon a fundamental basis of the May agreements [the 1895 Treaties] which would make them wholly without effect.”<sup>804</sup>

A.11. In its reply the next day, 30 April 1896 (the same day that the 1896 Protocol was signed), Bolivia expressed its “perfect agreement”—

“that the failure by either of the Congresses to approve the Protocol of 9 December or the clarification we made to it would imply a disagreement upon a fundamental basis of the May agreements which would make them wholly without effect.”<sup>805</sup>

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<sup>803</sup> Note from the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile to the Minister of Foreign Affairs of Chile, No 117, 29 April 1896, **CPO Annex 5**.

<sup>804</sup> Note from the Minister of Foreign Affairs of Chile to the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 521, 29 April 1896, **CPO Annex 6**.

<sup>805</sup> Note from the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile to the Minister of Foreign Affairs of Chile, No 118, 30 April 1896, **CPO Annex 7**.



**D. The failure of each Congress to approve the terms of the 1895 and 1896 Protocols**

A.12. Neither Congress was willing to be bound by the terms of the 1895 Treaties as supplemented by the 1895 and 1896 Protocols, and it followed that they were rendered wholly without effect.

A.13. In purporting to approve the 1895 and 1896 Protocols, Bolivia stated in connection with Article IV of the 1895 Protocol that—

“it is for the Legislative Branch, in the exercise of its constitutional authority, to decide whether the Port and the zone offered by Chile as a replacement for the Port and territory of Arica and Tacna, meet the conditions established in the provisions agreed between the two Republics.

This legislative declaration will be reported to the Chilean Government when the treaties and supplementary protocols are exchanged”<sup>806</sup>.

A.14. Bolivia thus purported to reserve for its own Congress a potestative power to decide whether any port offered by Chile met the conditions enumerated in the 1896 Protocol. This defeated the object and purpose of the 1896 Protocol, which was to establish objective criteria for the acceptability of a port. Chile did not accept Bolivia’s reservation, the Chilean Congress did not approve the 1895 and 1896 Protocols, and no instruments of ratification of either protocol were ever exchanged.<sup>807</sup>

A.15. Therefore, by application of the exchange of notes of April 1896, the 1895 Treaties, including the 1895 Transfer Treaty, are “wholly without effect”. That is what the two States actually agreed. Bolivia nevertheless now argues that the content of the 1895 Transfer Treaty reflected “promises already made at the end of the nineteenth century”.<sup>808</sup> The only source on which Bolivia relies for this

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<sup>806</sup> Bolivia’s Reservation to the 1896 Protocol, 7 November 1896, **CPO Annex 9**, p 133.

<sup>807</sup> See Letter from the Ministry of Foreign Affairs of Chile to the Extraordinary Envoy and Minister Plenipotentiary of Chile in Bolivia, 15 June 1897, **CPO Annex 25**, p 413.

<sup>808</sup> Bolivia’s Reply, para 341(c).

untenable proposition is a memorandum prepared by the Foreign Ministry of Chile and presented to Chile's Congress on the day that the 1895 and 1896 Protocols were submitted to it.<sup>809</sup> This document did not constitute a promise to Bolivia. It was written by a Chilean Ministry and addressed to the Chilean Congress, encouraging it to approve the 1895 and 1896 Protocols, which the Congress declined to do.

A.16. Since the 1895 Treaties and its protocols did not enter into force, neither Chile nor Bolivia “can be held to such suggested concessions” made in the negotiation of those instruments.<sup>810</sup> The 1895 Treaties having been left wholly without effect, Bolivia and Chile subsequently negotiated the 1904 Peace Treaty as the comprehensive resolution of all issues then pending between them, as explained in Chapter 3 of this Rejoinder.

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<sup>809</sup> Memoria of the Ministry of Foreign Affairs of Chile, 1896, **BM Annex 189**, relied on at Bolivia's Reply, para 341(c), fn 509.

<sup>810</sup> The Court has consistently held, in the context concessions made by each party in the course of negotiations that did not lead to a binding agreement, that: “If no agreement is reached, neither party can be held to such suggested concessions”. See *El Salvador/Honduras: Nicaragua Intervening*, para 73; *Qatar v. Bahrain, Jurisdiction and Admissibility, 1994*, para 40; and *Factory at Chorzów, Claim for Indemnity, Merits, 1928, P.C.I.J., Ser A, No 17*, p 51, see also pp 62-63.

## APPENDIX B

### ADDITIONAL DETAILS CONCERNING THE 1950 DIPLOMATIC NOTES

#### A. The discussions leading to the 1950 notes neither created nor confirmed any legal obligation

B.1. Bolivia relies on diplomatic exchanges and correspondence preceding the 1950 diplomatic notes as:

(a) demonstrating that, in the 1930s and 1940s, Bolivia “continued to persist in its claim” with respect to Chile’s alleged undertaking to negotiate sovereign access to the sea;<sup>811</sup>

(b) establishing that, by June 1948, Bolivia and Chile “had already agreed to initiate negotiations on sovereign access and to formalize that agreement through an exchange of notes”;<sup>812</sup> and

(c) confirming the “binding character of the 1950 Notes”.<sup>813</sup>

Chile responds to these contentions in turn below.

#### 1. *Bolivia’s assertion that it persisted in its “claim”*

B.2. Relying on isolated exchanges in the 1940s, Bolivia asserts that it persisted in its claim with respect to Chile’s alleged obligation to negotiate sovereign access. The documents upon which Bolivia places emphasis show that assertion to be unsustainable.

(a) Bolivia relies on its Ambassador Gutiérrez’s account (published in 1953) of an invitation to Chile to open negotiations in 1941 on Bolivia’s

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<sup>811</sup> Bolivia’s Reply, paras 353-357.

<sup>812</sup> Bolivia’s Reply, para 233.

<sup>813</sup> Bolivia’s Reply, para 238.

“maritime reintegration”.<sup>814</sup> That account indicates that “the Chilean Foreign Minister did not reject the Bolivian proposal to open direct negotiations between the two countries; but noted that a suitable atmosphere had to be created in advance so as to reach an understanding that counts on the full acceptance of the two peoples.”<sup>815</sup> This exchange neither suggests, nor is consistent with, the existence of any Bolivian claim to a right to negotiate on sovereign access to the sea.

(b) Bolivia also relies on another account given by Ambassador Gutiérrez (published in 1998), which refers to Bolivia presenting a memorandum on its “landlocked condition” and “need to obtain ‘an own port on the coast of the Pacific’” to a representative of the US State Department in April 1943.<sup>816</sup> That was not a proposal made to Chile to engage in negotiations and it obviously cannot be said to have given rise to any commitment to negotiate on the part of Chile.

(c) Bolivia relies on exchanges in May and June 1943 to contend that Chile “had promised and had committed itself to negotiate a sovereign access to the Pacific Ocean.”<sup>817</sup> That contention is supported neither by the extracts of the documents set out in Bolivia’s footnotes nor by any other parts of those documents. There is no suggestion in any of those documents that the Parties were subject to or were creating a legal obligation to negotiate on “sovereign access”.<sup>818</sup>

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<sup>814</sup> Bolivia’s Reply, para 356, referring to A. Ostria Gutiérrez, *A Work and a Destiny, Bolivia's International Policy after the Chaco War* (1953), **BR Annex 281**, p 66.

<sup>815</sup> A. Ostria Gutiérrez, *A Work and a Destiny, Bolivia's International Policy after the Chaco War* (1953), **BR Annex 281**, p 66.

<sup>816</sup> Bolivia’s Reply, para 357, referring to A. Ostria Gutiérrez, *Notes on Port Negotiations with Chile* (1998), **BR Annex 342**, p 4.

<sup>817</sup> Bolivia’s Reply, para 357.

<sup>818</sup> On 6 May 1943, in response to reported statements of the Bolivian Foreign Minister concerning Bolivia’s “territorial and maritime reintegration”, the Chilean Foreign Minister issued a statement in which he noted that there was no pending issue concerning territorial sovereignty between Chile and Bolivia, which had been definitively settled in the 1904 Peace Treaty. In a meeting of the same day with the Bolivian Ambassador to Chile, the Chilean Foreign Minister emphasized that Chile was open to hear from Bolivia directly as to its aspirations, and that it was necessary first “to create an environment conducive to

(d) In September 1943 Bolivia submitted a memorandum to the US Secretary of State, stating that it “maintains its legitimate aspirations for a sovereign outlet to the Pacific Ocean through territory owned by Chile”, and “fosters a direct understanding with Chile on basis [*sic*] that take into account both countries’ advantages and high interests and does not wish to disturb continental harmony in its pursuit for a sovereign outlet to the sea.”<sup>819</sup> Bolivia relies on this memorandum to support its proposition that “Chile had promised and had committed itself to negotiate a sovereign access to the Pacific Ocean.”<sup>820</sup> Apart from the fact that a memorandum submitted by Bolivia to the US could not be taken as an expression of Chile’s promising or committing itself, that proposition appears nowhere in Bolivia’s memorandum and is directly inconsistent with the language actually used.

(e) Finally, in this section of its Reply, Bolivia relies on reports of a meeting between the Bolivian Ambassador and the Chilean President in late December 1944.<sup>821</sup> Bolivia’s report records the Chilean President as stating that

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understanding and affection, instead of provoking mistrust and resentment”: Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 280, 7 May 1943, **BR Annex 251**, pp 1-2. In a meeting of 10 June 1943, the Bolivian Ambassador expressed a willingness to initiate direct negotiations. Bolivia did not claim that Chile was subject to any prior obligation to negotiate, nor did it refer to “sovereign access”, which Bolivia now says was the topic of the discussions envisaged (see Bolivia’s Reply, para 357). The Chilean Foreign Minister reportedly indicated that he was “pleased to see that attitude in the Bolivian Government” and expressed openness to engage in a constructive dialogue with Bolivia on issues of concern to it: Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 369, 11 June 1943, **BR Annex 252**, p 147. Proposals were then made by Bolivia to formalize through notes Chile’s invitation to begin direct negotiations “regarding the port ideal” of Bolivia, and such proposals are wholly inconsistent with the existence of any legal obligation to negotiate, including to the extent that Bolivia anticipated that its proposal might be flatly refused: see Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 386, 18 June 1943, **BR Annex 253**, p 151; and Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 403, 25 June 1943, **BR Annex 254**, p 159.

<sup>819</sup> Memorandum of the Bolivian Ambassador to the US submitted to the US Secretary of State, 15 September 1943, **BR Annex 255**, p 165.

<sup>820</sup> Bolivia’s Reply, para 357.

<sup>821</sup> Bolivia’s Reply, para 357, citing 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**; and J. Gumucio Granier, *The Landlocked Condition of Bolivia in the World Fora* (1993), **BR Annex 337**, pp 94-95.

Chile “is willing to consider any direct proposal of your country, aiming at solution of this problem”; the “problem” being “Bolivia’s aspiration to its own outlet to the sea”.<sup>822</sup> That expression of openness to consider proposals is not a promise or legal commitment to “negotiate a sovereign access to the Pacific Ocean” for Bolivia, nor does it in any way indicate the existence of any such obligation; again, to the contrary.<sup>823</sup>

B.3. The documents that Bolivia relies on to show that it was persisting in its “claim” are consistent only with the absence of the legal obligation for which it now contends.

2. *There was no agreement to initiate negotiations on sovereign access reached by June 1948*

B.4. Relying on records of meetings on 1 and 17 June 1948, Bolivia says that, by June 1948, Chilean President González Videla and Bolivian Ambassador Ostria Gutiérrez “had already agreed to initiate negotiations on sovereign access and to formalize that agreement through an exchange of notes”. Bolivia relies on

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<sup>822</sup> 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**, p 3.

<sup>823</sup> Cf. Bolivia’s Reply, para 357. This conclusion is confirmed by contemporaneous documents which indicate that neither Bolivia nor Chile considered that Chile was subject to any legal obligation to negotiate. For example, in a meeting between the Chilean Ambassador to Bolivia and the Bolivian Minister of Foreign Affairs on 18 October 1945, the Chilean Ambassador stated that “Chile considers that there is no pending problem or issue, either legal or juridical, with this sister Republic” but that “the Government could hear the suggestions” of Bolivia: Letter from the Embassy of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 18 October 1945, **CR Annex 389**. Similarly in a meeting of 30 October 1945 between the Chilean Ambassador to Bolivia and the Bolivian President, the Bolivian President stated that he wished “to pursue an understanding with Chile”, but was not putting forward any “concrete proposal”: Letter from the Embassy of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 31 October 1945, **CR Annex 390**. Consistently with this, Bolivia stated in November 1944 that “fortunately, all of my country’s international issues have been satisfactorily and very fairly resolved. In the future, any matters referring to topics of this nature which Bolivia should solve will be strictly about trade agreements, the strengthening of relations with its neighbouring countries, cultural exchanges, and anything entailing forging deeper bonds”: Statement of the New Bolivian Ambassador in Peru, reproduced in Letter from the Ministry of Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, 16 November 1944, **CR Annex 388**.

this “agreement” as support for its contention that the 1950 notes constitute a legally binding agreement and a treaty.<sup>824</sup>

B.5. These records of meetings do not transform the 1950 notes into a legally binding agreement or a treaty. Before Bolivia sent its note to Chile, and Chile sent its note to Bolivia, the two States did engage in discussions on the topic of sovereign access. The documentary record of those discussions shows that on various occasions Chile is recorded as stating that it was open to consider and study Bolivia’s proposals, and indeed that it was open to negotiation.<sup>825</sup> The documents do not suggest in any way that Chile was subject to or was willing to accept any legal obligation to negotiate.

B.6. As to the meetings in June 1948 on which Bolivia places particular emphasis:

(a) On 1 June 1948, the Bolivian Ambassador to Chile met with Chilean President González Videla, and on 2 June with the Chilean Minister of Foreign Affairs Vergara. In its Reply, Bolivia says that at the meeting of 1 June 1948 the “President of Chile ... stated that they had no trouble in formalizing the negotiations that had been commenced.”<sup>826</sup> That appears nowhere in Bolivia’s contemporaneous note, which instead suggests that the Chilean President was “not opposed” to “the possibility of formalizing the negotiations in writing ... but that

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<sup>824</sup> Bolivia’s Reply, paras 232 and 233.

<sup>825</sup> See 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**; and 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**.

<sup>826</sup> Bolivia’s Reply, fn 318, referring to Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 455/325, 2 June 1948, **CCM Annex 142** (this is also **BR Annex 256** and **BM Annex 61**). See also Cable from the Bolivian Ambassador to Chile to the Ministry of Foreign Affairs of Bolivia, No 116, 1 June 1948, **CCM Annex 141** (this is also **BM Annex 60**), referred to in Bolivia’s Memorial, para 125, to which a cross-reference is made in Bolivia’s Reply at fn 317. Bolivia relies on its own documents recording the meeting on 1 June. Chile’s contemporaneous minutes of that meeting were submitted with its Counter-Memorial: see Minutes of Meeting between the Chilean President and the Bolivian Ambassador to Chile, 1 June 1948, **CCM Annex 140**. Those Minutes are however ignored by Bolivia in its Reply.

we would do so when [Bolivia's Ambassador] received the answer from the Bolivian Government."<sup>827</sup> On no less than three occasions during that meeting, the Chilean President affirmed that the conversations were "informal", and far from obliging Chile to negotiate sovereign access, the Chilean President emphasized that "*under no circumstance* could these informal talks be relied on as bases for any discussion since the very idea of granting a strip of land north of Arica had *merely been the subject of a conversation*."<sup>828</sup> Chile's contemporaneous account of the meeting concludes with a promise from the Bolivian Ambassador to "propose a concrete proposal that would allow negotiations to be declared officially open",<sup>829</sup> and that is consistent with Bolivia's account, which suggests that the Bolivian Ambassador should "visit [the Chilean President] again once [he] received an answer from La Paz."<sup>830</sup> It is also consistent with Bolivia's account of the meeting of 2 June with the Chilean Minister of Foreign Affairs Vergara, following which the Bolivian Ambassador considered that it was for Bolivia to make a proposal.<sup>831</sup> The language of the account is, by contrast, quite inconsistent with any binding agreement to negotiate having been reached or intended.

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<sup>827</sup> 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**, p 3. In this respect Bolivia's account is entirely consistent with Chile's contemporaneous minutes: see Minutes of Meeting between the Chilean President and the Bolivian Ambassador to Chile, 1 June 1948, **CCM Annex 140**, p 1.

<sup>828</sup> Minutes of Meeting between the Chilean President and the Bolivian Ambassador to Chile, 1 June 1948, **CCM Annex 140**, pp 1-2 (emphasis added).

<sup>829</sup> Minutes of Meeting between the Chilean President and the Bolivian Ambassador to Chile, 1 June 1948, **CCM Annex 140**, p 2.

<sup>830</sup> 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**, p 3.

<sup>831</sup> 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**, p 5. Bolivia relies on the passage at p 524 which states: "With regard to formalizing the negotiations, opening that stage by exchanging notes, for example, Mr. Vergara Donoso also said that he fully agreed". It ignores what immediately follows, i.e. wording that makes it plain that no binding agreement was reflected, reached or intended: "In short, although the Chilean Foreign Minister was not as expressive as President González Videla, on the contrary he was extremely cautious, he did not rule out negotiations on the fundamental aspect of the Bolivian problem, i.e., an outlet to the sea for our country, stating his desire and hope to reach an understanding and to carry out constructive work between the two nations."



(b) On 17 June 1948, Bolivia's Ambassador met with Chilean President González Videla, and proposed that Chile transfer the entirety of Arica to Bolivia. That proposal was emphatically rejected. Bolivia's Ambassador then referred to the possibility of transferring a strip of land north of Arica.<sup>832</sup> As to that possibility, Chile's contemporaneous minutes record that the Chilean President invited the Bolivian Ambassador to submit a proposal in writing, stating: "Only when the Chilean Ministry of Foreign Affairs had been informed of this concrete proposal made by Bolivia on the cession of a strip of land north of Arica, could negotiations be declared open."<sup>833</sup>

(c) The Bolivian Ambassador then had two meetings with the Chilean Foreign Minister, at the first of which it was suggested by Bolivia's Ambassador that notes would be sent in two stages.<sup>834</sup> It is plain that the Chilean Foreign Minister was very concerned about political opposition in Chile to the grant to Bolivia of sovereign access to the sea, and the precise content of the Bolivian note proposing entry into negotiations was evidently seen as a matter of importance given the great political sensitivity. The Bolivian Ambassador then prepared a draft note proposing entry into negotiations, and this was shown by him to Chile's Foreign Minister at a second meeting (on 25 June 1948). The Bolivian Ambassador's report back to his Minister stated that Chile's Minister was able to agree "in principle" with the terms of the draft note (not with the proposal to be made), and also recorded Chile's Minister as having stated that "in order to reply in the affirmative, he needed to examine the project with the President of the

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<sup>832</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 28 June 1948, **CR Annex 394**, pp 2-3; and Minutes of a conversation between the President of Chile and the Bolivian Ambassador to Chile, 17 June 1948, **CR Annex 391**.

<sup>833</sup> Minutes of a conversation between the President of Chile and the Bolivian Ambassador to Chile, 17 June 1948, **CR Annex 391**. See also Telegram from the Ministry of Foreign Affairs of Chile to the Embassy of Chile in Bolivia, 19 June 1948, **CR Annex 392**. The Bolivian account also suggests that the Ambassador was to approach the Chilean Foreign Minister, although in contrast to Chile's record, the Bolivian document suggests that this was "to put into effect what has been agreed upon verbally": Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 28 June 1948, **CR Annex 394**, p 4.

<sup>834</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 28 June 1948, **CR Annex 394**, p 4.

Republic and with his counsels of the Chancellery”. In his report back to La Paz, Bolivia’s Ambassador stated his view that this was “just”.<sup>835</sup>

(d) Chile’s minute of that same meeting records that the Chilean Minister noted that “the Government of Chile would declare its disposition to listen to any concrete proposal on this matter by the Bolivian Government, but making an express reservation that official negotiations could only be declared open once Chile knows said proposals and considers them acceptable as a basis for discussions.”<sup>836</sup> Again here, it is apparent that no agreement had been reached to initiate negotiations on sovereign access: the two States continued to be engaged in preliminary discussions on potential proposals.

B.7. These meetings in June 1948 highlight the extreme political sensitivity of matters concerned with Bolivia’s aspirations to a sovereign outlet to the Pacific. They do not suggest in any way that Chile was subject to, was accepting, or was willing to accept any legal obligation to negotiate. Indeed, in light of both States’ appreciation of the great political sensitivity of the issue—which was well-placed, as explained in Chapter 5 of the Rejoinder—this is entirely as would be expected.

B.8. Bolivia also relies on two statements of President González Videla of Chile made in July 1948, that he was not “looking for a pretext ‘to get out of my commitment’”<sup>837</sup> and that he would keep his word and “[w]hat has been verbally agreed is as if it were already written”.<sup>838</sup> The relevant statements of Chilean President González Videla are recorded in letters from Bolivia’s Ambassador in

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<sup>835</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 28 June 1948, **CR Annex 394**, p 6.

<sup>836</sup> Minutes of a conversation between the Minister of Foreign Affairs of Chile and the Bolivian Ambassador to Chile, 25 June 1948, **CR Annex 393**.

<sup>837</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 598/424, 15 July 1948, **BR Annex 258**, cited in Bolivia’s Reply, fn 319.

<sup>838</sup> Note from the Bolivian Ambassador in Chile to the Minister of Foreign Affairs of Bolivia, No 648/460, 28 July 1948, **BR Annex 259**, cited in Bolivia’s Reply, fn 319. This statement of Chilean President González Videla is also said by Bolivia to “confirm the commitment [that Chile] had made in the 1920s”: Bolivia’s Reply, para 194(a). For the reasons explained in Chapter 4 of this Rejoinder, no such commitment was made in the 1920s, and it therefore could not have been “confirmed” in 1948.

Santiago to the Bolivian Minister of Foreign Affairs, reporting on two meetings with President González Videla on 15 and 23 July 1948.

B.9. On 15 July 1948, the Chilean President indicated that the proposed commencement of formal negotiations would need to be postponed until after the parliamentary elections scheduled in March 1949, in view of the complicated “political situation” in Chile.<sup>839</sup> Bolivia’s note records the Chilean President as reiterating that position on 23 July 1948.

(a) Chile’s President was not understood by Bolivia’s Ambassador as having established the existence of any obligation to negotiate on Chile’s part. Bolivia’s Ambassador considered that signature of the draft note that he had prepared would be necessary “to open a new period in the relations between our countries”. He continued in his report:

“Our meeting ended with the reiterated statements made by President Gonzalez Videla in order to complete the negotiations after the electoral digression, *and thus confirmed the pessimistic impression that I transmitted to you*, at the end of my Note No 598/424, dated 15<sup>th</sup> of the current month, in regard to the possibility of signing the draft note that officially opened direct negotiations ‘to satisfy the fundamental Bolivian need to obtain a proper and sovereign outlet to the Pacific Ocean.’

However, confirming what I also stated in that note, I must tell you that I maintain *my confidence in the good intentions of President Gonzalez Videla* and that it would be absurd to attribute bad faith to him in the dealings related to this matter, ... and, at most, *what could be thought of his current attitude is that he might have rushed a little* – which is inherent to his personal character.”<sup>840</sup>

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<sup>839</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 598/424, 15 July 1948, **BR Annex 258**, recording that this was discussed between the Bolivian Ambassador to Chile and both the Chilean Minister of Foreign Affairs and the Chilean President on 14 and 15 July 1948.

<sup>840</sup> Note from the Bolivian Ambassador in Chile to the Minister of Foreign Affairs of Bolivia, No 648/460, 28 July 1948, **BR Annex 259**, pp 2-3.

In short, Bolivia regretted, but understood, the political impediment that had arisen. Bolivia's Ambassador could not have been further away from indicating to his superiors that Chile was legally obliged to negotiate. Indeed, in May 1950, the same Bolivian Ambassador to Chile wrote to the Bolivian Minister of Foreign Affairs that steps that were anticipated at that time would take the matter "out of the field of mere personal talks ... to formalize it and document it."<sup>841</sup> This only serves to confirm that the two States were engaged in non-binding discussions and that more would be required to achieve any level of formality, let alone to create a legal obligation to negotiate.

3. *The diplomatic exchanges preceding the 1950 notes do not confirm the existence of any legal obligation*

B.10. In its Reply, Bolivia places emphasis on the exchanges preceding the 1950 notes as confirming their "binding character" and asserts that Chile "expressed its acceptance to negotiate on Bolivia's sovereign access to the sea."<sup>842</sup> However, as with the June-July 1948 exchanges considered above, the remaining exchanges do not somehow confirm that the 1950 notes created any binding legal obligation, let alone the obligation that Bolivia now alleges.

B.11. The correct position is that the political and diplomatic discussions preceding the 1950 notes, and the fact that drafts were exchanged in the course of those discussions, is of no assistance to Bolivia in establishing that the notes are a treaty, an agreement, or that they otherwise created any legal obligation. Any such treaty, agreement, or obligation could only be derived from the actual terms of the 1950 notes. Those actual terms do not evidence a binding agreement or any objective intention to create a legal obligation, and the preceding discussions and exchanges cannot somehow transform the differing wording of the 1950 notes into concordant language evidencing an objective intention to create a legal obligation to negotiate. To the contrary: the prior attention to the specific terms used in the

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<sup>841</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 25 May 1950, **CR Annex 397**.

<sup>842</sup> Bolivia's Reply, paras 238-239.

1950 notes serves to emphasize that Chile was precisely not willing to agree to negotiation on the terms proposed by Bolivia.

B.12. As to the period 1946-1947, even a cursory review of the documents relied on shows that they do not assist Bolivia's case.

(a) As to 1946, Bolivia relies only on a press report of a meeting between the Bolivian Minister of Foreign Affairs, the Bolivian Ambassador and the Chilean President. The report records the Bolivian Minister as saying "that the conversation had been cordial and that he had the best impression" of the Chilean President.<sup>843</sup> That is it.

(b) So far as discussions in 1947 are concerned, Bolivia has elected to ignore the points made in Chile's Counter-Memorial.<sup>844</sup> On 2 April 1947, Chilean President González Videla is recorded as having reiterated that he would "study a gradual solution to the Bolivian port issue". As to the topics that might be discussed between the two countries during the first stage of those negotiations, the Chilean President referred only to the "question of the warehouses, railway and wharf in Arica", which he stated "could constitute the first stage of those negotiations".<sup>845</sup> None of this assists Bolivia. Further, according to Bolivia's evidence, on 18 July 1947, the Chilean President "referred to his idea of gradually facilitating the outlet of [Bolivia] through Arica and declared ... with greater candor than ever, 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."<sup>846</sup> The Bolivian Ambassador suggested, in his report to the Bolivian Ministry, that it "must adopt a position" on the issue; that "it is time to decide whether we should propose direct negotiations with Chile, on the bases indicated,

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<sup>843</sup> "Foreign Minister Solares Welcomes by H.E. Accompanied by Ambassador Ostria Gutiérrez", *El Mercurio*, 9 November 1946, **BM Annex 126**.

<sup>844</sup> See Chile's Counter-Memorial, para 6.5.

<sup>845</sup> 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**.

<sup>846</sup> 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**, p 1.

or on different bases, or whether ... it would be preferable to do nothing in this regard”.<sup>847</sup> Given Bolivia’s position during this meeting it is hardly credible to assert that anything was agreed or confirmed.

B.13. The exchanges of 1948 have already been considered above, at paragraphs B.6-B.9. If Chile had approved and signed Bolivia’s draft note proposing a formal entry into negotiations as Bolivia’s Ambassador had then wished, there might at least be some factual basis for saying that the two States had reached an agreement. But Chile was not willing to approve and sign that draft note, as Bolivia’s own evidence makes plain.<sup>848</sup> Bolivia also refers to a document dated 6 January 1948 recording a discussion between Bolivian Ambassador Ostria Gutiérrez and the Chilean President, but that discussion likewise does not support the contention that the 1950 notes were binding.<sup>849</sup>

B.14. Bolivia then moves forward to December 1949, relying on a meeting with President González Videla referred to in a Bolivian report dated 24 December 1949,<sup>850</sup> and a further meeting on 14 March 1950.<sup>851</sup> Bolivia’s record of the meeting in December 1949 refers to the President of Chile’s “willingness to continue with the direct negotiations started before” and to the President’s “determined aim to provide a solution for Bolivia’s port issue during his

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<sup>847</sup> 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**, p 2.

<sup>848</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 515/375, 28 June 1948, **BR Annex 257**, p 191. The correct translation of this document has been resubmitted by Chile as **CR Annex 394**.

<sup>849</sup> See Bolivia’s Reply, fn 330; and 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** (this is also **BM Annex 59**). As to this, Bolivia ignores Chile’s explanation of this report in its Counter-Memorial, para 6.5(b). The document refers to the President’s “desire to reach an agreement that would gradually please Bolivia’s aspirations”, and records that he asked for Bolivia’s position, stating “I would like to know specifically whether Bolivia is or is not interested in moving forward with these negotiations”. The Bolivian Ambassador did not answer the question.

<sup>850</sup> Ambassador of Bolivia’s Note No 1406/988 of 24 December 1949, **BM Annex 64**.

<sup>851</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 14 March 1950, **CR Annex 395**.

administration.”<sup>852</sup> That language does not indicate an intention to create any legal obligation to negotiate. Bolivia’s record of the meeting also makes clear that Bolivia’s Ambassador continued to be without instructions “to continue with the direct negotiations and reach a formula of understanding between Bolivia and Chile”,<sup>853</sup> confirming that no agreement had been reached.

B.15. As for the meeting on 14 March 1950, it appears that Bolivia was proposing that both States submit a basis for negotiations to the Government of the US so as to facilitate obtaining Peru’s consent to any “settlement formula”. The Chilean President expressed Chile’s interest in requesting the use of Bolivian waters as compensation but made clear that any specific proposal would have to be preceded by consultations with the Chilean Congress, and it is evident that he considered that this would restrict him in the ability to discuss matters with US President Truman.<sup>854</sup> Again, the exchanges point to the political sensitivity of these high-level diplomatic discussions into which no sense of legal obligation can be implied.

B.16. The Chilean President did then meet with US President Truman in April 1950 to discuss a possible way forward to granting Bolivia sovereign access to the Pacific Ocean.<sup>855</sup>

(a) President González Videla was focused on compensation to Chile in the form of the use of waters from the lakes of Bolivia’s Altiplano. Thus he addressed “the utilization of falling waters of the High Plateau to promote the transformation and financial and agricultural development of the provinces of the north of Chile,

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<sup>852</sup> Ambassadors of Bolivia’s Note No 1406/988 of 24 December 1949, **BM Annex 64**, pp 269 and 270.

<sup>853</sup> Ambassadors of Bolivia’s Note No 1406/988 of 24 December 1949, **BM Annex 64**, p 271.

<sup>854</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 14 March 1950, **CR Annex 395**.

<sup>855</sup> Remarks of Welcome to the President of Chile at the Washington National Airport, 12 April 1950, **CR Annex 396**.

the south of Peru and an important sector of the Bolivian territory, in return for which Bolivia could obtain its outlet to the sea”.<sup>856</sup>

(b) This scheme was of particular interest to President Truman, and his backing was of great importance given the need to provide finance for the canalization and supply of water from Bolivia’s highlands that Chile’s President was envisaging as compensation for any grant to Bolivia of sovereign access to the sea.<sup>857</sup>

(c) This would necessarily have been a very significant project, and its nature and scale explains in part Chile’s motivation for negotiating with Bolivia and also indicates that any form of binding agreement could only be reached after many further discussions. Following President González Videla’s visit to the US, Chile communicated to Bolivia that President Truman offered firm and determined support, and that the US “would be willing to consider favourably, at the proper time, the financial aid” necessary to establish a port as well as for the utilization of the waters from the highlands.<sup>858</sup>

B.17. In May 1950, the Bolivian Ambassador provided Chile with a further draft proposing the formal entry into negotiation—with “the aim of taking the port

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<sup>856</sup> Statement by the President of Chile regarding the port negotiations, 29 March 1951, **BR Annex 278**, p 18. As to Chile’s motivation, see also Ministry of Foreign Affairs of Bolivia, *The Blue Book: The Maritime Claim of Bolivia* (Directorate of Information of the Presidency of the Republic of Bolivia, May 2004), **CPO Annex 61**, p 877; and Speech by the Representative of Bolivia, in Minutes of the Extraordinary Meeting of the Permanent Council of the OAS, 14 February 1979, **CR Annex 425**, p 28.

<sup>857</sup> See Address by the President of the US opening the meeting of the Foreign Ministers of the American Republics, 26 March 1951, **CR Annex 404**. US President Truman stated: “I like to think of a project about which I talked to the President of Chile, which contemplates the diversion of water from those high mountain lakes between Bolivia and Peru for making a garden on the coast of South America to the west for Chile and Peru, and in return giving Bolivia a seaport on the Pacific. I had a very pleasant conversation with the President of Chile on that subject.” See also A. Ostria Gutiérrez, *Notes on Port Negotiations with Chile* (1998), **CR Annex 440**, pp 41-46.

<sup>858</sup> Note from the Bolivian Minister of Foreign Affairs to the Ambassador of Bolivia in Chile, 17 May 1950, reproduced in A. Ostria Gutiérrez, *Notes on Port Negotiations with Chile* (1998), **CR Annex 440**, pp 43-47. The River Desaguadero drains Lake Titicaca from the south. Chile also suggested that the matter remain strictly confidential. See also G. Gonzalez Videla, *Memoirs* (1975), **BR Annex 299**, pp 895-896.



negotiation out of the field of mere personal talks ... to formalize it and place it on due record”. The Bolivian Ambassador was hoping for an exchange of notes, stating:

“If this were to happen and we were to manage to conclude the exchange of the said notes, we would be taking a particularly transcendental step, even if it would probably be in the general terms of the negotiation, namely, to acknowledge ‘the fundamental need of Bolivia to obtain its own and sovereign access to the Pacific Ocean’.”<sup>859</sup>

B.18. There are two important points to note. First, the “particularly transcendental step” was not suggested to be conclusion of a binding agreement to negotiate, and this is nowhere alluded to in the Bolivian Ambassador’s note. Secondly, Bolivia sought and saw as of transcendental importance an acknowledgement by Chile of “the fundamental need of Bolivia to obtain its own and sovereign access to the Pacific Ocean”. No such acknowledgement was however contained in Chile’s note of 20 June 1950. Thus the correspondence prior to the exchange of notes of June 1950 serves in fact to highlight the critical differences in what Bolivia was seeking from Chile, and what Chile was willing to consider.

**B. Statements of Chile and Bolivia made after the June 1950 notes did not confirm the existence of a legal obligation**

B.19. In its Reply, Bolivia places an increased emphasis on statements made by representatives of Chile and Bolivia after June 1950, alleging that both Chile and Bolivia “acknowledged ... that the Exchange of Notes constituted an agreement entailing legal effects.”<sup>860</sup> That is incorrect.

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<sup>859</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 25 May 1950, **CR Annex 397** (emphasis in original).

<sup>860</sup> Bolivia’s Reply, para 240.

1. *The contemporaneous statements of Chile did not confirm the existence of a legal obligation*

B.20. So far as concerns Chile's position in the period after June 1950:<sup>861</sup>

(a) Bolivia refers to a statement by Chile's Foreign Minister as reported on 11 July 1950, to the effect 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".<sup>862</sup> This statement can in no sense be interpreted as reflecting a sense of legal obligation.<sup>863</sup>

(b) Bolivia continues to place reliance on reports of 19 July 1950 of an interview given by the Chilean Minister of Foreign Affairs.<sup>864</sup> The Chilean Minister is reported as stating that "we are open to hold friendly conversations about [Bolivia's] port aspirations", that "Chile is open to studying in direct, friendly conversations with that country the possibility of satisfying its longings through compensation to Chile" and "Yes. We have agreed to open conversations." He referred to this as the "essence of our Ministry of Foreign Affairs' policy". Again, these remarks merely confirm the expression of political willingness set out in Chile's 1950 note: they do not reflect any sense of legal obligation. The Foreign Minister also stated (in a passage ignored by Bolivia): "But nothing more. No Bolivian proposal on this issue has been received by our Ministry of Foreign Affairs. If and when such proposal is received, we will study it. We will reject it, accept it, amend it, etc. Nothing can be said about things that

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<sup>861</sup> As to the limited probative value of such statements, see *Qatar v. Bahrain, Jurisdiction and Admissibility, 1994*, paras 26-27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Judgment, I.C.J. Reports 1986*, para 64; Chile's Counter-Memorial, para 4.7; and paras 2.8 and 2.13 above.

<sup>862</sup> Bolivia's Reply, para 242, fn 336, referring to **BM Annex 66** which is correctly translated by Chile as **CCM Annex 145**: Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 645/432, 11 July 1950, **CCM Annex 145**.

<sup>863</sup> See also Chile's Counter-Memorial, paras 6.13-6.14.

<sup>864</sup> This interview is reproduced in "The Foreign Minister asserts: 'Chile is willing to study the Bolivian longing on basis of reciprocal compensations'", *VEA (Chile)*, 19 July 1950, **BR Annex 270** and in **BM Annex 67**, and is correctly translated by Chile in Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 668/444, 19 July 1950, **CCM Annex 146**.

are to occur in the future.”<sup>865</sup> The statement provides no support for Bolivia’s claim that the notes constitute an agreement entailing legal effects.

(c) Bolivia refers to a report of a statement of Chilean President González Videla on 19 July 1950, that, “consistently with the tradition of the Chilean Foreign Ministry ... I have never refused to hold conversations regarding Bolivia’s port aspiration” and that he “was willing to hold friendly conversations with the Bolivian Government.”<sup>866</sup> Again, this is not a statement that implies a sense of legal obligation.<sup>867</sup>

(d) In a footnote, Bolivia refers to its own internal note reproducing a reported statement of the Chilean Foreign Minister on 3 August 1950 that Chile is “willing to consider, through direct contacts, any proposals that Bolivia may

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<sup>865</sup> Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 668/444, 19 July 1950, **CCM Annex 146**, pp 4-5. See also the Chilean Minister of Foreign Affairs’ address to the Chilean Senate in September 1950 which records that, after discussing with President Truman in April 1950 the possibility of the project to utilize the waters from Bolivia’s highlands, the Chilean Minister told Bolivia’s Ambassador that “*Bolivia has no right whatsoever*, that all negotiations must be based on compensation favorable to Chile and that, in any case, they must be subject to Peru’s prior agreement. ‘*Chile, therefore, he added, has no commitment and it has the absolute freedom to accept or reject any proposed compensation ...*’”: Minutes of the 26th Ordinary Session of the Chilean Senate, 6 September 1950, **CR Annex 403** (emphasis added).

<sup>866</sup> “Gonzalez Videla declares: All that has been agreed to is to initiate conversations with Bolivia; Arica will always remain free”, *VEA* (Chile), 19 July 1950, **BR Annex 269**, pp 301 and 305 (duplicating the report in **BM Annex 67**, correctly translated with Chile’s Counter-Memorial as Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 668/444, 19 July 1950, **CCM Annex 146**, pp 3-4). The Chilean President explained that his willingness was subject to “two irrevocable conditions”: that the conversations not concern treaty revision and that “all possible conferences in which the problem of Bolivia’s landlocked situation is studied shall count on Peru’s prior agreement”. He also stated that “the tone of the conversations with Bolivia will be none other than that of friendly, amiable dealings, based on providing compensation to Chile”: Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 668/444, 19 July 1950, **CCM Annex 146**, p 3.

<sup>867</sup> Cf. Bolivia’s Reply, para 240. Bolivia does not engage with Chile’s Counter-Memorial, para 6.14, fn 353.

submit to it.’<sup>868</sup> That openness to hearing proposals is not somehow confirmation that the 1950 notes constituted an agreement entailing legal effects.

(e) In response to intense media speculation, both States made the 1950 notes public on 30 August 1950.<sup>869</sup> Following that, the Chilean Minister of Foreign Affairs confirmed—consistent with the terms of Chile’s 20 June 1950 note—that he had “accepted”, “consented”, or “agreed” to open negotiations.<sup>870</sup> Two points in respect of these statements bear noting. First, each of them was made in response to the suggestion that “Chile had taken the initiative to open negotiations”.<sup>871</sup> Chile was clarifying that it was *responding to* a proposal made

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<sup>868</sup> Bolivia’s Reply, para 242, fn 336, citing Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 737/472, 3 August 1950, **CCM Annex 147**, p 575 (this is also **BM Annex 68**). Around the same time, the Chilean Minister noted that the willingness to negotiate that Chile expressed in its 1950 note formed part of a “traditional policy”: Confidential Circular from the Minister of Foreign Affairs of Chile to the Heads of Diplomatic Missions of Chile, 28 July 1950, **CR Annex 401**.

<sup>869</sup> Bolivia’s Reply, para 244. Note that in fn 339 to para 244 Bolivia relies on a summary statement in a note from the British Embassy in La Paz to the British Foreign Office, referring to the 1950 notes as containing a “formal agreement ... to enter into direct negotiations”: Note from the British Embassy in La Paz to the American Department of the Foreign Office, 1 September 1950, **BR Annex 272**. This summary made by an official of a third State has no probative value.

<sup>870</sup> Note from the Chargé d’affaires of Bolivia to Chile to the Minister of Foreign Affairs of Bolivia, No 832/505, 4 September 1950, **BR Annex 273**, p 345; “Let us not divide ourselves by political parties in resolving our foreign affairs”, *El Imparcial* (Chile), 13 September 1950, **BR Annex 276**, pp 367, 371 and 405; and “Chancellor maintains statements made with regard to Bolivia”, *La Nación* (Chile), 5 September 1950, **BR Annex 274**, p 353.

<sup>871</sup> Note from the Chargé d’affaires of Bolivia to Chile to the Minister of Foreign Affairs of Bolivia, No 832/505, 4 September 1950, **BR Annex 273**, p 5, quoting the Chilean Minister of Foreign Affairs in a note sent to the Chilean Senate. So far as concerns the statement in “Chancellor maintains statements made with regard to Bolivia”, *La Nación* (Chile), 5 September 1950, **BR Annex 274**, it was made in response to the allegation that the former Chilean Minister of Foreign Affairs “commenced the negotiations concerning the corridor”, in respect of which Walker Larraín “hastened to publish the corresponding rectification”. So far as concerns the statement in “Let us not divide ourselves by political parties in resolving our foreign affairs”, *El Imparcial* (Chile), 13 September 1950, **BR Annex 276**, it was made as part of an explanation rejecting the suggestion that “Walker offered Bolivia a port” (p 367). At the same time, the Chilean Minister reiterated that “the Government of Chile does not refuse to enter into NEGOTIATIONS with Bolivia, because this is the only means to give an ear to a country and to the proposals it might make” (p 377, emphasis in original) and “we have only agreed to enter into conversations with Bolivia” (p 405). See also Letter from the Ministry of Foreign Affairs of Chile to the President of the Foreign Relations Committee of the Chamber of Deputies, 30 August 1950, **CR Annex 402**, stating expressly that the notes “corroborate and confirm the statements made by the undersigned to the effect that the

by Bolivia—and the natural words it used to explain that position was that it consented, accepted or agreed to Bolivia’s proposal of direct discussions. These statements do not indicate that Chile considered itself to be subject to any legal obligation to negotiate.<sup>872</sup> Secondly, the Chilean Minister of Foreign Affairs reiterated that Chile was acting consistently with its “traditional policy”, i.e. its willingness to listen to Bolivia on proposals it might make regarding its access to the sea.<sup>873</sup> Chile’s “traditional policy” did not involve any legal obligation to negotiate, and the Minister made clear that “no changes have been produced in our foreign policy”<sup>874</sup> as a result of its 1950 note. These statements therefore do not assist Bolivia.

(f) In March 1951, Chilean President González Videla confirmed that “we placed on record in our response [of 20 June 1950] that Chile was willing to enter into a direct negotiation aimed at seeking a formula that may make it possible to give Bolivia an own outlet to the Pacific Ocean.” He emphasized that on the “numerous occasions the Government of Bolivia has expressed its desire to obtain an outlet to the Pacific Ocean ... the policy of the Chilean Government has unvaryingly been a single one: to express its willingness to give an ear to any Bolivian proposal aimed at solving its landlocked condition”. He referred to this as “a first step in a field that must meticulously be studied before being able to safely walk on it”, and reiterated that “[e]very time Bolivia has updated its desire for an outlet to the sea, consideration was naturally given to what that country might offer us as compensation in the event that an agreement is reached”,

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initiative for the dealings came from La Paz, and that the Government of Chile has limited itself to stating its disposition, in accordance with the tradition in our Foreign Ministry, to enter into conversations with the Bolivian Government.”

<sup>872</sup> As to the use of the term “agreed”, as explained in para 2.10 above, even if used in the instrument said to create obligations, this is not conclusive evidence of an intention to be legally bound.

<sup>873</sup> “Let us not divide ourselves by political parties in resolving our foreign affairs”, *El Imparcial* (Chile), 13 September 1950, **BR Annex 276**, pp 373, 377 and 399-403. See also Note from the Chargé d’affaires of Bolivia to Chile to the Minister of Foreign Affairs of Bolivia, No 832/505, 4 September 1950, **BR Annex 273**, p 2.

<sup>874</sup> “Let us not divide ourselves by political parties in resolving our foreign affairs”, *El Imparcial* (Chile), 13 September 1950, **BR Annex 276**, p 403; see also pp 371 and 397-401.

referring to the possibility of utilizing the waters of the Bolivian plateau for a hydroelectric project, with the financial cooperation of the US. He said that what “yesterday was a survey on an idea that was absolutely far from our economic and financial possibilities, has just turned into a hope.”<sup>875</sup> These statements merely confirm Chile’s expression of willingness “to give an ear” to Bolivia’s proposals, subject to appropriate compensation. They do not suggest that Chile was subject to any legal obligation to negotiate.

(g) Likewise in a statement to the Chilean Congress in May 1951, President González Videla simply quoted verbatim Chile’s expression of willingness from its 1950 note and characterized Chile’s response to Bolivia’s “aspiration” as Chile being “willing to give an ear to any concrete proposal by that country”.<sup>876</sup> This does not in any sense demonstrate that Chile was holding firm to an “understanding with regard to the binding nature of the notes of 1950”.<sup>877</sup> On the contrary, President González Videla said his position was “consistent with [Chile’s] policy and inspired in an effective Pan-Americanist spirit”.<sup>878</sup> Chile thus confirmed its expression of political willingness to listen to Bolivia, and nothing more.

(h) Finally, Bolivia relies on President González Videla’s memoirs, published 25 years after the 1950 notes, where he wrote: “I accepted to hold direct talks with the Government of Bolivia to study the way to satisfy its port aspirations”, and that the idea was “to find a formula that could satisfy Bolivia’s

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<sup>875</sup> Statement by the President of Chile regarding the port negotiations, 29 March 1951, **BR Annex 278**, pp 19-22 and 24. That Chile’s 1950 note was not intended to form any part of a treaty is reinforced by the President pointing out that the Chilean Constitution provided that “[b]efore their ratification, treaties must be subject to Congress approval”, and that, on this basis, concerning Chile’s 1950 note it was a “severe mistake” to believe that “the President of the Republic has the duty to consult the National Congress to adopt initiatives of this nature” (p 23).

<sup>876</sup> Report by Chilean President to the National Congress inaugurating the regular period of sessions, 21 May 1951, **BR Annex 280**, p 56.

<sup>877</sup> Cf. Bolivia’s Reply, para 253.

<sup>878</sup> Report by Chilean President to the National Congress inaugurating the regular period of sessions, 21 May 1951, **BR Annex 280**, p 56.

aspiration for an own and sovereign access to the Pacific Ocean.”<sup>879</sup> This merely restates the same expression of political willingness reflected in Chile’s 1950 note.

2. *The contemporaneous statements of Bolivia did not confirm the existence of a legal obligation*

B.21. So far as concerns Bolivia’s position, as expressed at the time:

(a) Bolivia places emphasis on a statement of its own Ambassador which allegedly “interpreted the Notes of 1950 as shaping an agreement”.<sup>880</sup> The statement at issue merely suggests that Chile “accept[ed] to formalize [a] direct negotiation”, and reproduces the political expression of openness which appears in Chile’s 20 June 1950 note. Bolivia’s Ambassador further emphasized that the two States “have only entered into a preliminary stage”. None of this suggests that Bolivia’s Ambassador considered that the two States had created an agreement with legal effect.<sup>881</sup> The same applies so far as concerns the Bolivian Ambassador’s statement reported in January 1951, that “ideas are still being exchanged with the Chilean Government, which retains a favorable position that has been officially expressed in the note of June 1950”.<sup>882</sup> Furthermore, the communiqué issued by the Bolivian Foreign Ministry in March 1951 was consistent with the Parties’ cautious approach in doing no more than quoting the exact wording of the 1950 notes.<sup>883</sup>

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<sup>879</sup> Bolivia’s Reply, para 241, citing G. González Videla, *Memoirs* (1975), **BR Annex 299**, p 902.

<sup>880</sup> Bolivia’s Reply, para 246.

<sup>881</sup> Statements made to the press by the Ambassador of Bolivia to Santiago, 30 August 1950, **BR Annex 271**, pp 18-19. This is confirmed by aspects of the same statement, such as: “[a]ny solution that *might* be reached with regard to the Bolivian port problem, leading the Parties into the territorial stage, will have to be based on a faithful understanding among Bolivia, Chile and Peru” (p 19, emphasis added).

<sup>882</sup> “Ambassador Ostria spoke of the Chilean-Bolivian port problem in La Paz”, *El Diario Ilustrado* (Chile), 6 January 1951, **BR Annex 277**, cited in Bolivia’s Reply, para 252.

<sup>883</sup> Communiqué of the Ministry of Foreign Affairs of Bolivia regarding the statement made by the President of Chile, 30 March 1951, **BR Annex 279**.

(b) Likewise the Bolivian Ambassador’s statement reported in December 1951 that “[t]he negotiations – the initial phase of which was formalized with the Notes of 1 and 20 June 1950 – have entered a waiting period”<sup>884</sup> does not suggest that the Ambassador considered the two States to have created any legal obligation.

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<sup>884</sup> A. Ostria Gutiérrez, *Notes on Port Negotiations with Chile* (1998), **BR Annex 342**, p 202, cited in Bolivia’s Reply, para 252, fn 352. In its Reply, Bolivia suggests that a “waiting period” was requested by Chile, but it does not provide any evidence of that (Bolivia’s Reply, para 252, referring to Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, No 844/513, 9 September 1950, **BR Annex 275**, p 357, which records only that the Chilean Minister “was supportive of entering into a waiting period.” Similarly A. Ostria Gutiérrez, *Notes on Port Negotiations with Chile* (1998), **BR Annex 342**, p 201, refers only to the fact that “a waiting period had followed the establishment of a de facto Government in Bolivia”.)



**LIST OF ANNEXES TO THE REJOINDER**  
**VOLUMES 2 AND 3**

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>VOLUME 2</b> <b>ANNEXES 374 - 415</b>			
<b>Annex 374</b>	Preliminary Peace Protocol between Bolivia and Chile, 19 May 1891  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	1
<b>Annex 375</b>	Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, 25 January 1901 (extracts)  (Original in Spanish, English translation)	The Alfredo Montalvo Bolivian Digital Pamphlets Collection, < <a href="https://digital.library.cornell.edu/catalog/bol:0454">https://digital.library.cornell.edu/catalog/bol:0454</a> >	11
<b>Annex 376</b>	Letter from the Legation of Bolivia in Chile to the President of Bolivia, 10 April 1902  (Spanish transcription, English translation, original in Spanish)	National Archive of Bolivia (Sucre)	37
<b>Annex 377</b>	Treaty on Demarcation of Frontiers between Peru and Bolivia, 23 September 1902  (English translation)	1909 3(4) <i>American Journal of International Law, Supplement: Official Documents</i> , pp 381-383	53
<b>Annex 378</b>	Protocol to the 1904 Treaty of Peace and Amity between Bolivia and Chile, 20 October 1904  (Original in Spanish, English translation)	National Archive of Chile	57

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 379</b>	Treaty on Rectification of Borders between Peru and Bolivia, 17 September 1909  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Peru, < <a href="https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&amp;documentId=605E">https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&amp;documentId=605E</a> >	63
<b>Annex 380</b>	Letter from the Minister of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, 29 April 1910  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	69
<b>Annex 381</b>	Letter from the Minister Plenipotentiary of Chile in Bolivia to the Government of Bolivia, 14 August 1910  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	73
<b>Annex 382</b>	Letter from the Ministry of Foreign Affairs of Bolivia to the Minister Plenipotentiary of Chile in Bolivia, 29 August 1910  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	79
<b>Annex 383</b>	E.B. Codesido, <i>Annotations to the History of Diplomatic Negotiations with Peru and Bolivia 1900-1904</i> (1919), pp 188-192 (extract)  (Original in Spanish, English translation)		83

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 384</b>	Note from the Ministry of Foreign Affairs of Bolivia to the Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, 21 November 1919  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 43 to its Memorial	95
<b>Annex 385</b>	Note from the Minister of Foreign Affairs of Chile to the Minister Plenipotentiary of Bolivia in Chile, 21 December 1921  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 237 to its Reply	113
<b>Annex 386</b>	Letter from the Legation of Chile in Bolivia to the Minister of Foreign Affairs of Bolivia, 5 December 1926  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	121
<b>Annex 387</b>	Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia Abroad, 21 January 1927  (Original in Spanish, English translation)	A. Vergara Vicuña, <i>The Sea, Link of Peace between Bolivia and Chile</i> (1936), pp 314-322	137
<b>Annex 388</b>	Letter from the Ministry of Foreign Affairs of Chile to the Chilean Ambassador to Bolivia, 16 November 1944  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	157

<b>ANNEX NO</b>	<b>TITLE</b>	<b>SOURCE</b>	<b>PAGE NO</b>
<b>Annex 389</b>	Letter from the Embassy of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 18 October 1945  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	161
<b>Annex 390</b>	Letter from the Embassy of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 31 October 1945  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	171
<b>Annex 391</b>	Minutes of a conversation between the President of Chile and the Bolivian Ambassador to Chile, 17 June 1948  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	185
<b>Annex 392</b>	Telegram from the Ministry of Foreign Affairs of Chile to the Embassy of Chile in Bolivia, 19 June 1948  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	191
<b>Annex 393</b>	Minutes of a conversation between the Minister of Foreign Affairs of Chile and the Bolivian Ambassador to Chile, 25 June 1948  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	195

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 394</b>	Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 28 June 1948  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 257 to its Reply	203
<b>Annex 395</b>	Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 14 March 1950  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 65 to its Memorial	221
<b>Annex 396</b>	Remarks of Welcome to the President of Chile at the Washington National Airport, 12 April 1950  (Original in English)	Public Papers, Harry S. Truman, 1945-1953, < <a href="https://www.trumanlibrary.org/publicpapers/index.php?pid=708&amp;st=chile&amp;st1=&gt;">https://www.trumanlibrary.org/publicpapers/index.php?pid=708&amp;st=chile&amp;st1=&gt;</a>	229
<b>Annex 397</b>	Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 25 May 1950  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 260 to its Reply	231
<b>Annex 398</b>	Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Chile, 1 June 1950  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 109A to its Memorial	241

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 399</b>	Note from the Minister of Foreign Affairs of Chile to the Bolivian Ambassador to Chile, 20 June 1950  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 109B to its Memorial	249
<b>Annex 400</b>	Letter from the Embassy of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 7 July 1950  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	255
<b>Annex 401</b>	Confidential Circular from the Minister of Foreign Affairs of Chile to the Heads of Diplomatic Missions of Chile, 28 July 1950  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	261
<b>Annex 402</b>	Letter from the Ministry of Foreign Affairs of Chile to the President of the Foreign Relations Committee of the Chamber of Deputies, 30 August 1950  (Original in Spanish, English translation)	Chamber of Deputies of the Republic of Chile	267
<b>Annex 403</b>	Minutes of the 26th Ordinary Session of the Chilean Senate, 6 September 1950, pp 24-27 (extract)  (Original in Spanish, English translation)	Senate of the Republic of Chile	271

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 404</b>	Address by the President of the US opening the meeting of the Foreign Ministers of the American Republics, 26 March 1951  (Original in English)	Public Papers, Harry S. Truman, 1945-1953, < <a href="https://www.trumanlibrary.org/publicpapers/index.php?pid=269&amp;st=&amp;st1=&gt;">https://www.trumanlibrary.org/publicpapers/index.php?pid=269&amp;st=&amp;st1=&gt;</a>	285
<b>Annex 405</b>	Telegram from the Embassy of the US in Peru to the US Secretary of State, 31 March 1951  (Original in English)	US National Archives and Records Administration	291
<b>Annex 406</b>	A. Ostria Gutiérrez, <i>A Work and a Destiny, Bolivia's International Policy After the Chaco War</i> (1953), pp 75-81 (extract)  (Original in Spanish, English translation)		293
<b>Annex 407</b>	Exchange of notes establishing a Mixed Bolivian-Peruvian Commission, 20 April 1955  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Peru, < <a href="https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&amp;documentId=91EA">https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&amp;documentId=91EA</a> >	309
<b>Annex 408</b>	Preliminary Convention between Bolivia and Peru concerning the joint utilization of the waters of Lake Titicaca, 30 July 1955  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Peru, < <a href="https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&amp;documentId=920A">https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&amp;documentId=920A</a> >	323

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 409</b>	Agreement between Bolivia and Peru concerning a preliminary economic study of the joint utilization of the waters of Lake Titicaca, 19 February 1957  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Peru, < <a href="https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&amp;documentId=6C2A">https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&amp;documentId=6C2A</a> >	333
<b>Annex 410</b>	Memorandum Concerning the Question of Free Access to the Sea of Land-Locked Countries by the Secretariat of the UN Conference on the Law of the Sea, A/Conf.13/29, 14 January 1958, pp 22-39 (extract)  (Original in English)	United Nations, < <a href="http://www.un.org/ga/seaarch/view_doc.asp?symbol=A%2FConf.13%2F29&amp;Submit=Search&amp;Lang=E">http://www.un.org/ga/seaarch/view_doc.asp?symbol=A%2FConf.13%2F29&amp;Submit=Search&amp;Lang=E</a> >	341
<b>Annex 411</b>	UN Conference on the Law of the Sea, Official Records Volume VII: 5th Committee (Question of Free Access to the Sea of Land-locked Countries), Summary Records of Meetings and Annexes, A/Conf.13/43, 24 February – 27 April 1958, pp 18-19 (extract)  (Original in English)	United Nations, < <a href="http://legal.un.org/docs/?path=../diplomaticconferences/1958_lof/docs/english/vol_7.pdf&amp;lang=E">http://legal.un.org/docs/?path=../diplomaticconferences/1958_lof/docs/english/vol_7.pdf&amp;lang=E</a> >	361
<b>Annex 412</b>	Confidential Aide Mémoire from the Ministry of Foreign Affairs of Chile for the personal information of Ambassador Ríos Gallardo, 6 August 1963  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	365



ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 413</b>	Memorandum from the Ministry of Foreign Affairs of Chile to Ambassador Ríos Gallardo, 8 August 1963  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	371
<b>Annex 414</b>	Telex from the Consulate General of Chile in Bolivia to the Ministry of Foreign Affairs of Chile, 26 April 1971  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	375
<b>Annex 415</b>	Memorandum by the Consulate General of Chile in Bolivia to the Minister of Foreign Affairs of Chile, 3 October 1973  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	379
<b>VOLUME 3 ANNEXES 416 - 454</b>			
<b>Annex 416</b>	A. Crespo Gutiérrez, <i>The Treaties Signed with Chile in 1895</i> (1975), pp 43-47, 53, 58-62, 67-68, 71-73 (extracts)  (Original in Spanish, English translation)		391
<b>Annex 417</b>	“Banzer claims Landlocked Situation, Not A Basic Condition”, <i>El Mercurio</i> (Chile), 5 February 1975  (Original in Spanish, English translation)	<i>El Mercurio</i> (Chile)	425

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 418</b>	Telegram from the US Secretary of State to the US Embassy in Bolivia, 15 February 1975 (Original in English)	US National Archives and Records Administration, < <a href="https://aad.archives.gov/aad/createpdf?rid=90952&amp;dt=2476&amp;dl=1345">https://aad.archives.gov/aad/createpdf?rid=90952&amp;dt=2476&amp;dl=1345</a> >	431
<b>Annex 419</b>	“Memorandum of Conversation”, Bolivia, 7 June 1976 (Original in English)	Foreign Relations of the US, 1969–1976, Volume E–11, Part 2, Documents on South America, 1973-1976, Office of the Historian, < <a href="https://history.state.gov/historicaldocuments/frus1969-76ve11p2/d79">https://history.state.gov/historicaldocuments/frus1969-76ve11p2/d79</a> >	437
<b>Annex 420</b>	Report from Gregorio Amunátegui Prá to the President of Chile, October 1976 (Original in Spanish, English translation)	Personal records of Gregorio Amunátegui Prá	447
<b>Annex 421</b>	“The National Maritime Council Speaks Out: The exchange of territories is the only realistic solution for Bolivia”, <i>La Tercera</i> (Chile), 1 November 1976 (Original in Spanish, English translation)	<i>La Tercera</i> (Chile)	475
<b>Annex 422</b>	Note from the Bolivian Ambassador to Chile to the Minister of Foreign Affairs of Bolivia, 7 April 1977 (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 314 to its Reply	479

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 423</b>	Memorandum by the Ministry of Foreign Affairs of Chile entitled "Course of the negotiation with Bolivia", 1978  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	489
<b>Annex 424</b>	First draft of the resolution on the maritime problem of Bolivia circulated by Bolivia at the 11th General Assembly of the OAS, 1979  (Original in Spanish, English translation)	U. Figueroa Pla, <i>The Bolivian Claim Before International Fora</i> (2007), pp 485-486	515
<b>Annex 425</b>	Minutes of the Extraordinary Meeting of the Permanent Council of the OAS, 14 February 1979 (extracts)  (English translation)	Organization of American States, OEA/Ser.G CP/ACTA 368/79, 14 February 1979, pp 6-57, 68, 71, 73	521
<b>Annex 426</b>	Report on the Maritime Problem of Bolivia, 26 October 1979  (Original in English)	Organization of American States, General Assembly, Ninth Regular Session, OEA/Ser.P AG/doc. 1145/79, 26 October 1979	567
<b>Annex 427</b>	Minutes of the 6th Meeting of the General Committee of the OAS General Assembly, 19 November 1982 (extracts)  (English translation)	Organization of American States, General Assembly, Twelfth Regular Session, OEA/Ser.P/XII.O.2, 29 July 1983, Vol. II, Part I, pp 662, 696-705, 710-715, 717-720	579
<b>Annex 428</b>	Letter from the President of Colombia to the President of Chile, 18 November 1983  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	601

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 429</b>	Official Message from the Embassy of Chile in Peru to the General Directorate for Foreign Policy of Chile, 21 December 1983  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	605
<b>Annex 430</b>	Official Message from the Consulate General of Chile in Bolivia to the Directorate of Bilateral Affairs of the Ministry of Foreign Affairs of Chile, 26 June 1984  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	609
<b>Annex 431</b>	Minutes of the 2nd Plenary Meeting of the OAS General Assembly, 12 November 1984 (extract)  (English translation)	Organization of American States, General Assembly, Fourteenth Regular Session, OEA/Ser.P AG/Actas 200/84, 12 November 1984, pp 1-9	613
<b>Annex 432</b>	Minutes of the 3rd Meeting of the General Committee of the OAS General Assembly, 15 November 1984 (extracts)  (English translation)	Organization of American States, General Assembly, Fourteenth Regular Session, OEA/Ser.P/XIV.O.2, 17 September 1985, Vol. II, Part I, pp 350, 368-372, 375-376, 380-382	623
<b>Annex 433</b>	H. Muñoz, <i>The Foreign Relations of the Chilean Military Government</i> (1986), pp 142-144 (extract)  (Original in Spanish, English translation)		633

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 434</b>	Draft Chilean-Bolivian Joint Communiqué, 1986  (Original in Spanish, English translation)	Archives of the Ministry of Foreign Affairs of Chile	639
<b>Annex 435</b>	Speech of the Minister of Foreign Affairs of Bolivia, 21 April 1987  (Original in Spanish, English translation)	Ministry of Foreign Affairs of Chile, <i>Memoria of the Ministry of Foreign Affairs for 1987</i> , pp 25-28	643
<b>Annex 436</b>	Minutes of the 4th Meeting of the General Committee of the OAS General Assembly, 12 November 1987 (extracts)  (English translation)	Organization of American States, General Assembly, Seventeenth Regular Session, OEA/Ser.P/XVII.O.2, 14 November 1987, Vol. II, Part I, pp 341, 351-364	653
<b>Annex 437</b>	Minutes of the 2nd Meeting of the General Committee of the OAS General Assembly, 19 May 1992 (extracts)  (English translation)	Organization of American States, General Committee, Twenty-Second Regular Session, OEA/Ser.P/XXII.O.2, 1 April 1993, Vol. II, Part I, pp 295, 299-309	667
<b>Annex 438</b>	Minutes of the 4th Plenary Meeting of the OAS General Assembly, 4 June 1996 (extracts)  (English translation)	Organization of American States, General Assembly, Twenty-Sixth Regular Session, OEA/Ser.P/XXVI-O.2, 30 April 1997, Vol. II, Part I, pp 79-83	681

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 439</b>	Minutes of the 4th Plenary Meeting of the OAS General Assembly, 3 June 1997 (extracts) (English translation)	Organization of American States, General Assembly, Twenty-Seventh Regular Session, OEA/Ser.P/XXVII-O.2, 5 June 1998, Vol. II, Part I, pp 155-156, 183-187	689
<b>Annex 440</b>	A. Ostria Gutiérrez, <i>Notes on Port Negotiations with Chile</i> (1998), pp 41-47 (extracts) (Original in Spanish, English translation)		697
<b>Annex 441</b>	Minutes of the 4th Plenary Meeting of the OAS General Assembly, 5 June 2001 (extracts) (English translation)	Organization of American States, General Assembly, Thirty-First Regular Session, OEA/Ser.P/XXXI-O.2, 31 October 2001, Vol. II, pp 133-134, 140-144	713
<b>Annex 442</b>	Minutes of the 4th Plenary Meeting of the OAS General Assembly, 10 June 2003 (extracts) (English translation)	Organization of American States, General Assembly, Thirty-Third Regular Session, OEA/Ser.P/XXXIII-O.2, 5 September 2003, Vol. II, pp 127, 138-141	723
<b>Annex 443</b>	Note from the President of Chile to the President of Bolivia, December 2005 (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 81 to its Memorial	731

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 444</b>	“Chilean Foreign Affairs Minister does not exclude a sovereign outlet to the sea for Bolivia”, <i>El Universal</i> (Venezuela), 16 April 2006  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 132 to its Memorial	735
<b>Annex 445</b>	“Chile accepts to include outlet to the sea for Bolivia in the agenda”, <i>Diario Libre</i> (Dominican Republic), 18 July 2006  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 135 to its Memorial	739
<b>Annex 446</b>	“The surveys show that a high percentage of the Chilean population does not agree with the proposal ‘sea for Bolivia’”, <i>El Mercurio</i> (Chile), 24 June 2007  (Original in Spanish, English translation)	<i>El Mercurio</i> (Chile)	745
<b>Annex 447</b>	Political Constitution of the Plurinational State of Bolivia, 7 February 2009 (extract)  (Original in Spanish, English translation)	Bolivia, InfoLeyes, < <a href="http://bolivia.infoleyes.com/shownorm.php?id=469">http://bolivia.infoleyes.com/shownorm.php?id=469</a> >	751
<b>Annex 448</b>	“The Bolivian enclave that Piñera stopped” and “The formula that is most suitable for the President”, <i>La Tercera</i> (Chile), 5 December 2010  (Original in Spanish, English translation)	Original submitted by Bolivia as Annex 363 to its Reply	759

ANNEX NO	TITLE	SOURCE	PAGE NO
<b>Annex 449</b>	<p>“Moreno and the enclave: ‘Alternatives that divide the country are not beneficial’”, <i>La Tercera</i> (Chile), 6 December 2010</p> <p>(Original in Spanish, English translation)</p>	Original submitted by Bolivia as Annex 364 to its Reply	787
<b>Annex 450</b>	<p>“Bachelet offered 28 km to Bolivia”, <i>El Deber</i> (Bolivia), 6 February 2011</p> <p>(Original in Spanish, English translation)</p>	Original submitted by Bolivia as Annex 143 to its Memorial	793
<b>Annex 451</b>	<p>Letter from the Ministry of Foreign Affairs of Chile to the Ministry of Foreign Affairs of Bolivia, 8 November 2011</p> <p>(Original in Spanish, English translation)</p>	Original submitted by Bolivia as Annex 82 to its Memorial	803
<b>Annex 452</b>	<p>E. Silva Cimma, <i>The Last Patience</i> (2012), pp 33-36 (extract)</p> <p>(Original in Spanish, English translation)</p>	< <a href="http://www.xn--pequeodios-x9a.cl/wp-content/uploads/2015/10/SILVA-CIMMA.pdf">http://www.xn--pequeodios-x9a.cl/wp-content/uploads/2015/10/SILVA-CIMMA.pdf</a> >	809
<b>Annex 453</b>	<p>Statement by the Minister of Foreign Affairs of Chile, 67th Session of the UN General Assembly, A/67/PV.15, 28 September 2012, pp 37-41 (extract)</p> <p>(Original in English)</p>	United Nations, < <a href="https://documents-dds-ny.un.org/doc/UNDOC/GE/N/N12/523/96/PDF/N1252396.pdf?OpenElement">https://documents-dds-ny.un.org/doc/UNDOC/GE/N/N12/523/96/PDF/N1252396.pdf?OpenElement</a> >	819
<b>Annex 454</b>	<p>Clarifications on History of the XIX<sup>th</sup> Century Between Chile and Bolivia</p> <p>(Original in English)</p>	Prepared by the Government of Chile in response to BR Annex 373	825



## **CERTIFICATION**

I certify that the 81 annexes filed with this Rejoinder are true copies of the documents reproduced and that the translations provided are accurate.

Claudio Grossman

Agent of the Republic of Chile

15 September 2017