INTERNATIONAL COURT OF JUSTICE

OBLIGATION TO NEGOCIATE ACCESS TO THE PACIFIC OCEAN
(BOLIVIA v. CHILE)

REPLY OF THE GOVERNMENT OF THE PLURINATIONAL STATE OF BOLIVIA

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INTRODUCTION

1. This case raises the important question of the extent to which a State is entitled to rely upon promises and representations made by another State and, more specifically, of the circumstances in which one may insist that the other does not arbitrarily and unilaterally close down negotiations to which the two States have committed themselves to resolve a long-standing matter between them.

2. Bolivia's case concerns "the non-compliance by Chile with its obligation to negotiate in good faith a sovereign access for Bolivia to the Pacific Ocean, and its repudiation of that obligation."[1] Chile's obligation arises under international law from a course of conduct over more than a century, including agreements with Bolivia and also Chile's own unilateral declarations, expressly and repeatedly affirming that, notwithstanding Bolivia's cession to Chile of its coastal territories under the 1904 Treaty, Bolivia should not become perpetually landlocked. Through this course of conduct, Chile bound itself to negotiate in order to grant Bolivia its own sovereign access to the Pacific Ocean.

3. In its Counter-Memorial, Chile attempts to deny the reality that has guided relations between the two States. The factual record demonstrates that throughout the past century Chile and Bolivia have been in agreement on three essential points:

- The existence of an obligation to negotiate in order to grant Bolivia its own sovereign access to the sea;
- The independence of that obligation from the 1904 Treaty; and
- A shared understanding of what a 'sovereign access to the sea' entails.

As was explained in Bolivia's Memorial, it is the arbitrary and unilateral repudiation of this position by Chile that led to the initiation of these proceedings.[2]

4. Chile's Counter-Memorial fails to address Bolivia's legal case. It pursues a combined strategy of ignoring the applicable law, denying the historical continuity and cumulative effect of the facts, and recycling Chile's mischaracterization of Bolivia's claim as an attempt

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[1] BM, para. 3.

[2] BM, paras. 440-482.

to modify the 1904 Treaty, despite the express rejection of that argument by the Court in its Judgment of 24 September 2015.

5. *First*, in regard to the applicable law, Chile does not adequately address the point that obligations may result not only from express agreements, but also, as the International Law Commission (ILC) has recognised, from the unilateral acts of a State[3]. While focusing on whether the many agreements and joint declarations made by the Parties are legally binding or not (it being Bolivia's contention that they are binding), it is remarkable that Chile's voluminous Counter-Memorial does not discuss estoppel or any of the analogous doctrines in international law. Chile simply asserts categorically that: "[t]he objective intention necessary to create a legal obligation cannot be inferred from another State's expectations, as Bolivia suggests"[4].

6. It is Bolivia's position that Chile's obligations in this case arise from agreements and unilateral declarations expressing its intention to be bound. Further, the Court has recognized that even without such express agreements and declarations, a mere course of conduct can indicate an intention to be bound based on "an admission, recognition, acquiescence or other form of tacit consent to the situation."[5] In this regard, Chile's Counter-Memorial has failed to refute Bolivia's alternative argument 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.

7. *Second*, in regard to the facts, Chile ignores the historical context and continuity of the dispute, including Chile's own express and repeated affirmations that Bolivia's sovereign access to the sea must be retained and resolved by negotiation. In a clear attempt to diminish the cumulative effect of more than a century of its own consistent conduct, Chile portrays

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[3] See International Law Commission, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, ILC Yearbook 2006 Vol. II, Part II.

[4] CCM, para. 4.18.

[5] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua* intervening), I.C.J. Rep. 1992,

p. 350, para 364.

express and repeated agreements and unilateral declarations accepting an obligation to negotiate as "sporadic" diplomatic exchanges that "punctuated longer periods of silence". The facts indicate the exact opposite.

8. Beginning in the nineteenth century, and extending throughout the twentieth century, Bolivia and Chile consistently and continuously recognized their commitment to negotiate a settlement to put an end to Bolivia's landlocked status, which Chile had initially imposed by force. This course of conduct was in furtherance of the Parties' historical understanding following Chile's occupation of Bolivia's coastal territories in the War of the Pacific in 1879. In the 1884 Truce Pact, Chile and Bolivia considered negotiations as a way to provide Bolivia a sovereign access to the sea. This commitment was confirmed in the 1895 Transfer Treaty by providing for sovereign access through the occupied Peruvian territories of Tacna and Arica once their status was resolved as between Chile and Peru. The 1895 Transfer Treaty did not ultimately enter into force. Similarly, the 1904 Treaty was concluded by Chile and Bolivia at a time when the dispute between Chile and Peru concerning sovereignty over those territories remained unsettled. In fact, whether in the 1920 Act, the 1926 Matte Memorandum, or other exchanges between the Parties during this period, Chile and Bolivia were in agreement that the question of sovereign access would be resolved only after the status of Tacna and Arica determined. In anticipation, discussions continued between Bolivia and Chile on a formula to provide a sovereign access to the sea.

9. This understanding was confirmed by the 1929 Treaty of Lima, which finally resolved the question of sovereignty over Tacna and Arica between Chile and Peru. Although that Treaty was *res inter alios acta* in regard to Bolivia, Chile and Peru specifically contemplated in their agreement the cession of part of this territory in the future to a third party (undoubtedly, Bolivia) and provided a mechanism applicable to such cession. In addition to the significance of Chile's own conduct, this recognition of Bolivia's continued interest was confirmed by Peru's letter of 26 July 2016 to the Court, recognizing that negotiations on sovereign access during the Charaña process (1975-78) – some fifty years after the Treaty of Lima was concluded – reflected the "firm intention of finding a solution to Bolivia's

landlocked situation" consistent with "the agreement stipulated in Article 1 of the Supplementary Protocol to the 1929 Treaty"[6].

10. Because of the devastating Chaco War (1932-35) between Bolivia and Paraguay the question of sovereign access was not actively pursued again between the Parties until 1941. In 1950, this culminated in the conclusion of an agreement in an exchange of notes between the Parties "to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean".[7] There is no doubt that this was a formal legally binding agreement. Chile's own 1961 Trucco Memorandum reaffirmed the commitment made by Chile in the 1950 Exchange of Notes. Chile attempts to dismiss the Memorandum as an inconsequential internal document, although it was in fact submitted to Bolivia in the course of formal diplomatic exchanges. In any event, the allegedly 'internal' character of the document could only give it greater weight in confirming – that is, in Chile's view, the Chilean Government placing its position on record for its own reference – that Chile had in fact expressed its willingness to negotiate sovereign access and thus had an intention to be bound.

11. Attempts to find a negotiated solution were formalised in 1975 through the conclusion of a Joint Declaration by the Parties' respective Heads of States. Chile accepts that what followed in the Charaña process (1975-78) were "sustained negotiations on the possible transfer from Chile to Bolivia of sovereignty over territory to grant Bolivia sovereign access to the Pacific."[8] It denies, however, that the Joint Declaration constitutes a binding agreement, even if it was published in the Treaty Series of Chile, and was thus quite plainly and publicly treated by Chile as a legally binding agreement rather than a mere political commitment. In that agreement, the Parties "decided" to find a solution for "the landlocked situation that affects Bolivia"[9].

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6 Note from the Ambassador of Peru to the Kingdom of the Netherlands, Carlos Herrera, to the Registrar of the International Court of Justice, 26 July 2006 para. 4.3, **BR, Annex 370.**

7 Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Chile, Horacio Walker Larrain, N° 529/21, 1 June 1950, **BR, Annex 265.**

8 CCM, para. 1.5.

9 BM, Annex 111 para. 4.

12. That shared resolution was reaffirmed in the same year, 1975, by a unanimous Declaration of the Organisation of American States (OAS) on the 150th Anniversary of Bolivia's Independence. It affirmed that "[t]he landlocked situation which affects Bolivia is a matter of continental concern." The Chilean delegation to the OAS specifically indicated that it "agrees with the approval of the Declaration" and "reiterates the spirit of the Joint Declaration of Charaña". This was a legal undertaking made by Chile before the entire OAS membership to find a solution to Bolivia's landlocked condition. The OAS remained seized of the matter, and further declarations were made in the following years, notably in its 1983 resolution calling on the Parties to find "a formula for giving Bolivia a sovereign outlet to the Pacific Ocean."[10]

13. Against this background of a consistent and continuous course of conduct in fulfilment of the clear historical understanding that Bolivia must not remain landlocked, Chile argues that while the obligation to negotiate "is said to have arisen between the latter part of the nineteenth century and 1989…Bolivia is unable to point to any specific date on which the obligation it claims came into existence"[11]. The factual record does not support that contention. At multiple points, Chile entered into agreements and made unilateral declarations that individually and cumulatively created and affirmed the obligation to negotiate Bolivia's sovereign access to the sea. Chile also makes much of the fact that "in more than 20 years of engagement following the restoration of democracy in Chile in 1990… Bolivia never once alleged that Chile was under an obligation to negotiate with Bolivia over sovereign access to the Pacific Ocean."[12] The fact is that during this period, Bolivia recalled Chile's commitment on several occasions before Chile repudiated it in 2011 and refused to negotiate any further. That is exactly why Bolivia finally decided to initiate proceedings before the Court in 2013.

14. *Third,* in regard to the characterization of the dispute, Chile misrepresents both Bolivia's case and the Court's Judgment on Preliminary Objections in order to recycle its arguments on jurisdiction. In particular, Chile persists in its view that an obligation to negotiate sovereign access is inconsistent with the continued validity of the 1904 Treaty

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[10] See BM, pp. 72-79.

[11] CCM, para. 1.5.

[12] CCM, para. 1.5.

because that instrument 'conclusively settled the matter'. That contention was the sole basis of Chile's invocation of Article VI of the Pact of Bogotá to object the Court's jurisdiction, which was squarely rejected by the Court in the following terms:

> "The provisions of the 1904 Peace Treaty … do not expressly or impliedly address the question of Chile's alleged obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. In the Court's view, therefore, the matters in dispute are matters neither "settled by arrangement between the Parties…" nor governed by agreements or treaties in force on the date of the conclusion of the [Pact of Bogotá]" [i.e. as at 30 April 1948][13].

15. Chile's continuing refusal to distinguish between the obligation to negotiate a sovereign access to the Pacific Ocean and the independent obligations arising under the 1904 Treaty is the basis of its argument that none of the exchanges between the Parties could constitute legally binding commitments because the Parties recognized that the negotiations were without prejudice to the 1904 Treaty. Bolivia has consistently maintained, and the Court has recognized, that reaffirmation of the validity of the 1904 Treaty in negotiations is wholly consistent with the Parties' consent to a distinct and separate obligation to negotiate the sovereign access for which the 1904 Treaty had not provided.

16. Chile further claims that the outcome of negotiations on sovereign access would be inconsistent with the 1904 Treaty. Both Bolivia's case, and the Court's conclusions, however, are clear in this regard. It has been Bolivia's consistent case from the outset that the Court is only called upon to establish whether there is an obligation to negotiate in order to give Bolivia a sovereign access to the sea, but not to determine the precise modality of such access. Bolivia stated clearly in its Memorial that beyond that obligation, "[t]he two States themselves will negotiate the exact terms of that sovereign access."[14] Similarly, the Court held that:

> "Even assuming *arguendo* that the Court were to find the existence of such an obligation, it would not be for the Court to predetermine the outcome of any negotiation that would take place in consequence of that obligation."[15]

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[13] Judgment of 24 September 2015, para. 50.

[14] BM, para. 3.

[15] Judgment of 24 September 2015, para. 3.

17. The meaning of this obligation, like the meaning of every legal obligation, can be the subject of detailed and precise analysis and exegesis; but one point is clear. The obligation means that Chile may not refuse to include the question of Bolivia's sovereign access to the Pacific Ocean on the agenda of negotiations with Bolivia: it cannot simply declare that there is nothing to negotiate and completely refuse to discuss the matter in good faith.

18. This Reply consists of three Parts. Part I deals with Chile's serious misinterpretations of matters of principle, surprisingly including issues already settled by this Court. The first of them refers to Chile's biased reading of the Judgment of 24 September 2015, and the consequences arising from the ruling (**Chapter 1**). Bolivia is unfortunately forced to clarify that, contrary to Chile's insistence, the dispute before the Court is neither a dispute based on a right of sovereign access (**A**), nor a legal controversy that involves the 1904 Treaty (**B**). The second misinterpretation concerns Chile's new attempt to redefine Bolivia's invocation of the obligation to negotiate, which has been, again, seriously distorted (**Chapter 2**). Bolivia re-establishes the legal framework of the obligation to negotiate as preliminary clarification (**A**) before spelling out the precise content of the obligation as agreed upon by the Parties, namely the materialization of the sovereign access to the Pacific Ocean (**B**), and concludes with the meaning of the expression "sovereign access to the sea" (**C**).

19. Part II aims to clarify and complete Chile's partial treatment of the legal framework of the obligation to negotiate on sovereign access to the sea. As for the legal principles applicable to the case (**Chapter 3**), Bolivia addresses a number of matters in dispute concerning the expression of an intention to be bound and the obligation to negotiate in good faith (**A**), as well as the precise legal basis that underpins Bolivia's claim (**B**). Then, in view of Chile's efforts to undo its own acts and conduct and erase the legal implications arising from them, Bolivia is obliged to bring them under review to demonstrate that each of them establishes a clear obligation to negotiate, and that the said obligation results not only from general international law (**Chapter 4**), but also from Chile's specific and unequivocal intent to negotiate sovereign access to the sea (**Chapter 5**). To this end, Bolivia demonstrates that, contrary to the Counter-Memorial's efforts to dilute them, Chile's intention to negotiate a sovereign access to the Pacific Ocean is manifested through agreements, declarations, unilateral acts, and consistent conduct (**A**). Because of Chile's mistreatment of central events in particular, Bolivia needs to clarify the meaning and scope of central instruments such as the

1920 Act and the 1926 Matte Memorandum (**B**); the 1950 Exchange of Notes (**C**); the reiteration of the 1950 Agreement and the 1961 Trucco Memorandum (**D**); the Charaña Joint Declaration (**E**); agreements and unilateral acts within the OAS, and the undertakings post-1990 (**F**). Part II concludes with important considerations based on estoppel and legitimate expectations as further legal bases of the obligation to negotiate (**Chapter 6**). After defining their nature (**A**), and the conditions and effects arising from estoppel and legitimate expectations (**B**), Bolivia demonstrates that, as consequence of Chile's acts and conduct, both constitute bases of Chile's obligation to negotiate a sovereign access to the Pacific Ocean (**C**).

20. Part III sets out to unveil Chile's attempt to create a fragmented and partial account of the historical background and its legal consequences by showing that the obligation to negotiate binding upon Chile is the result of a long-standing and consistent commitment (**Chapter 7**). Bolivia demonstrates that Chile's rejection of the uninterrupted and consistent nature of its commitment is artificial and, more fundamentally, does not stand the factual record (**A**), a historical backdrop which clearly denies and corrects Chile's misrepresentation of its own responsibility during crucial events such as the Charaña process (**B**), and its aftermath, which clearly shows that, contrary to what has been submitted in the Counter-Memorial, Chile's own acts and conduct do not support the contention concerning the termination of the obligation, as its own commitment to negotiate was consistently reaffirmed since then (**C**). Part III concludes with a series of final remarks (**D**).

21. This Reply concludes with Bolivia's formal submissions to the Court.

22. The Reply is accompanied by the annexes referred to in the footnotes throughout it, including an index listing the annexes, which are organized, in chronological order, in Volumes II to V. A number of the documents that Bolivia filed as annexes in the Memorial remain relevant to the Reply and, except in cases necessary, Bolivia does not file them for a second time. Bolivia begins the numbering of the annexes filed with this Reply at Annex 234.

PART I

CHILE HAS MISINTERPRETED BOTH

THE 2015 JUDGMENT OF THE COURT AND BOLIVIA'S CLAIM

23. The Chilean Counter-Memorial reveals a misinterpretation of both the Judgment on the preliminary objection issued by the Court on 24 September 2015 and the substantive content of Bolivia's case on the merits. In the following two chapters, Bolivia defines the true scope, first of the judgment by the Court, and second, of Bolivia's case on the merits.

CHAPTER 1

CHILE'S MISINTERPRETATION OF THE JUDGMENT OF 24 SEPTEMBER OF 2015

24. In its Judgment of 24 September 2015, the Court rejected Chile's preliminary objection. In doing so, it clarified a number of points regarding the scope of Bolivia's case. By raising once again arguments that were rejected by the Court[16], Chile appears to have profoundly misunderstood the consequences of the Court's Judgment on jurisdiction.

25. Specifically, Chile maintains its assertion that Bolivia's claim is a ploy designed to bring before the Court a claim concerning its right to sovereign access to the sea; and Chile reiterates its assertion that Bolivia's true purpose is to revise the 1904 Treaty[17]. These assertions of a hidden agenda have already been rejected by the Court. It is therefore necessary to clarify the conclusions of the Court's Judgment on the preliminary objection, namely that the dispute before the Court is not whether Bolivia has a right to sovereign access as such[18] and that the object of the dispute is not the revision of the 1904 Treaty[19].

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[16] CCM, para. 1.17. to 1.19.

[17] CCM, para. 1.4.

[18] Judgment of 24 September, 2015, para. 32.

[19] Judgment of 24 September, 2015, para. 33.

A. Bolivia's case is not a dispute about a right of sovereign access

26. The Court confirmed that the dispute is not about a "right" of Bolivia to have access to the sea. As demonstrated below, the case submitted by Bolivia to the Court concerns an "obligation to *negotiate*". The object of the negotiation is a "sovereign access" to the Pacific Ocean for Bolivia, the outcome of those negotiations not being predetermined.

27. Bolivia does not claim that this sovereign access constitutes a "right". Its claim is that negotiations on this matter are required, and that this requirement to negotiate constitutes a right for Bolivia and an obligation for Chile. This obligation has arisen as a result of a consistent set of formal agreements, unilateral acts and other legal processes such as informal agreements, tacit agreements, and acquiescence or estoppel stemming from a consistent course of conduct and representations by Chile on which Bolivia has relied. In brief, the obligation arises from a large variety of sources beyond formal treaties.

28. Bolivia's position has been confirmed by the Court, which recalled that: "Bolivia does not ask the Court to declare that it has a right to sovereign access"[20].

29. The ultimate objective of the negotiations, namely Bolivia's sovereign access to the sea, has been repeatedly confirmed. By way of example, the Chilean Minister of Foreign Affairs, Patricio Carvajal Prado, wrote to the Bolivian Ambassador in Santiago, Guillermo Gutiérrez Vea Murgía , on 19 December 1975 stating:

> "3. Furthermore, Your Excellency expressed the gratitude of your Government for the intentions expressed by the President of Chile to negotiate with Bolivia a sovereign maritime coast linked to the Bolivian territory through an equally sovereign strip of land."
>
> "4. c) As His Excellency President Banzer stated, the cession to Bolivia of a sovereign maritime coastline, linked to Bolivian territory through an equally sovereign territorial strip, would be considered."

[20] Judgment of 24 September, 2015, para. 33.

> "4. d) Chile would be willing to negotiate with Bolivia the cession of a strip of territory north of Arica up to the Concordia Line based on the following delimitations:"[21].

30. Further, on three separate occasions, Chile issued fully documented proposals for the establishment of a corridor for Bolivia[22]. Notably, Chile has already recognized before the Court that it engaged in negotiations regarding Bolivia's access to the sea, stating in its *Rejoinder* in the *Peru v. Chile* case that:

> "1.43 [Peru] expressed no opposition to the notion that the boundary parallel with Chile would become the maritime boundary between Peru and a then-envisaged Bolivian corridor to the sea to be ceded by Chile… The existing Chile-Peru maritime boundary would have become the Bolivia-Peru maritime boundary."[23]

31. Chile even provided the Court with a map describing the proposed corridor[24]. Chile further stated:

> "3.17 One of the issues specifically mentioned in the Presidential joint declaration, called the Act of Charaña, was Bolivia's access to the sea. Following this, Chile and Bolivia commenced negotiations on a set of arrangements to provide Bolivia access to the sea. Negotiations had reached an advanced stage by late-1975 and continued well into 1976."[25]

32. Only new negotiations between the Parties can determine the modalities of Bolivia's sovereign access to the sea. The Court agrees with Bolivia's position:

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[21] CCM, Annex 180. There are then thirteen paragraphs from *(a)* to *(m)*, describing the envisaged corridor in considerable detail, including its limits and geographical characteristics.

[22] They are as follows: the proposal as initially made in the Treaty and protocols for the transfer of territories (1895) the proposal made by Chilean President González Videla to Ambassador Ostria Gutiérrez (1948-1950); and the "Charaña proposal" under the Declaration signed by Presidents Banzer and Pinochet (1975).

[23] *Case concerning maritime dispute (Peru v. Chile)*, Chile's Rejoinder, p. 28, para. 1.43. Chile devoted a full section to "Peru's Acknowledgement of the Maritime Boundary in the Context of a possible Access to the Sea for Bolivia (1975-1976)", see at 140-145.

[24] The proposed maritime zone for Bolivia and its boundaries were depicted in Chile's *Rejoinder* in the *Case concerning maritime dispute (Peru v. Chile)*. See figure 73: Diagram showing the Peruvian proposal of 1976.

[25] *Ibid.*, p. 141, para. 3.17.

> "it would not be for the Court to predetermine the outcome of any negotiation that would take place in consequence of that obligation."[26].

33. Contrary to Chile's attempts to divert the Court's attention[27], the Court itself clarified:

> "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."[28]

B. Bolivia's case is not a dispute about the 1904 Treaty

34. In its Application of 24 April 2013, Bolivia requested the Court to rule that Chile was subject to an obligation to negotiate in good faith Bolivia's sovereign access to the sea. This is the main purpose of the Application. Bolivia does not seek to question the validity of the 1904 Treaty.

35. This was the conclusion of the Court in its Judgment of 24 September 2015, rejecting Chile's argument that a hidden agenda existed in the Bolivian claim[29]. In reaching this conclusion, the Court was careful to analyse the relevant provisions of this Treaty,[30] deducing that:

> "The provisions of the 1904 Peace Treaty set forth at paragraph 40 do not expressly or impliedly address the question of Chile's alleged obligation to negotiate Bolivia's sovereign access to the Pacific Ocean."[31]

36. However, Chile persists in asserting that the Bolivian claim is a reformulation of Bolivia's alleged "longstanding aspiration to change the settlement agreed in the 1904 Peace Treaty"[32]. Based on this assertion, Chile dedicates an important chapter of its Counter-Memorial (Chapter 3 of Part I) to the significance it claims the 1904 Treaty would have with respect to the present dispute. By doing so, Chile attempts to place before the Court two

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[26] Judgment of 24 September, 2015, para. 33.

[27] CCM, para. 1.4.

[28] Judgment of 24 September, 2015, para. 34 and 50.

[29] Judgment of 24 September 2015, para. 33 and 34; cf CCM, 1.4.

[30] Judgment of 24 September 2015, para. 40 and following paragraphs.

[31] Judgment of 24 September 2015, para. 50.

[32] CCM, para. 1.4. *in fine*

issues that are not related to the present claim: (i) the transit right that the 1904 Treaty grants Bolivia through Chilean territory and ports, and (ii) Chile's submission that the 1904 Treaty entirely and definitively settled all points of dispute that might exist between the two States.

37. However, the Court's decision as to its jurisdiction is final. As the Court stated in its Judgment of 2007:

> "The Court will however observe that the decision on questions of jurisdiction, pursuant to Article 36, paragraph 6, of the Statute, is given by a judgment, and Article 60 of the Statute provides that "[t]he judgment is final and without appeal", without distinguishing between judgments on jurisdiction and admissibility, and judgments on the merits." [33]

1) Arrangements that are based on the right of transit constitute an issue independent of sovereign access to the sea

38. For a State, enjoying a transit right is factually and legally distinct from having a sovereign access to the sea. In international law, this distinction is recognized in the differentiation that is made between coastal States and land-locked States in the United Nations Convention on the Law of the Sea[34]. The transit through its own territory granted by a coastal State to another State deprived of a seacoast remains conditional on the consent of the coastal State.

39. Chile refers to the alleged advantages enjoyed by Bolivia pursuant to the 1904 Treaty. It cites Article VI of the 1904 Treaty by virtue of which Bolivia is granted a right of commercial transit through Chilean territory and ports on the Pacific[35], and Article VII of the same Treaty, which allows Bolivia to set up its own customs agency in certain defined ports[36].

40. Chile, however, refrains from mentioning serious difficulties that are widely known in the region. In practice, the free-transit regime is severely restricted and limited and is far from being observed by Chile. For the purposes of the present proceedings, Bolivia wishes only to

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[33] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, at p. 43, para. 117.

[34] Part X, Articles 124 to 132 of the Convention, 10 December 1982, 1833 UNTS 3.

[35] CCM, para. 3.21.

[36] CCM, para. 3.27.

underline that the difficulties encountered by Bolivia illustrate perfectly the difference between transit rights and sovereign access. Since it merely enjoys a transit right, Bolivia depends on the solutions and approaches to implementation that Chile chooses to adopt[37].

41. A sovereign access exists when a State does not depend on anything or anyone to enjoy this access. Non-conditionality is a key requirement for the sovereign character of the access. A transit right purportedly granted to Bolivia is not equivalent to a sovereign access. The transit right is distinct from, and cannot undermine, Bolivia's claim regarding Chile's obligation to negotiate Bolivia's sovereign access to the sea.

42. This is reflected in the Court's Judgment of 24 September 2015, in which the Court clearly accepted that the present dispute was not about the status of the 1904 Treaty[38]. The Court recognized that it is a dispute of a different kind, namely the obligation upon Chile to negotiate in good faith a sovereign access to the sea for the benefit of Bolivia.

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[37] To mention but a few struggles faced by Bolivia on a daily basis: discontinuity of operations of the Arica-La Paz railway; the privatization of the Arica, Iquique and Antofagasta ports; the increase of port services; storage and custom's fees; endless controls of Bolivian cargo in transit; deteriorated motorways linking Arica to the Bolivian frontier; regular strikes of the Chilean customs and port employees; unilateral tariff increases; long waiting periods to access services; limited parking lots for drivers; serious violation of basic human rights of truck drivers, *etc*. See Address by President Evo Morales Ayma, 33rd Period of Session of the United Nations Human Rights Council Geneva, 23 September 2016, **BR, Annex 371**. And also see Note from the Permanent Mission of the Plurinational State of Bolivia before the UN and other international organizations, to the Presidency of the Human Rights Council, N° MBNU-370/41, 10 October 2016, **BR, Annex 372**. Further, the diminishing competitiveness of the Bolivian economy as a consequence of the elevated fees, reduced connectivity, and higher costs of access to global markets. See *Improving Trade and Transport for Landlocked Developing Countries: A Ten Years Review. World Bank-United Nations Report in Preparation for the 2nd United Nations Conference on Landlocked Developing Countries (LLDCs)*, November 2014 (available at http://unohrlls.org/custom-content/uploads/2013/09/Improving-Trade-and-Transport-for-Landlocked-Developing-Countries.pdf). For further analysis and details of the economic impact, see BM Annex 180.

[38] Judgment of 24 September 2015, para. 33.

2) The obligation to negotiate a sovereign access to the sea exists independently of the 1904 Treaty as recognised by the Court and by the practice of both Parties

43. For more than a century, the Parties agreed on the fact that the matter of Bolivia's sovereign access to the Pacific Ocean had not been settled by the 1904 Treaty and that negotiations on this matter did not undermine the Treaty. Chile itself proceeded on this basis when agreeing to enter into negotiations with Bolivia. At the preliminary phase of the present proceedings, Bolivia had the opportunity to underscore how, at various stages of this century-old negotiation, Chile expressed its opinion on this issue[39].

44. In its Counter-Memorial, Chile seeks to gloss over the stance it repeatedly took and, seeking to avoid its obligations, tries to present Bolivia's claim as simply a new formulation of Bolivia's alleged desire to amend the 1904 Treaty[40]. Since such an amendment would not be possible without Chile's consent, Chile uses the 1904 Treaty to render any negotiation aimed at granting Bolivia a sovereign access impossible. The Chilean stance, however, is inconsistent.

45. On the one hand, Chile insists on the inviolability of treaties and is careful to remind the Court that, pursuant to Article II of the 1904 Treaty, Bolivia recognized the Chilean claim over its conquered territories[41]. Consequently, in Chile's view, as of 1904 no negotiation is possible on a Bolivian sovereign access to the sea. On the other hand, however, Chile recognizes that, at different stages during the twentieth century, both States entered into negotiations to provide Bolivia with "some form of sovereign access to the Pacific Ocean"[42]. Chile goes so far as acknowledging that a binding obligation to negotiate *might* have existed but then asserts that, were it to be the case, such an obligation would have already been fulfilled as both States had negotiated in good faith and negotiations failed – so that the *status quo* resulting from the provisions of the 1904 Treaty was maintained[43].

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[39] CR 2015/19. See also Judgment of 24 September 2015, para. 23 and 47.

[40] CCM, para. 1.4.

[41] CCM, para. 3.11.

[42] CCM, para. 1.13 (b).

[43] CCM, *ibid.*

46. In a subsequent chapter of its Counter-Memorial, Chile again insists on the fact that any question of sovereignty between both States was settled once and for all in 1904[44]. In the same paragraph however, Chile admits that diplomatic exchanges and political negotiations could have brought about a change in the "allocation of sovereignty".

47. A central question that arises in the present case is therefore very simple: if Chile considers the 1904 Treaty to be an obstacle to any negotiation aimed at giving Bolivia a sovereign access to the Pacific Ocean, why did Chile not stop all negotiations as soon as the Treaty entered into force?. Why, on the contrary, did Chile repeatedly continue negotiating and participating actively in them so frequently?

48. In the following paragraphs, (i) Bolivia recalls the context in which both Parties adopted the formula according to which the search for Bolivian access to the Pacific Ocean should occur "independently of the 1904 Treaty" and (ii) refers to a series of key examples that leave no doubt as to the Parties shared position in this regard.

(i) The relevant context

49. As soon as the end of the Pacific War drew near, Chile's most immediate interest was to hold the natural resources Bolivian coastal territories[45]. In the longer term, however, it was also in Chile's own interest not to leave Bolivia landlocked[46] because this would be a source of both resentment and economic difficulties for Bolivia that could negatively impact the stability of the region and Chile's own interests. Different Chilean authorities subsequently confirmed Chilean policy toward Bolivia. For example, the President of Chile, Aníbal Pinto, stated to the Deputy Governor of Tacna on 2 July 1880 as follows:

> "The bases for peace would be on the part of Bolivia: renunciation of its rights over Antofagasta and the littoral that stretches up to Loa [River], and, in

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[44] CCM, para. 3.3.

[45] BM, Annex 39. This was the recognized goal of the war as reflected in the 1884 Truce Pact. Chilean Plenipotentiary Minister König cynically recalled it in the 1900 ultimatum and it is recorded under Article II of the 1904 Treaty.

[46] As expressed by Domingo Santa Maria (the Chilean President) in January 1884, five years after the start of hostilities: "we must grant [Bolivia] an access of its own to the Pacific". BM, Annex 36.

compensation, we would cede Bolivia the rights that the arms have given us over the Departments of Tacna and Moquegua."[47]

50. Two years later, as a peace treaty was being considered, the addressee of this letter wrote to the President of Chile:

> "There are two essential points in this Treaty: the incorporation into Chile of all the former Bolivian littoral and the amendment of boundaries north of Camarones for Bolivia to have an outlet to the Pacific and be located between Chile and Peru"[48]

51. The same requirement was expressed by the Chilean Ministry of Foreign Affairs in a communication to the National Congress of Chile in 1896 declaring that:

> "The Government of Chile, believes that is in its interest to make all possible efforts and do what is legally possible while observing commitments that have been made, to fulfil the national aspiration of the Bolivian people, not only on account of the benefit that Chile would gain bringing under its sovereignty and dominion the coastline it currently occupies provisionally but also, in view of the political interest in fulfilling an urgently felt need of its neighbour. The fulfilment of that need is essential for its independence existence, as it is not only the importation and exportation of goods that Bolivia seeks but also to end its landlocked condition and to be able to communicate with the other nations as a sovereign State to, conclude treaties of navigation and trade. Neighbouring Bolivia, as Chile does, it cannot be indifferent to a nation perpetually upset by a disorder that will last until it secures the fulfilment of its need, its independent and economically effective international access to the Pacific Ocean. Within this conviction, the Government, after detailed consideration, has resolved in Council to adopt the policy to do everything possible, within the bounds of international honour aforementioned, to satisfy that natural hope of Bolivia and the first step in this regard would be, undoubtedly the completion of the treaties exchanged already by approving the Additional and Explanatory Protocols submitted to the National Congress today"[49].

52. Official Chilean policy toward Bolivia was thus clearly stated, with a twofold objective: i), taking possession of the Bolivian coastline and ii) giving Bolivia an outlet to the sea located on the lands conquered from Peru. However, historical circumstances did not

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[47] J. M. Concha, *Chilean Initiatives toward a strategic alliance with Bolivia (1979-1899)*, (2011), p. 69, **BR, Annex 365**.

[48] O. Pinochet de la Barra, *Summary of the Pacific War - Gonzalo Bulnes* (2001), p. 222, **BR, Annex 350**.

[49] BM, Annex 189 (emphasis added).

allow the simultaneous achievement of both objectives. The peace agreement signed with Peru by virtue of the 1883 Treaty of Ancón guaranteed the transfer of the Peruvian province of Tarapaca to Chile. The result was that occupied Bolivian territories could not be returned to Bolivia without disrupting the continuity of Chilean territory (which now included the province of Tarapaca). Thus, sovereign access to the sea had to be secured on territories to the north of Tarapaca.

53. A solution had been foreseen in the 1895 Treaties. These agreements were prepared and negotiated over a long time, and duly ratified, although they did not ultimately enter into force[50]. 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[51]. These Treaties presented the solution to the two-fold objective mentioned above. The Peace Treaty of 18 May 1895 established Chile's continuing possession of the conquered territories and deprived Bolivia of the 400 kilometre coastline[52]. The Treaty on the Transfer of Territories of the same date anticipated putting an end to the landlocked situation of Bolivia[53].

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[50] In its Counter-Memorial Chile focuses on only part of paragraph 16 of the Court's Judgment. Chile notes that, "As the Court has already observed, the 1985 Transfer Treaty 'never entered into force'" (CCM, para 2.4). However, the Court stated in that same paragraph: "This Treaty included provisions for Bolivia to regain access to the sea, subject to Chile acquiring sovereignty over certain specific territories", See Judgment, Preliminary Objections, 24 September 2015, para. 16.

[51] CCM, para 1.8, 2.2, 2.4, 2.9 and 3.8. The entry into force of the 1895 Transfer Treaty was aborted in an unorthodox manner. There was no agreement between Bolivia and Chile "to leave the 1895 Treaties without effect", as Chile contends. On the contrary, the exchange of ratifications of 30 April 1896 and the exchange of notes of 29 and 30 April that year are the expression and evidence of the parties' commitment to proceed with the approval of the protocols that were still being processed. Final approval was left pending not with Bolivia's consent, but rather by Chile's failure to comply with its commitments. Chile was warned by the Bolivian Chancellery: "that Bolivia complied with its duty to sanction the stipulations agreed upon and that it was the Government of Chile which, in the midst of constant hesitation, delayed their definitive sanction, leaving to the present the approval of the aforementioned explanatory Protocols pending by its Congress. Bolivia, however, persisted in its intention to uphold the stipulated arrangements and instructed its Legation in Chile to continue taking the steps leading to the approval of the aforementioned Protocols." Circular of the Ministry of Foreign Affairs of Bolivia to the Legations of Bolivia abroad, 25 January 1901, **BR, Annex 234.**

[52] BM, Annex 99.

[53] BM, Annex 98.

54. No return of conquered territories that were formerly Bolivian was contemplated. The then-envisaged outlet to the sea was to be provided on what had previously been Peruvian lands. These can be divided in two groups. First, the region of Tarapaca in the south (previously Peruvian territory, then Chilean by virtue of the Treaty of Ancón in 1883)[54]. Second, the regions of Tacna and Arica in the north - under Chilean administration, although of an undecided status in 1895 because a referendum to decide whether they would be returned to Peru or would become Chilean was then pending.

55. Preferably, the maritime outlet to be given to Bolivia would have been on the territories located in the northern regions, Tacna and Arica. For Chile to dispose of them, however, the scheduled referendum had to be in its favour. Chile undertook that if the result of referendum was not in its favour, it would give Bolivia a less important sea outlet on what had previously been Peruvian territory to the south, which was indisputably under Chile's possession[55].

56. The unsuccessful event of 1895 is revealing of the objectives governing the position of Chile. Two principles were established as a result of the new power relationship created at the end of the 1879 military conflict: first, that Bolivia could not reclaim its coastal territories occupied by Chile and, second, that Bolivia should not become a landlocked country.

57. In this context an agreed position emerged according to which the search for a Bolivian access to the sea should occur "independently of the 1904 Treaty". This formula meant that the outlet granted to Bolivia could not be located on its former coastal territory but elsewhere. Chile added a further requirement, namely that its territorial continuity could not be interrupted. Consequently, any transfer of territory had to be located in the far north of Chile along its boundary with Peru.

(ii) Key examples

58. This compatibility between respect for the 1904 Treaty and the negotiation of a sovereign access to the Pacific Ocean for Bolivia is explicitly recognized in the 1919 Memorandum:

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[54] BM, Annex 97.

[55] BM, Annex 98.

> "V. Independently of what was established in the Peace Treaty of 1904, Chile accepts to initiate new negotiations aimed at satisfying the aspirations of the friendly country, subject to Chile's triumph in the plebiscite"[56].

59. In 1923, this recognition was reiterated again in explicit terms by the Chilean authorities when it was affirmed that:

> "The revision of our treaty, furthermore, *is not a necessary legal condition* for entering into negotiations to realise Bolivia's desires: that Treaty does not contain any other territorial stipulation than the one declaring Chile's absolute and perpetual dominion of the area of the former Littoral included in the Atacama Desert, which had been the subject of a long dispute between the two countries. […] Chile will never recognize the obligation to give a port to Bolivia within that zone, because it was ceded to us definitively and unconditionally in 1904, and also, because, as I said in my note of the 6th of this month, such recognition would interrupt the continuity of its own territory; however, without modifying the Treaty and leaving its provisions intact and in full force and effect, there is no reason to fear that the well intentioned efforts of the two Governments would not find a way to satisfy Bolivia's aspirations, provided that they are limited to seeking free access to the sea and do not take the form of the maritime vindication that Your Excellency's note suggests."[57]

60. The meaning of Chile's position is clear; "maritime vindication" was only possible in regard to territories other than those ceded by Bolivia under the 1904 Treaty. The above explanation of its Foreign Minister was provided shortly after Bolivia approached the League of Nations hoping to recover its lost territories. Chile did not want the issue of a possible return of former Bolivian territories to be raised. However, it was willing to grant to Bolivia its own access to the Pacific Ocean in northern territories on lands won by Chile (or that Chile expected to obtain) from Peru[58].

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[56] BM, Annex 19; CCM, Annex 117.

[57] CCM, Annex 126 (emphasis added).

[58] An apparent difficulty of a purely formal nature should be addressed. In 1904, the territories of Tacna and Arica were not under Chilean sovereignty but merely under Chilean administration. However, when in 1904 Chile signed the Treaty with Bolivia delimiting their respective territories, it included that northern region of Tacna and Arica. This Treaty therefore delimited the boundary between Bolivia on the one hand and, on the other, regions with an ambiguous juridical status, Tacna and Arica. Once their status was decided in 1929, Tacna was returned to Peru and Arica remained Chilean. Consequently, the boundary resulting from the 1904 Treaty signed between Bolivia and Chile remained the same boundary between those two States and, on the

61. The subsequent landmarks of the history of the negotiations, i.e. the Exchanges of Notes of 1950 or the Agreement of 1975, confirm this interpretation and the agreement existing between both States on this point. Replying to the Bolivian note of 1 June 1950, and recalling the previous commitments of his country, the Foreign Minister of Chile declared that:

> "… together with safeguarding the legal situation established by the Treaty of Peace of 1904, has been willing to study, through direct negotiations with Bolivia, the possibility of satisfying the aspirations of the Government of Your Excellency…"
>
> "and that, motivated by a fraternal spirit of friendship towards Bolivia, is willing to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean"[59].

62. A proper analysis of the previous exchanges clearly shows the meaning of the expression "together with safeguarding the legal situation established by the Treaty of Peace of 1904" is clear. Chile would not accept any transfer that would return to Bolivia the seacoast which was part of the Chilean territory by virtue of the 1904 Treaty. However, another solution would be compatible with the Chilean requirement to comply with the 1904 Treaty.

63. The same analysis applies to the 1961 Trucco Memorandum (named after its author, the Chilean Ambassador), and the exchanges between the two States that started in 1975 and represented the most advanced stage of negotiations. Bolivia noted that no reversal of the cession of territories secured in the 1904 Treaty was required: there would be no return to Bolivia of the territories that had previously been under Bolivian possession. At the same time, Chile made an offer to Bolivia of a territory located north of Arica to grant it sovereign access to the sea. During these different stages of negotiations, Bolivia always demonstrated its agreement with Chile's interpretation of the requirement to negotiate.

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other side, the boundary delimiting the Tacna region became the frontier between Peru and Bolivia. See the map produced by Chile: CCM, page 39.

[59] See Note from the Minister of Foreign Affairs of Chile, Horacio Walker Larraín, to the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, N° 9, 20 June 1950, **BR, Annex 266.**

64. In the event that negotiations successfully led to the granting to Bolivia of a corridor in the region of Arica, depending on the exact nature of the modalities of the sovereign access to be agreed on by the Parties, a modification of the boundary established by the 1904 Treaty may have been required. But neither State considered it as an obstacle as the 1919 Memorandum demonstrates in stating that:

> "VI. It would be a matter of a prior agreement to determine the line to indicate the boundary between the areas of Arica and Tacna that would come under the dominion of Chile and Bolivia, respectively, as well as the other commercial compensation or compensation of another kind that would be the basis for the agreement"[60].

65. During the most advanced negotiations, the Charaña negotiations started in 1975, the written record makes clear that Chile considered the 1904 Treaty as an obstacle for former Bolivian territories to be returned to Bolivia, but not to negotiations on a Bolivian sovereign access to the sea involving territories located in the north. As confirmed by eminent Chilean lawyers:

> "Dans l'esprit du gouvernement de Santiago, les négociations avec la Bolivie doivent aboutir à un accord autonome par rapport à toute autre pratique conventionnelle antérieure entre les deux pays. Cela signifie que le Traité de Paix de 1904, qui a consolidé les arrangements territoriaux entre les deux pays, n'est d'aucune façon interprété, modifié ou révisé par le nouvel accord objet de la négociation. De ce point de vue, l'accès souverain de la Bolivie à la mer serait juridiquement entièrement indépendant des réclamations historiques relatives à la perte du littoral maritime, et le principe *Pacta sunt servanda* serait donc respecté"[61].

66. In summary, the practice and conduct of both Parties over many decades demonstrates that negotiations to grant Bolivia a sovereign access to the Pacific Ocean were independent of the 1904 Treaty. The Parties never contemplated the abrogation of Article II of the 1904 Treaty whereby Bolivia ceded its coastal territories to Chile. Both States accepted that the part

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[60] BM, Annex 19 and CCM, Annex 117.

[61] R. Díaz Albonico, M. T. Infante Caffi, F. Orrego Vicuña, « Les négociations entre le Chili et la Bolivie relatives à un accès souverain à la mer», -*Annuaire français de droit international*, vol. 23, No. 1 1977, p.353, **BR, Annex 313**.

of the boundary located further north in Tacna/Arica could be modified and that this would be independent of the 1904 Treaty.

CHAPTER 2

CHILE'S MISINTERPRETATION OF BOLIVIA'S CLAIM

67. Bolivia has asked the Court to declare that Chile is under an obligation to negotiate in good faith a sovereign access to the Pacific Ocean. Bolivia dedicated an important part of its Memorial to the nature of that obligation.[62] The Court, in its Judgment on the Preliminary Objection, defined the scope of the respective arguments:

> "Moreover, should this case proceed to the merits, Bolivia's claim would place before the Court the Parties' respective contentions about the existence, nature and content of the alleged obligation to negotiate sovereign access[63]".

68. Given that Chile has misinterpreted the Bolivian claim, Bolivia is forced to clarify it. The nature and content of the obligation upon Chile to negotiate clearly derives from the prolonged and continuous conduct of the Parties since the end of the Pacific War (Truce Pact 1884). Chile, however, asserts that the exchanges with Bolivia on this subject were purely political and as such could not have created any legal obligation[64]. Basing its argument on a distinction between obligation of means and obligation of result, Chile distorts and confuses Bolivia's claim.

69. In accordance with the Court's expectations outlined above, in this Chapter Bolivia will analyse in further detail the obligation binding upon Chile. First, Bolivia demonstrates that such an obligation qualifies as an obligation to negotiate (A). Second, Bolivia shows that this obligation to negotiate has a precise and defined content, namely an obligation to negotiate a sovereign access to the Pacific Ocean (B). And, to conclude, Bolivia spells out the legal meaning of the terms "sovereign access to the sea" (C).

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[62] See Chapter II (p. 97) and Chapter III (p. 157) of Bolivia's Memorial.

[63] Judgment of 24 September 2015, para. 33.

[64] CCM, para. 1.1.

A. An obligation to negotiate

1) In international law, the obligation of Chile belongs to the category of obligations to negotiate

70. The obligation that Bolivia invokes is an obligation to negotiate. This category of obligation is well known among the obligations that are identified under international law[65]. Underpinned by the principle of good faith, the legal nature of such an obligation is indisputable[66].

71. In the present proceedings, the obligation to negotiate arises from a variety of sources that will be presented in Part II, Chapter 5. To demonstrate the nature of this obligation, Bolivia highlights the particular significance of the Joint Declaration of Charaña[67], which constitutes:

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[65] See further Part II, Chapter 4 below. The obligation may be defined as "l'obligation imposant aux partenaires d'une relation internationale spécifique, l'engagement et la conduite de bonne foi de négociations" (J. Salmon (dir.), *Dictionnaire de droit international public*, Brussels: Bruylant, 2001, at p. 767). The States concerned must "régler avec sagesse un compromis d'intérêts" (P. Reuter, « De l'obligation de négocier », in *Il processso internazionale*, Studi in onore di Gaetano Morelli, Milano: Giuffré, 1975, p. 714). The goal is to reach an agreement and the "reconnaissance d'une marge dans laquelle les partenaires peuvent aller à la rencontre l'un de l'autre" (*Ibid.).*

[66] "En dépit du degré élevé d'appréciation subjective qu'elles comportent au profit de ceux qui y sont soumis et du fait que leur mise en œuvre nécessite habituellement l'intervention d'accords complémentaires (ou mieux de discussions unilatérales discrétionnaires), les obligations de coopération, de négociation, de consultation et même de simple considération (d'un événement futur éventuel en vue d'une action également éventuelle) constituent des obligations juridiques, dont un tiers peut déterminer, dans certains limites, si elles sont exécutées de bonne foi. Leur violation entraîne les mêmes conséquences que tout autre obligation juridique", See «La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationals): septième Commission: rapport provisoire», Michel Virally, *Annuaire de l'Institut de droit international*, vol. 60, issue 1, 1983 p. 255.

[67] CCM, Annex 174.

> "…l'affirmation solennelle par les parties d'un accord ou d'une série d'accords entre elles, portant sur des points importants de leurs relations mutuelles ou sur des principes – juridiques ou non – destinés à gouverner ces relations"[68].

72. Chilean lawyers, commenting on the process of the Charaña negotiations in which the two States engaged in 1975, clearly characterized them as the implementation of an obligation to negotiate:

> "La réponse du gouvernement chilien peut en fait être considérée comme une promesse unilatérale, étant donnée qu'elle constitue l'acceptation d'une norme de conduite, dont l'objectif est de commencer une négociation. En tout cas, la portée de l'obligation est bien clairement limitée à une simple négociation, idée que le texte chilien suggère en parlant de «...cadre pour une négociation destinée à atteindre une solution... »"[69].

73. The quote above highlights certain key elements. On the part of Chile, there was the "*acceptation d'une norme de conduite*". The word "norme" is unequivocal. Moreover the same authors use the term "obligation", which implies a binding requirement. The phrase "*portée de l'obligation*" further underscores its characterisation as an obligation to negotiate. It is also acknowledged that this is a "*négociation destinée à atteindre une solution*".

2) Chile seeks to deny the legal nature of its obligation to negotiate

74. Before the Court, Chile seeks to deny that it is bound by an obligation to negotiate by asserting the following: i) negotiations were never conducted; there were simply discussions or diplomatic exchanges; ii) The willingness to negotiate expressed by Chile was merely a political posture. There was no intention to create any legal obligation; iii) Subjective declarations of intent cannot create an objective legally binding commitment. Each distortion of the historical record is addressed in turn.

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[68] See «La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationals): septième Commission: rapport definitive», Michel Virally, *Annuaire de l'Institut de droit international*, vol. 60, issue 1, 1983, p. 198.

[69] R. Díaz 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 », *Annuaire français de droit international*, vol. 23, No. 1, 1977, p. 353, **BR, Annex 313.**

75. The first distortion by Chile in its Counter-Memorial is to replace the term "negotiations" (which has a legal content) with the vague term "discussions" or by the very general expression "exchanges that were purely diplomatic and political"[70]. However, by doing so, Chile ignores the string of documents that Chile itself produced recording its commitment to enter into "negotiations" that in fact it pursued. It is worth dwelling on some revealing examples to solve Chile's lack of rigor.

76. On 18 January 1978, in a letter to the Bolivian President Hugo Banzer Suárez, the President of Chile, Augusto Pinochet Ugarte stated:

> "I reiterate *my Government's intention of promoting the ongoing negotiation aimed at satisfying the longings of the brother country to obtain a sovereign outlet to the Pacific Ocean.* […] In order to locate the real prospects of *the negotiations that we are committed to*, Your Excellency considered it appropriate to make a brief review of what happened from August 1975 to date, when the Government of Bolivia submitted its guidelines to commence it"[71].

The Chilean Head of State does not refer simply to discussions but to "negotiations", reflecting the fact that he committed himself to engage in them and the "intention" of his Government to promote them.

77. That Chile is in fact well aware that these are true negotiations (as opposed to diplomatic and political exchanges), is reflected in the title of the book published by its Ministry of Foreign Affairs "History of the Chilean-Bolivian Negotiations, 1975-1978"[72].

78. The term "negotiations" was also used by Chile before the Court when, during the proceedings against Peru regarding their maritime border, it mentioned a "possible access of Bolivia to the sea". Chile referred to "negotiations between Chile and Bolivia in 1975-1976, which envisaged an exchange of territories"[73].

79. The second distortion by Chile in its Counter-Memorial is its assertion that a State's expression of a "willingness" to do something (to negotiate with Bolivia regarding its

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[70] CCM, para. III 2.

[71] BM, Annex 78; CCM, Annex 236 (emphasis added).

[72] CCM, annex 189.

[73] *Case concerning maritime dispute (Peru v. Chile)*, Chile's Rejoinder, para. 3.16.

sovereign access to the sea) cannot constitute a legal obligation for that State[74]. Chile cites a note of 1923 from the Chilean Foreign Minister to the Ambassador of Bolivia as evidence that no commitment exists. In this text the Minister states his "willingness to discuss the proposals that the Bolivian Government wishes to present". Chile concludes that:

> "Chile's expressed 'willingness' was not language capable of evidencing an intention to create any legal obligation"[75].

80. The historical record shows that Chile repeatedly used the term "willingness" to characterize its position regarding the possibility of providing Bolivia with a sovereign access to the sea. Chile seeks to restrict the scope of this word by suggesting that it always refers to a political posture, distinguishing it from the term "intention". However, this is a false distinction[76]. In order to establish an obligation of a State, international law does indeed take into account the intention expressed by this State. In the present case, and interpreting the terms in good faith, there is no opposition between the terms "willingness" and "intention"; the affirmation of one (the willingness) indicates the existence of the other (the intention). In Part II of the present Reply, Bolivia will demonstrate how the various acts of Chile evidence its intention to be bound.

81. The third distortion by Chile in its Counter-Memorial consists in drawing a distinction between, on the one hand, subjective statements that would only commit their authors and, on the other hand, objective actions binding the State[77].

82. However, Chile cannot disregard the fact that the "objective" manifestation of an intention occurs through:

> "des aspects sociaux, c'est-à-dire dans les manifestations extérieures, objectivement constatables, qui lui ont permis d'atteindre à l'efficacité dans la création du droit"[78].

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[74] CCM, para.1.28, 4.2 and 5.27. See further Part II, Chapter 5.

[75] CCM, para. 5. 27.

[76] See further Part II, Chapter 5.

[77] CCM, para. 4.7.

[78] See «La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationals): septième Commission:

83. Declarations and commitments made by State authorities are fundamental to establishing a State's objective intention. It is well established that when a Head of State or a Minister of Foreign Affairs intervenes in the arena of international relations, he does not speak on his own behalf but on behalf of his State.

84. The jurisprudence of the Court does not support the possibility that State representatives who have made legally binding declarations[79] on behalf of their Government may withdraw from their statements and claim that they were mere political declarations. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain Case*, the Court noted:

> "The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a 'statement recording a political understanding', and not to an international agreement"[80].

85. In accordance with the jurisprudence of this Court, Chile may not now dismiss as words with merely political significance all declarations and exchanges by which they have asserted their willingness to grant Bolivia a sovereign access to the Pacific Ocean[81], and disregard the rules governing international relations conducted in good faith.

86. Indeed, even if it had made a merely political commitment, *quod non*, Chile cannot deny that:

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rapport provisoire», Michel Virally, *Annuaire de l'Institut de droit international*, vol. 60, issue 1, 1983, p. 238.

[79] As recalled by the ICJ in *Aegean Sea Continental Shelf*, "in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up" (*Greece v. Turkey), Judgment, I.C.J. Reports 1978*, p. 3 at p. 39, para. 96).

[80] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment I.C.J. Reports 1994*. p.122.

[81] CCM, para. 4.7 and 4.14.

> "A State that has entered into a purely political commitment is subject to the general obligation of good faith which governs the conduct of subjects of international law in their mutual relations.
>
> Consequently, it is subject to all legal obligations resulting from such a commitment, in particular when it has created the appearances of a legal commitment on which another person has relied and if the conditions required by international law for the creation of such obligations are fulfilled"[82].

3) Contrary to Chile's claims, Bolivia repeatedly invoked the existing obligation to negotiate

87. By seeking to single out certain events from an ongoing series of historical facts, Chile tries to demonstrate that there has never been, at any time in more than one hundred years of relations regarding this issue with Bolivia, any behaviour that could have the effect of creating a legally binding obligation. According to Chile, throughout this long period, only "sporadic diplomatic and political exchanges" are identified[83], and Chile characterizes the main instances of past negotiations as "discrete and very different periods"[84]. Chile now claims that, prior to filing the case before the Court, Bolivia had not maintained that an obligation to negotiate existed for Chile[85].

88. However, this characterisation of the historical record is not supported by the facts. Bolivia's stance has remained consistent through the past decades. On numerous occasions dating back to the beginning of the twentieth century, Bolivia referred to the fact that Chile (which, from the time of the ratification of its territorial conquests onward, affirmed its willingness to negotiate a solution to the landlocked situation of Bolivia) had committed itself to negotiate and had, consequently, to deliver on this commitment. Admittedly, due to certain periods of Bolivia's history, phases of more intense negotiations were momentarily paused; however, as soon as they were successfully overcome Bolivia continued raising its claim and Chile, for its part, left the door open to negotiations until 2011, when it was abruptly closed.

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[82] "International documents with legal effect, and international documents that are lacking in legal effect": Conclusions du rapport définitif, Annuaire del Institut du Droit International, Vol. II, Tome II, Session de Cambridge, 1983, p. 141.

[83] CCM, para. 1.3.

[84] CCM, para. III.2.

[85] See CCM, para. 5.40, 6.8. and 9.10.

89. This is addressed in more detail below[86], however, for present purposes, it is worth highlighting some key examples:

a. In a note addressed to the League of Nations on 8 September 1922, reference is made to "the promise contained in the speech of M. Edwards, the Chilean Delegate, during the course of that meeting"[87]. The speech referred to was made before the Assembly of the League of Nations during the session of 1921. By recalling the promise that had then been made, Bolivia assumed that Chile would abide by that promise.

b. In 1929, in the Memorandum addressed by Bolivia to the US State Department, Bolivia first recalled Peru's stance (which was open to granting Bolivia an outlet to the sea on its former provinces), and then the terms of the message by Peru's President Leguía in 1926 as follows:

> "The Problem of the Pacific cannot be solved without invoking the right of Peru and, in any case, our fraternal willingness to aid Bolivia in securing an exit to the sea which she claims with such great need."

Bolivia then underscored that these declarations committed their authors:

> "Such eloquent and solemn declarations, coming from the Governments which participated in the struggle of 1879, did not seem destined to be cast into oblivion"[88].

c. The 1950 Exchange of Notes was preceded by lengthy discussions that had been initiated as early as 1941, reflecting the pending issue between the two States and Bolivia's concern to remind Chile of its commitment.

d. Bolivia reminded Chile that it was engaged on the path of negotiations and that it had to pursue them, during a speech of the Foreign Minister of Bolivia on 3 April 1963, when he said:

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[86] See below, Part III, Chapter 7 (A).

[87] See CCM, Annex 122. The meeting referred to was held on 28 September 1921. The exchanges between 1921-22 need to be read in the light of the Bolivia-Chile meeting of 10 January 1920, CCM, Annex 118.

[88] BM, Annex 23.

> "The Exchange of Notes of 1 and 20 June 1950, according to the norms of International Law, constitutes a formal commitment between Bolivia and Chile in order to give Bolivia an own and sovereign outlet to the Pacific Ocean and to give Chile, in return, an appropriate compensation that is not territorial in nature. This commitment is inseparable from the legal regime governing the relations between Bolivia and Chile and is guaranteed, as any other exchange of Notes, by the faith of both States and their national honor"[89].

When the Bolivian Minister speaks of "the juridical regime", it is clear that he is referring to a legal commitment[90].

e. Similarly, in 1967 the Bolivian President Barrientos explicitly asked Chile to deliver on its commitment made in the Notes of 1950:

> "The unshakeable belief that the existing commitments must be fulfilled assign meaning to the attitude adopted by Bolivia as to its claim that the obstacles to its full development be overcome, thus seeking to ensure the peace and progress of this part of the continent"[91].

f. In 1977, the Foreign Ministers of Bolivia and Chile respectively made a joint statement in which:

> "…they indicate that…they initiated negotiations aimed at finding an effective solution that allows Bolivia to count on a free and sovereign outlet to the Pacific Ocean"[92].

g. On 26 October 1979 while addressing the General Assembly of the OAS, the Bolivian delegate publicly recalled the long list of commitments made by Chile, according to which Chile offered Bolivia an access to the Pacific Ocean. This was done in front of all of the States of the continent[93].

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89 BR, Annex 287.

90 CCM, Annexes 165 and 166.

91 CCM, para. 16, d) and Annex 170.

92 BM, Annex 165, CCM, Annex 222.

93 BM, Annex 203 and CR 2015/21; Organization of the American States, Minutes of the Second Session of the General Commission of 26 October 1979, Bolivian delegate, Gonzalo Romero, pp. 360-361, CCM, Annex 248.

90. The obligation to negotiate established through such acts entails two consequences. First, Chile cannot refuse to enter into negotiations on the sovereign access to the sea and cannot rely upon any projected improvement of the free-transit regime to indefinitely postpone the resumption of negotiations. Second, this legally binding obligation does not require the Parties to engage only in general discussions; it imposes an obligation to negotiate on a specific subject matter, as examined in turn.

B. An obligation to negotiate the specific outcome of the sovereign access of Bolivia to the Pacific Ocean

91. The content of an obligation to negotiate results, on the one hand, from the general applicable principle and, on the other, from more specific elements, depending on the particular objective pursued through negotiation.

92. As set out in Part II of this Reply, the general principle applicable results from the obligations upon all States laid down in Article 33 of the UN Charter. Any State having a dispute with another State shall settle it by peaceful means listed in the Charter, the first of which is negotiation. In the present case, however, this *lex generalis* is complemented by the *lex specialis* that arises from the specific commitments made by Chile, according to which Chile stated its willingness to negotiate with Bolivia a sovereign access to the Pacific Ocean. This second source of the obligation arises from the specific subject matter in question. This section of the Reply examines first the way in which this subject matter has been described; and based on this description there will follow an analysis of the nature and scope of this obligation.

1) An obligation to negotiate a specific objective

93. As stated by the Court:

> "…the precise nature and limits of which [an obligation] must be understood in accordance with the actual terms in which they have been publicly expressed"[94].

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

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[94] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 253*, para. 51.

sovereign access to the Pacific Ocean. These negotiations have a specifically defined objective that the Parties must pursue, namely to put an end to Bolivia's situation as a State without a seacoast. Many examples exist of exchanges between the two States in which Chile commits itself on this subject matter. Some key examples are recalled in the following paragraphs (emphasis added, in each case).

95. On 9 September 1919, Chile addressed a memorandum to Bolivia in which it stated: "…Chile is willing to seek that Bolivia acquire *its own outlet to the sea*…"[95].

96. On 2 March 1923, both the willingness of Chile to negotiate and the subject matter of this negotiation ("facilitating *the access of Bolivia to the sea through its own port*"), were expressed by the President of Chile Arturo Alessandri to the Ambassador of Bolivia, who reported it in a note to his Minister[96].

97. On 4 December 1926, the Matte Memorandum (the Chilean Foreign Minister), recalled the negotiations conducted with the US State Department, and stated that:

> "…the Government of Chile has not rejected *the idea of granting a strip of territory and a port to the Bolivian nation*"[97].

98. During the Exchange of Notes of 1950, the subject matter was formulated with clarity:

> "[Chile] … motivated by a fraternal spirit of friendship towards Bolivia, is willing to formally enter into a direct negotiation *aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean*, and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests"[98].

99. When negotiations were resumed in 1975, the subject matter of the negotiations was formulated by both Parties. The Charaña Joint Declaration dated 8 February 1975 stated that both Head of States convened to search for a formula:

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[95] BM, Annex 19 and CCM, Annex 117.

[96] BM, Annex 51.

[97] BM, Annex 22 and CCM, Annex 129.

[98] **BR, Annex 266** and CCM, Annex 144. Additionally, the long preparation of this Exchange of Notes that began as early as 1941, evidences that the consistent aim pursued by the negotiators is to put an end to the landlocked situation of Bolivia. See BM, Annex 55 and CCM, Annex 135 and 160.

> "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"[99].

100. In the following Exchange of Notes, the note coming from the Chilean Foreign Minister on 19 December 1975 stipulated:[100]

> "c) As His Excellency President Banzer stated, *the cession to Bolivia of a sovereign maritime coastline, linked to Bolivian territory through an equally sovereign territorial strip*, would be considered.
>
> d) Chile would be willing to negotiate with Bolivia *the cession of a strip of territory* north of Arica up to the Concordia Line based on the following delimitations…".

101. In 1977, with negotiations at a standstill, the Chilean President offered to redouble efforts to reach the set objective. Confirming the subject matter of this objective, and particularly its joint character, his Bolivian counterpart replied on 8 February 1977:

> "Your Excellency's expressions ratifying the will to advance in said negotiations aimed at overcoming Bolivia's geographical confinement, *through a free and fully sovereign outlet to the Pacific Ocean*, from the current state of this transcendental diplomatic process, constitute, without a doubt, a powerful encouragement to strengthen our effort intended to reach the most desired goal of all Bolivians"[101].

102. Despite the difficulties faced, this goal was maintained and repeated that same year, first in a Joint Declaration of the Foreign Ministers of the two States on 10 June 1977[102], again in September 1977 in a joint communiqué involving Chile, Bolivia and Peru,[103] and finally on 23 November in a note from the President of Chile to his Bolivian counterpart in which he states:

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[99] BM, Annex 111 and CCM, Annex 174.

[100] See BM Annex 73 and CCM Annex 180.

[101] BM, Annex 75 and CCM, Annex 218.

[102] BM, Annex 165 and CCM, Annex 222.

[103] BM, Annex 129 and CCM, Annex 224.

> "My Government appreciates the special importance that *the current negotiations to give Bolivia a sovereign outlet to the Pacific Ocean* have in the context of our relations. My Government maintains unchanged the political will that gave rise to these negotiations and is willing to move ahead with them in accordance with the desires and with the intensity that Your Excellency deems advisable"[104].

103. The same objective was publicly recognized by Chile before the General Assembly of the Organization of American States. On 24 October 1979, the head of the Chilean delegation declared in this forum that it was only through dialogue that the path towards a sovereign access to the sea would be open for Bolivia[105]. On 31 October, he again affirmed:

> "Chile's willingness to negotiate *a solution with Bolivia to its aspiration to have free and sovereign access to the Pacific Ocean*"[106].

104. The General Assembly of the Organization reaffirmed this objective in its resolution No. 426 of 31 October 1979[107], and again in its resolution AG/RES. 560 (XI-O/81) of 27 November 1980[108].

105. Chile claimed its willingness to start a process once more in 1983, when the AG/RES. 686 (XIII-O-83) General Assembly adopted a resolution exhorting both countries:

> "…to begin a process of rapprochement and strengthening of friendship of the Bolivian and Chilean peoples, directed toward normalizing their relations and overcoming the difficulties that separate them *including, especially, a formula for giving Bolivia a sovereign outlet to the Pacific Ocean*, on bases that take into account mutual conveniences and the rights and interests of all parties involved"[109].

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[104] BM, Annex 76 and CCM, Annex 234.

[105] Minutes of the 6th Plenary Meeting, 9th Regular Session of the OAS General Assembly, 24 October 1979, Vol. II, OEA/Ser.P/IX.0.2, **BR, Annex 319.**

[106] BM, Annex 204 and CCM, Annex 249.

[107] BM, Annex 191 and CCM, Annex 250.

[108] BM, Annex 192 and CCM, Annex 253.

[109] BM, Annex 195 and CCM, Annex 266. While in its Counter-Memorial Chile tries to minimize the scope of these resolutions, they nonetheless provide additional evidence of the agreement between the two States on the subject matter of the negotiation that the Organization urged them to conduct. This point will be discussed in more detail in Part II, Chapter 5(F).

106. In 1987, during a meeting held in Montevideo, the Chilean Foreign Minister, alluding to the Charaña Joint Declaration, recalled that:

> "…*the commitment to move forward with the dialogue at different levels was expressly enshrined in order to find a formula for the many vital issues both countries faced, for instance, the one related to the landlocked status that affects Bolivia*, within the framework of reciprocal benefit and also taking into account the aspirations of the Bolivian and Chilean people"[110].

107. In the same year, anxious to see the issue settled, the OAS adopted a new resolution which referred to: "an equitable solution… whereby *Bolivia must obtain sovereign and useful access to the Pacific Ocean*". The text continues as follows: "*The objective* indicated in the preceding paragraph *must be accomplished* in the spirit of brotherhood and American integration…"[111]. Significantly, in both paragraphs it is the verb "must" that is used.

108. It is apparent that, for more than a century, both Parties agreed that Chile had to negotiate with Bolivia in order to achieve the objective of both States, namely granting Bolivia a sovereign access to the Pacific Ocean. The Bolivian claim before the Court concerns this specific obligation, which Chile now refuses to observe and comply with in good faith.

109. However, the specificity of the situation that evolved between the two States should not be ignored. As observed by the Court in its Judgment of 24 September 2015, it represents "a particular dispute that arises in the context of a broader disagreement between Parties"[112]. As a consequence, the Court:

> "considers that, while it may be assumed that sovereign access to the Pacific Ocean is, in the end, Bolivia's goal, a distinction must be drawn between that goal and the related but distinct dispute presented by the Application"[113].

110. This obligation, which is the subject matter of the present dispute, is consequently distinct, as emphasised by Bolivia[114], from what would be an obligation to grant the said

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[110] BM, Annex 169.

[111] BM, Annex 199 and CCM, Annex 300.

[112] Judgment of 24 September 2015, para. 32.

[113] *Ibid*.

[114] BM, para. 497.

sovereign access to Bolivia. Bolivia will now address the scope of the obligation, resulting from the Court's definition.

2) Because of the precision of its objective, the obligation of Chile to negotiate may be characterized as a qualified obligation

111. It follows from the historical record, as cited above, that Chile is subject to an obligation to negotiate in relation to a specific subject matter. That clearly identified subject matter permits the clarification of the scope of the obligation in question.

112. 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[115]. In the case of the *Railway Traffic between Lithuania and Poland*[116], the Permanent Court of International Justice noted that the commitment to negotiate entails an obligation to pursue them as far as possible, with a view to concluding an agreement[117]. The Court, in the Gulf of Maine Case referred to:

> "…the duty to negotiate with a view to reaching agreement, and to do so in good faith, with a genuine intention to achieve a positive result"[118].

113. In the *Lanoux Lake* case of 1957, it was observed that even if the standards governing negotiations are quite flexible, their very existence require that certain conditions are respected:

> "…la réalité des obligations ainsi souscrites ne saurait être contestée et peut être sanctionnée, par exemple, en cas de rupture injustifiée des entretiens, de délais anormaux, de mépris des procédures prévues, de refus systématiques de prendre en considération les propositions ou les intérêts adverses, plus généralement en cas d'infraction aux règles de la bonne foi (affaire de Tacna-Arica, *Recueil des sentences arbitrales*, t. II, p. 921 et suiv.; affaire du trafic ferroviaire entre la

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[115] See further Part II, Chapter 4.

[116] *Railway traffic between Lithuania and Poland, PCIJ, Advisory Opinion of 15 October 1931, Series A/B, No. 42*, p. 116.

[117] Ibid.

[118] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, para. 87.

Lithuanie et la Pologne, Cour permanente de Justice internationale, A/B 42, p. 108 et suiv.)"[119].

114. In its Judgment on the *North Sea Continental Shelf*, the Court observed that:

> "*(a)* the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a forma1 process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it"[120].

115. As an example of an unjustified refusal to negotiate and to consider the proposals or interests of the other party, a fine illustration is Chile's attitude in June 1987. Bolivia submitted two memoranda, including alternative proposals on enclaves, for Chile's consideration, and Chile first agreed to examine them, but then suddenly rejected them. Chile claimed that any transfer of territorial sovereignty was unacceptable, but the truth is that the very subject matter of the obligation to negotiate, as defined several decades ago and pursued over many years with Chile's consent, had consistently referred to such transfers[121].

116. In the present case, the obligation to behave so that negotiations are meaningful required Chile to pursue them without moving away from the goal set for these negotiations, i.e. granting Bolivia a sovereign access to the Pacific Ocean. Once the subject matter of negotiations has been specifically defined, as in the present case, neither of the Parties may modify nor abandon it unilaterally[122]. Yet, that is what Chile purported to do. The *note verbale* of 8 November 2011, whereby Chile indicates its refusal to recognize any obligation to negotiate a sovereign access to the sea, represents a blatant infringement of this obligation[123].

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[119] *Affaire du lac Lanoux (Espagne, France),* 16 November 1957, XII *RIAA*, Vol. XII pp. 306-307.

[120] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p 47.

[121] See further below, Part III, Chapter 7(C) (1).

[122] *Award in the matter of an arbitration between Kuwait and the Aminoil Company*, 24 March 1982 (21 ILM 976) See also the ICJ Judgment on the *North Sea Continental Shelf*, 1969, quoted above.

[123] BM, Annex 82.

117. The specific obligation to negotiate in the present case may be considered in relation to the wide range of situations in which there is an obligation to negotiate. This wide range does not divide neatly into two distinct categories (i.e., obligations of conduct, and obligations of result), as Chile suggests[124]. More precisely, "*sa portée est susceptible de degré*"[125].

118. At one end of the spectrum is a *non-conditional* obligation. This does not mean that there is simply an obligation merely to enter into negotiations. It is also required, as indicated by the Permanent Court of International Justice, that the States "… pursue them as far as possible, with a view to concluding agreements[126]. There is also a large variety of *conditional* obligations to negotiate. These are qualified obligations: that is, the obligation to negotiate is entered into within a predetermined framework imposed upon the parties for the duration of the negotiations. The precise result of the negotiations, however, is not predetermined, because a wide margin of discretion is left to the Parties.

119. Between the mere obligation to enter into negotiations on the one hand, and the obligation to conclude an agreement on the other, an obligation to negotiate will have varying effects depending on the intentions of those who have created it. In the present case, the framework for negotiations has been precisely demarcated by the Parties. It differs from an obligation of result, but it is an obligation to negotiate with a view to reaching an agreement regarding the objective that has been agreed upon by the Parties (a Bolivian sovereign access to the sea) and to do so taking into account elements from previously drafted commitments. It is this obligation that Bolivia asks the Court to recognize as falling upon Chile. Bolivia will further explain the scope of this obligation by examining the exact definition of the expression "sovereign access to the sea".

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[124] CCM, para. 1.10.

[125] P. Daillier, M. Forteau, A. Pellet, *Droit international public*, Paris: LGDJ, 2009, para. 504.

[126] *Railway traffic between Lithuania and Poland, PCIJ, Advisory Opinion of 15 October 1931, Series A/B, No. 42*, p. 116. This is confirmed by the 'Principles and guidelines for international negotiations' adopted by the United Nations General Assembly on 8 December 1998, whereby the Assembly refers to "the importance of conducting negotiations in accordance with international law in a manner compatible with and conducive to the achievement of the stated objective of negotiations", Doc. UNGA RES/53/101, 8 December 1998.

C. The legal meaning of the expression "sovereign access to the sea"

120. The expression "sovereign access to the sea" is a specific phrase that has historically been used to refer to the subject matter of the negotiation between Chile and Bolivia. Asked by Judge Owada about the meaning of this expression, Chile and Bolivia have respectively provided answers. First, Bolivia recalls the content of those answers (1). Then, Bolivia demonstrates how, over past decades, both States have agreed on the specific meaning of this expression in the negotiations between them (2). Finally, Bolivia identifies the criteria that characterizes a sovereign access to the sea in international law (3).

1) The Parties' replies to the question of Judge Owada

121. Following the hearings on the Preliminary Objection raised by Chile, Judge Owada put the following question to the Parties:

> "In the course of the present oral proceedings, as well as in the written documents submitted by the two sides, both the Applicant and the Respondent have been referring to the expression 'sovereign access to the sea'. This is not a term of art in general international law, though the Applicant and the Respondent have been referring to this expression in describing either their own position or the position of the other side. I should appreciate it if both of the Parties would define the meaning of that term as they understand it, and explain the specific contents of that term as they use it for determining their position on jurisdiction of the Court"[127].

122. Both Parties submitted their replies in writing[128]. Subsequently, each Party submitted written comments on the reply of the opposing Party[129].

123. In its response, Bolivia emphasized, on the one hand, that an agreement with a view to negotiating and the final outcome of such a negotiation are two different matters, and, on the other hand, that both Parties had repeatedly agreed that granting Bolivia a sovereign access to the sea was an issue independent from the 1904 Treaty. As a consequence, the case now brought before the Court does not refer to the specific modalities or the content of this sovereign access to the sea, but rather to the obligation to negotiate aimed at the establishment

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[127] CR 2015/21. 8 May 2015.

[128] See the Parties' answers submitted to the Court on 13 May 2015.

[129] See the respective comments of the Parties submitted to the Court on 15 May 2015.

of such an access. Bolivia noted that the existence and specific content of a future agreement between the Parties were not issues at stake in these proceedings. Bolivia clarified:

> "The broad understanding of the parties as to the definition of 'sovereign access to the sea', as reflected in their successive agreements to negotiate and the various proposals to find a solution, is that Chile must grant Bolivia its own access to the sea with sovereignty in conformity with international law"[130].

124. Bolivia's position faithfully reflects the historical record. As mentioned above, from the end of the Pacific War until the breakdown of negotiations in 2011, both Parties agreed on the objective of the negotiations, namely granting Bolivia a sovereign access to the sea. As will be further demonstrated, there was agreement between the two States on another aspect of the matter, namely the interpretation of the expression "sovereign access to the sea".

125. Chile, in contrast, in its reply to the question of Judge Owada, insisted on the fact that according to the meaning of that expression that Chile attributes to Bolivia, it necessarily involves a territorial cession. Chile claimed that, in formulating its objection to jurisdiction, it used the expression "sovereign access to the sea" with the same meaning as used by Bolivia in its Application and its Memorial.

126. Misinterpreting Bolivia's reply, Chile contended that Bolivia modified its understanding of the expression "sovereign access to the sea" during the course of proceedings, so as to be in a better position when faced with the plea of lack of jurisdiction[131]. In its comments on Bolivia's reply, Chile insisted that a sovereign access to the sea inevitably demands a cession of territory and that this is impossible due to the inviolability of the 1904 Treaty. This is simply incorrect.

127. The discrepancy between the Parties' positions on the definition of "sovereign access to the sea" is recent. Chile cannot erase the fact that it shared with Bolivia a common understanding of the expression until recently, when its position radically changed.

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[130] Written reply of Chile to the question put by Judge Owada at the public sitting held on the afternoon of 8 May 2015.

[131] Comments in writing of Chile on the written reply of the Bolivian Government to the question put by Judge Owada at the public sitting held on the afternoon of 8 May 2015 (15 May 2015).

2) The agreement of both Parties on the meaning of the expression "sovereign access to the sea"

128. Both Parties agreed on the subject matter of the negotiation and on their understanding of *that* subject matter. It is therefore surprising that Chile now attempts to distance itself from the position it had maintained since the end of the nineteenth century.[132]

129. Both States considered that sovereign access to the Pacific Ocean could be granted through a territorial strip exiting onto a sea coast area, either apt for the construction of a port or already provided with one. Territories thus transferred would come under Bolivian sovereignty. Some key examples of the Parties' agreement in this regard are provided in turn.

130. The 1895 Treaty of Transfer of Territory[133] reflects Chile's initial position: to definitively take possession of the Bolivian seacoast, but without leaving Bolivia deprived of an outlet to the sea[134]. Consequently, this Treaty anticipated the transfer to Bolivia, with full sovereignty, of the territories of Tacna and Arica (insofar as they would be under Chilean possession, depending on the outcome of the scheduled referendum on which Chile had agreed with Peru). The sovereign access to the sea envisaged in this Treaty was to be achieved through the transfer to Bolivia of territorial sovereignty over a large seacoast territory[135]. In the event that the result of the scheduled referendum was to the disadvantage of Chile, another formula, also in the form of a territorial cession, was envisaged.

131. After the signing of the 1904 Treaty, enshrining the conquest of the Bolivian territory by Chile but leaving unresolved the issue of a sovereign access to the sea for Bolivia, Chile declared its willingness for the settlement of the sovereign access issue. In the Memorandum of 9 September 1919, for example, the Chilean Foreign Minister declared that his country was

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[132] Comments in writing of Bolivia on the written reply of the Chilean Government to the question put by Judge Owada at the public sitting held on the afternoon of 8 May 2015 (15 May 2015).

[133] It is common ground that this did not come into force.

[134] See II, 1, b, para. 17.

[135] BM, Annex 98.

ready to make all necessary efforts for Bolivia to gain its own access to the sea: "…ceding to it an important part of that area to the north of Arica and of the railway line…"[136].

132. In other documents, the expression "*own port*" can be found, illustrating Chile's understanding of Bolivia's sovereign access to the sea. For example, in the message of the President of the Republic of Chile to the Ambassador of Bolivia in Santiago, dated 2 March 1923, Chile asserts the willingness of its country to facilitate a Bolivian access to the sea "*through its own port*"[137]. This understanding of a sovereign access still entails a territorial cession.

133. The exchange of notes that took place in June 1950 is particularly relevant. The subject matter of the negotiation to which Chile committed itself is the "sovereign access to the Pacific Ocean"[138], and the meetings in preparation of this diplomatic exchange shed light on the scope of the term. The Ambassador of Bolivia, Alberto Ostria Gutiérrez, reported on 24 December 1949 on his meeting with the Chilean President Gabriel González Videla. They talked about providing a solution regarding the "Bolivia's port problem", it was reported that the President of Chile did not require "any territory from Bolivia in exchange for the zone it will cede Bolivia"[139].

134. The sovereign access included a corridor and a port, both of which would be placed under Bolivian sovereignty. In the Charaña process, in a note dated 19 December 1975 signed by the Chilean Foreign Minister, Patricio Carvajal Prado, the notion of sovereign access is specified in the following terms:

> "…the cession to Bolivia of a sovereign maritime coastline, linked to Bolivian territory through an equally sovereign territorial strip, would be considered.

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[136] BM, Annex 19 and CCM, Annex 117.

[137] BM, Annex 51.

[138] Note from the Minister of Foreign Affairs of Chile, Horacio Walker Larraín, to the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, No 9, 20 June 1950: "….my Government will be consistent with that position and that, motivated by a fraternal spirit of friendship towards Bolivia, is willing to enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean", **BR, Annex 266**.

[139] BM, Annex 64.

> Chile would be willing to negotiate with Bolivia the cession of a strip of territory north of Arica up to the Concordia Line based on the following delimitations:…"[140].

Once again, and here with a specific geographical location identified, the sovereign access offered to Bolivia is defined as including a seacoast area linked to Bolivia by a strip of territory.

135. In 1987, a new round of negotiations was initiated (the "*enfoque fresco*" or 'fresh approach'). While Chile submitted no specific proposal, Bolivia submitted to Chile two memoranda offering various options, one including a port and a strip of territory for access and another proposing enclaves[141]. "Sovereign access to the sea" was clearly understood in a territorial sense.

136. The conduct of these past negotiations is crucial. They are inextricably linked with an aspect considered above, which is the agreement of both Parties (until recently, when Chile changed its mind) that negotiations were independent of the 1904 Treaty.

3) The notion of sovereign access to the sea in international law

137. There is no dispute between the Parties as regards the definition of sovereign access (the modalities of which have yet to be agreed). Bolivia and Chile have consistently considered that the purpose of negotiations on sovereign access to the sea is to put an end to Bolivia's landlocked status. Bolivia's sovereign access is thus different from a mere right of transit over Chilean territory.

138. Sovereign access exists when a State does not depend on anything or anyone to enjoy this access. Whatever the practical solutions adopted, sovereign access is a regime that secures the uninterrupted way of Bolivia to the sea – the conditions of this access falling within the exclusive administration and control, both legal and physical, of Bolivia.

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[140] BM, Annex 73 and CCM, Annex 180.

[141] BM, Annexes 27 and 28.

139. Bolivia has been consistent in its position in maintaining that Chile is subject to an obligation to negotiate. While the outcome is not predetermined its framework is conditioned by the nature of the agreed content of the negotiations and the criteria guiding its execution.

140. Finally, Bolivia reaffirms once again its intention that the granting of such sovereign access to the sea will be the product of a bona fide negotiation, mindful of the interests of both Parties.

PART II

THE LEGAL BASES OF THE OBLIGATION TO NEGOTIATE A SOVEREIGN ACCESS TO THE PACIFIC OCEAN

141. This Part of the Reply addresses Chile's contention that none of its numerous promises, commitments, and negotiations with Bolivia on granting it sovereign access to the Pacific Ocean gave rise to a legal obligation. According to Chile, the consistent and continuous conduct of the Parties over more than a century, including multiple agreements with Bolivia, Chile's own unilateral declarations, and other representations made by Chile to Bolivia, expressing its willingness to negotiate in order to grant Bolivia a sovereign access to the sea, was "all purely a matter of politics and diplomacy, not law"[142].

142. Chile's contention that its conduct did not give rise to any legal obligations is without merit. First, the 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, and the long and unequivocal record of agreements and promises by Chilean Presidents and Foreign Ministers to negotiate with Bolivia to grant it such sovereign access in fulfilment of that historical bargain, demonstrates an intention to be bound and not merely a series of empty political promises. Second, and irrespective of its intention to be bound, it is notable that Chile does not seriously engage with legitimate expectations as an additional basis for its legal obligations towards Bolivia[143]. Even assuming *arguendo* that none of Chile's agreements and promises gave rise to legal obligations, *quod non*, Chile made repeated representations on which Bolivia relied, so that Bolivia's legitimate expectations gave rise to an obligation on the part of Chile.

143. As a matter of principle, Chile's assumption that politics and law are mutually exclusive is misplaced. It may be true that certain diplomatic exchanges do not as such give rise to legal obligations; but this does not mean that in appropriate circumstances they cannot constitute legally binding commitments. It is well-established that:

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[142] CCM, para. 8.31.

[143] CCM, fn 204.

> "[L]egal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them."[144]

144. In the present case, Chile's denial of the existence of any legal commitment to negotiate a sovereign access to the sea contradicts both the applicable international law on the formation of obligations and the undisputed facts demonstrating that Chile expressed its full consent to enter into negotiations to find an appropriate solution to grant Bolivia sovereign access to the sea.

145. The applicable principles concerning the expression of an intention to be bound and the obligation to negotiate in good faith will be addressed in the first chapter of the present Part (Chapter 3). The following chapters will then establish that the evidence demonstrates Chile's undertaking to negotiate with Bolivia on granting it sovereign access to the sea. To that end, and to answer Chile's arguments put forward in the Counter-Memorial, Bolivia will consider each of the legal sources of the obligation to negotiate sovereign access to the sea and will show that the said obligation results from a number of different legal bases, each of them being able on its own to establish the said obligation to negotiate. Chile's obligation to negotiate on sovereign access to the sea results not only from general international law (Chapter 4) but also from Chile's specific and unequivocal intent to negotiate sovereign access to the sea (Chapter 5), as well as from the principle of estoppel and legitimate expectations (Chapter 6).

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[144] *United States Diplomatic and Consular Staff in Tehran, Judgment,* 24 May 1980, *I.C.J. Reports 1980,* p.20, para. 37.

CHAPTER 3

THE APPLICABLE LEGAL PRINCIPLES

A. Matters in dispute concerning the applicable legal principles

146. Although there are many points of agreement between Bolivia and Chile as regards the principles applicable to the formation of obligations in international law (in particular as regards the regime applicable to the conclusion of treaties or agreements, and the binding effects of unilateral acts)[145], there are a number of statements in the Counter-Memorial which mischaracterises Bolivia's legal claim or the applicable principles of international law.

147. *First*, Chile claims that "[e]ntering into negotiations does not create an obligation to negotiate again merely because one State becomes dissatisfied with the result"[146]. This is not, however, Bolivia's case. Bolivia's case is that Chile is bound to negotiate sovereign access to the sea not merely because it in fact entered into negotiations, but *as a result of* Chile's own agreements, unilateral promises, commitments, statements, and course of conduct over time. Chile *intended* Bolivia to understand that it was making, and acting in accordance with, a commitment to negotiate a sovereign access to the sea for Bolivia[147].

148. *Second*, Chile relies on a subjective approach to establish the existence of international obligations by arguing that "Bolivia never once alleged that Chile was under an obligation to negotiate with Bolivia over sovereign access to the Pacific Ocean"[148]. This subjective approach does not correspond to the well-established methodology according to which the existence of an international obligation has to be established objectively[149].

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[145] On which see BM, para. 291-334, and CCM, para. 4.2-4.22.

[146] CCM, para. 1.2.

[147] See Part I, Chapter 1(B)(2).

[148] CCM, para. 1.5. See also para. 1.26.

[149] See e.g. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment*, 1 July 1994, *ICJ Report 1994*, pp. 121-122, para. 27.

149. Further, it is not true to say that Bolivia never claimed that Chile consented and agreed to negotiate sovereign access to the sea. This is addressed in more detail below[150]. To take some recent examples[151]:

a. As Bolivia recalled during the oral proceedings on preliminary objections in May 2015 – without having been challenged by Chile on that point – "[m]ore than 30 years ago, in 1979, Bolivia made a statement before the General Assembly of the Organization of American States [[152]] recalling the numerous promises made to Bolivia by Chile to negotiate sovereign access to the sea". Chile did not object at that time to this statement;[153]

b. Bolivia also pointed out in May 2015 that:

> "[T]he declaration made in 1984 by Bolivia on signing the United Nations Convention on the Law of the Sea is free of any ambiguity: according to Bolivia, its **sovereign** access to the sea must be the product of negotiations — which was accepted by Chile — and not of a unilateral denunciation of the 1904 Treaty. In that declaration, Bolivia officially placed on record in that connection 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'"[154].

Once again, Chile did not object to that declaration, which has been duly communicated to the depositary and thus to the signatory of the UNCLOS. In the declaration made upon signature and confirmed upon ratification of UNCLOS, Chile considered it necessary to reserve its rights with regard to Argentina only[155].

c. Chile made the observation in its own Counter-Memorial that (i) in 1963 (that is to say, more than 50 years ago) Bolivia contended "that the [1950] notes constituted a

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[150] See Chapter 7, section A. See also Chapter 2, section A(3).

[151] See Chapter 2(C)(2) above and Chapter 5 below.

[152] See BM, Annex 203.

[153] See CR 2015/21, p. 18, para. 7. The same statement was publicly reiterated by Bolivia in 1987 (BM, Annex 210) and in 1988 (BM, Annex 213).

[154] CR 2015/19 (Translation), pp. 15-16, para. 28-29 (fn. omitted).

[155] Available at: http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Chile Statement made upon signature (10 December 1982) and confirmed upon ratification (25 August 1997).

'commitment' and suggested that these established 'legal rules'", and that (ii) this position of Bolivia was "reiterated by its President in 1967 (…)"[156].

150. *Third*, Chile contends in relation to some of its key statements, that it "nowhere used the language of legal obligation"[157]. Chile decides on its own definition of what 'the language of legal obligation' must be and then decides that because a statement does not use it, the statement cannot be legally binding, arguing that the words used by both Parties shows that no obligation exists or were meant to exist[158]. Such an approach does not correspond to what Chile acknowledges to be the applicable law: i.e. that intent to be bound has to be "objectively construed"[159] and that "careful analysis of all of the terms of the instrument is of course necessary, together with consideration of the circumstances in which they were drawn up"[160].

151. In the present case there is no doubt that, if relevant circumstances, in particular, the fact that for more than a century Chile repeatedly and consistently expressed the view that there was a need for, and Chile was willing to enter into, negotiations to put an end to the landlocked situation of Bolivia and agreed to do so, are taken into account in good faith, Chile can rightly be said to have undertaken to proceed with these negotiations.

152. As acknowledged by Chile, the words "promise" (*promesa*), "offer" (*oferta*), "acceptance" (*aceptación*) or "agreement" (*acuerdo*) have been used by the Parties, and in particular by Chile. These words clearly embodied a legal commitment. To take only one example, in 1977, Chile stated that, referring to the negotiations on sovereign access to the sea, "we have maintained our offer, accepted basically in December 1975, the terms of which are well known to the international community, and we shall continue our efforts to find ways and means which will enable these negotiations to come to a successful conclusion"[161].

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[156] CCM, para. 6.16, letter d).

[157] CCM, para. 5.36.

[158] See for instance CCM, para. 6.5(b).

[159] CCM, para. 4.1.

[160] CCM, para. 4.8.

[161] See CCM, para. 7.43, citing CCM, Annex 232. See Chapter 2(C)(2) above and Chapter 5 below.

153. *Fourth*, Chile alleges that as regards the standard of proof, on the basis in particular of the Judgment of the Court in 1974 in *Nuclear Tests*,[162] a distinction has to be made "between an intention to create a legal obligation and a political expression of willingness to act in a particular way"[163]. Chile also alleges that "[t]he burden for establishing the existence of a legally binding obligation on the basis of a unilateral statement is high, and requires a clear and specific statement evidencing an intention to be legally bound"[164].

154. That is not an accurate description of the 1974 Judgment of the Court:

a. As a matter of principle, the Court considered in 1974 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, the State being thenceforth legally required to follow a course of conduct consistent with the declaration"[165]. The Court made thus a reference to the intention as the core criterion without qualifying the said intention.

b. What, according to the Court, must be clear and specific is the statement (the Court "recalls that a statement of this kind can create legal obligations only if it is made in clear and specific terms)"[166]. In the present case, agreements and declarations of Chile are very clear and specific: they concern a commitment to negotiation on modalities to materialize a specific agreed outcome (Bolivia's sovereign access to the sea, to put an end to Bolivia's landlocked situation).

c. The Court did not rule out in 1974 the possibility that the willingness to do something can result in a legal undertaking, nor did it require that the relevant statements expressly contain the words "legal obligation", as Chile asserts. To the contrary, the Court relied on the existence of "a number of consistent public

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[162] CCM, para. 4.15 ff.

[163] CCM, para. 4.3, as well as para. 6.11.

[164] CCM, para. 4.20.

[165] *I.C.J. Reports 1974*, p. 267, para. 43 (Australia v. France).

[166] See *ibid.*; see also *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6 at p. 28, para. 50.

statements concerning future tests"[167] through which "France made public its intention to cease the conduct of atmospheric nuclear tests"[168] to conclude that the said statements, taken "as a whole", "must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made"[169]. The mere fact that France announced that it would adopt a certain course of conduct (i.e., cease the tests) was considered by the Court as meaning that France must "be held to" having committed itself not to pursue any new test. Following the general approach according to which "to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred",[170] the Court considered indeed that when France announced its intention to cease the tests "[i]t was bound to assume that other States might take note of these statements and rely on their being effective"[171].

e. The same applies *a fortiori* in the present case, in light of the context and the circumstances in which Chile consistently expressed the same position and agreed on the principle of negotiations to put an end to Bolivia's landlocked situation. As Chile acknowledged in the course of the present proceedings, "Chile has expressed willingness to consider Bolivia's political aspiration to gain sovereign access to the Pacific Ocean"[172] and "the Parties were willing to, and did, discuss the issue of access to the sea (…)"[173]. By announcing in a number of consistent, public statements that there was a need to find a solution to Bolivia's landlocked situation through negotiations between Chile and Bolivia on sovereign access to the sea, Chile was clearly "bound to assume that" Bolivia "might take note of these statements and rely on their being effective."

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[167] *Ibid.*, p. 264, para. 32.

[168] *Ibid.*, p. 267, para. 41.

[169] *Ibid.*, p. 269, para. 49.

[170] *Frontier Dispute* (Burkina Faso/Mali), *Judgment, I.C.J. Reports 1986*, p. 554 para. 40.

[171] *Ibid.*, p. 269, para. 51.

[172] See Chile's Preliminary Objection, para. 4.10-4.11 (emphasis added).

[173] CR 2015/18, pp. 60-61, para... 55-56 (emphasis added).

f. It must be stressed moreover that in 1974 the Court deduced the obligation binding upon France from a few statements only, made public over a very short period of time (some months). By contrast, in the present case, (i) there is a greater number of statements; (ii) accompanied by agreements between the two countries; (iii) which were reiterated for a century. There is thus no doubt that the 1974 ruling of the Court applies *a fortiori* in the present case.

155. *Fifth*, Chile focuses in the Counter-Memorial on a limited number of "episodes" and fails to address a large part of Bolivia's claim, which is based not only on the existence of specific, individual *bilateral* agreements (such as those made in 1950 and 1975, which do exist, and which bind Chile), but also of a large number of *unilateral* declarations and promises which, in and by themselves, but also taken together as a course of conduct or otherwise, constitute a distinct legal basis of the obligation to negotiate, based either on Chile's intent or on the doctrines of estoppel and legitimate expectations.

156. As already stressed by Bolivia[174], Chile's strategy in the Counter-Memorial consists in trying to hide the forest behind the trees. To circumvent the fact that over time, for many decades, Chile concluded a number of agreements and repeatedly made consistent declarations expressing its intent to negotiate in order to grant Bolivia a sovereign access to the sea, Chile adopts a selective approach consisting in, first, arbitrarily disconnecting agreements, declarations or conduct which are intertwined and, second, arbitrarily focusing on a few instances, leaving unmentioned a large number of others which are both legally relevant and significant[175].

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[174] See supra, Chapter 2(A) (3).

[175] Chile expressed its strategy in particular in the following paragraphs of its Counter-Memorial: para. 1.3: "Bolivia is seeking to knit together into an ongoing legal obligation to negotiate what are in fact *sporadic* diplomatic and political exchanges and, *occasionally*, actual negotiations (…)"; para. 1.11: "Bolivia seeks incorrectly to portray a picture of continuity from what in reality were different *incidents* of political dialogue, arising in *different contexts*, and *separated in time*"; para. 1.24: "Each aspect of the practice on which Bolivia relies had a *different context and content*, and Chile therefore deals with each of them *individually*"; para. III.2: "Bolivia seeks to portray a continual process of creating and confirming a legal obligation to negotiate throughout the course of the last century. In fact there are *five discrete and very*

B. The basis of Bolivia's case

157. Chile's selective approach and failure to address the whole claim of Bolivia is surprising given that Bolivia made it clear, on various occasions in the course of the present proceedings, that the obligation to negotiate on sovereign access to the sea rests on several (both alternative and cumulative) legal bases.

158. In its Application instituting proceedings, Bolivia stated that:

> "The facts provided above (Section III) show that, *beyond its general obligations under international law*, Chile has committed itself, *more specifically through agreements, diplomatic practice and a series of declarations attributable to its highest level representatives*, to negotiate a sovereign access to the sea for Bolivia".[176]

159. In its Memorial, Bolivia specified that:

a. "The binding effect of unilateral declarations is based on good faith. States are entitled to expect and require that such commitments, once made, will be adhered to. The principle is manifested in various specific legal doctrines, such as estoppel, preclusion, and legitimate expectations"[177];

b. "Each episode set out in Chapter I and highlighted below, meets the criteria for a binding legal commitment. An isolated commitment would suffice to create the obligation. But in the present case there is an accumulation of successive acts by Chile, which serves only to strengthen Bolivia's case. Those successive acts of Chile must be viewed in their proper context. They reiterated Chile's commitment to the obligation, and kept alive the legitimate expectation of Bolivia over the years that Chile would, in good faith, negotiate sovereign access to the Pacific Ocean for Bolivia"[178];

c. "When Chile remained silent in the face of Bolivia's declarations, made in connection with its signature of the 1965 Convention on Transit Trade of Land-Locked Countries and the 1982 United Nations Convention on the Law of the Sea, that it is not a naturally land-locked country, but a State temporarily deprived of access to the sea as a result of war, Bolivia

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different periods (…). Each of them was the product of its *own particular political and historical context* (…)", see CCM, para. 1.3, 1.11, 1.24 (emphasis added).

[176] Application, para. 31 (emphasis added). See also, Judgment on Preliminary Objections, 24 September 2015, para. 19, 31 and 51.

[177] BM, para. 332 (fn. omitted).

[178] *Ibid.*, para. 337.

> considered that Chile was recognising a situation that it had long promised to correct. (…) Chile's statements created legitimate and reasonable expectations, and a perception for Bolivia that Chile would fulfil its word. Bolivia has trusted its neighbour to observe its commitments in good faith"[179];

In 1979, while the Chile representative at the OAS:

d. "emphasized that '[o]n repeated occasions, I have indicated Chile's willingness to negotiate with Bolivia a solution to its aspiration to have a free and sovereign access to the Pacific Ocean'",[180] it is remarkable that "Chile did not at any point object to Bolivia's citation of the several agreements between the Parties, including the 1895 Transfer Treaty, the 1920 Act, the 1950 Exchange of Notes, the 1961 Truco Memorandum, and the 1975 Joint Declaration of Charaña"[181];

e. "Chile has frequently repeated its agreement to negotiate, and thereby kept alive Bolivia's legitimate expectation that these negotiations would succeed"[182].

160. In the course of the oral proceedings in May 2015, Bolivia made clear once again that its claim was based on several legal bases, which are mutually reinforcing:

> "[Chile] suggests that unless a specific agreement is concluded on a specific date that a course of conduct or consistent practice cannot create obligations. But that is not what this Court has held on many occasions. To give but one recent example, *Maritime Delimitation (Peru v. Chile)* characterized the parties' "tacit agreement" as "an evolving understanding between [them] concerning their maritime boundary". (…) Bolivia's theory (…) is that there are several instances of agreement with Chile. Paragraph 337 of the Memorial states clearly that "[e]ach episode set out … meets the criteria for a binding legal commitment. An isolated commitment would suffice to create the obligation. But in the present case there is an accumulation of successive acts by Chile, which serves only to strengthen Bolivia's case." The facts are all there. They demonstrate that on many occasions, Chile promised to negotiate sovereign access to the sea. (…) As a matter of law (…), a promise is a promise, whether in isolation, or in repetition. It is really as simple as that. (…) This consistent course of conduct gives rise to obligations, both before and after 1948, both in isolation and cumulatively."[183]

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[179] *Ibid.*, para. 396.

[180] *Ibid.*, para. 167, quoting Annex 204.

[181] *Ibid.*, para. 167.

[182] *Ibid.*, para. 409. See also para. 436.

[183] CR 2015/21, pp. 33-34, para.. 9-11; see also *ibid.*, pp. 12-13, para. 12.

161. Bolivia also made an express reference to acquiescence, with regard to the absence in particular of any protest from Chile to the 1979 statement by Bolivia listing the agreements in force between the Parties on the negotiations on sovereign access to the sea[184].

162. Chile clearly understood, upon the submission of Bolivia's Memorial, that the case concerns not only the existence of specific, formal agreements, but also the frustration of legitimate expectations[185]. It cannot deny it today. It is indeed Bolivia's case that an obligation to negotiate results not only from the continuing binding effect of each of the individual bilateral agreements and unilateral declarations of Chile setting out its commitment to engage in negotiations over a sovereign access, but also from Chile's cumulative course of conduct over time[186].

163. Chile's reply in its Counter-Memorial to these elements consists in bluntly asserting, without any further elaboration, that "[a]n accumulation of interactions, none of which created or confirmed a legal obligation, does not create such an obligation by accretion"[187]. Chile also claims that "[t]he objective intention necessary to create a legal obligation cannot be inferred from another State's expectations"[188], and that the resolutions adopted by the Assembly of the OAS would have no legal effect of any kind because, according to Chile, "[t]he issue was political, not legal" and these resolutions were only recommendations[189].

164. Chile's assertions do not address the criteria that are applicable in international law to the formation of obligations. Contrary to what Chile contends, it is well established in international law that obligations can result not only from individual, formal agreements – which exist in the present case – but also from sources and legal processes, such as informal

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[184] See CR 2015/21, p. 18, para. 7.

[185] See CR 2015/19, p. 24, para. 31 (quoting a statement of the Minister of Foreign Affairs of Chile).

[186] See Chapter 6, below.

[187] CCM, para. 10.3.

[188] CCM, para. 4.18; see also CCM, fn. 204.

[189] CCM, para. 8.3. As to the legal effect of such resolutions, see Part II, Chapter 5(F) below.

agreements, tacit agreements, acquiescence, unilateral acts, and doctrines such as estoppel based on clear and consistent courses of conduct[190].

165. To take just a few examples, international courts and tribunals have consistently held that obligations in international law can arise from a variety of sources beyond formal treaties:

a. According to the ITLOS:

> "in the *'Hoshinmaru'* case it recognized the possibility that agreed minutes may constitute an agreement when it stated that '[t]he Protocol or minutes of a joint commission such as the Russian-Japanese Commission on Fisheries may well be the source of rights and obligations between Parties' (*'Hoshinmaru' (Japan* v. *Russian Federation), Prompt Release, Judgment, ITLOS Reports 2007,* p. 18, at p. 46, para. 86). The Tribunal also recalls that in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain,* the ICJ observed that 'international agreements may take a number of forms and be given a diversity of names' and that agreed minutes may constitute a binding agreement. (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994,* p. 112, at p. 120, para. 23)"[191].

b. The ICJ held in 2014 that:

> "The 1954 Special Maritime Frontier Zone Agreement does not indicate when and by what means that boundary was agreed upon. The Parties' express

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[190] See J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. Oxford: Oxford University Press, 2012: "States are corporate entities that necessarily operate under a regime of representation. In order to hold them bound by consensual obligations, the normal rules of authorization under treaty law apply; (….) In addition to these normal rules, there are another cases where States' consent is given, assumed or implied" (p. 415); "Even though they are both rooted in the principle of good faith, unilateral acts are in their essence statements or representations intended to be binding and publicly manifested as such, whereas estoppel is a more general category, consisting of statements or representations not intended as binding nor amounting to a promise, whose binding force crystallizes depending on the circumstances" (p. 421).

[191] Delimitation of the Maritime Boundary in the Bay of Bengal (*Bangladesh/Myanmar),* Judgment of 14 March 2012, ITLOS Reports, para. 90. According to the ILC, "Although the term 'treaty' in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an 'agreed minute' or a 'memorandum of understanding', could not appropriately be called formal instruments, but they are undoubtedly international agreements subject to the law of treaties" (Draft Articles on the Law of Treaties, para. 2) of the commentary of Article 2, *Yearbook of the ILC,* 1966, p. 188).

acknowledgment of its existence can only reflect a tacit agreement which they had reached earlier. (…) 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"[192];

c. The ICJ also considered that in appropriate circumstances, conduct can reveal "an admission, recognition, acquiescence or other form of tacit consent to the situation", which is binding on the relevant State[193];

d. Arbitral Tribunals have also admitted the possibility of tacit agreements resulting from a course of conduct over time[194].

166. In the present case, there exist a great number of agreements, diplomatic practice, and a series of declarations attributable to the highest level representatives of Chile over the course of a century, which embody or reflect (i) a clear acknowledgment by Chile that the landlocked situation of Bolivia was a pending issue, and (ii) a clear intention to find a definitive solution to this issue through negotiations[195]. This acknowledgment and this intention have been expressed on many occasions and in various ways, and have created an obligation binding on Chile. As will be elaborated below, they are, beyond the obligation to negotiate under general international law (see *infra,* Chapter 4), legally attributable to Chile either as treaties, agreements or unilateral acts (see *infra*, Chapter 5). Furthermore, regardless of Chile's intentions, it is bound by these statements on the basis of the doctrines of estoppel and legitimate expectations (see *infra*, Chapter 6).

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[192] *Maritime Dispute (Peru* v. *Chile), Judgment, I.C.J. Reports 2014*, p. 3 at para. 91.

[193] ICJ, *Land, Island and Maritime Frontier Dispute, Judgment*, 11 September 1992, *I.C.J. Reports 1992*, p. 577, para. 364. See also *Air Transport Services Agreement,* Award, 22 December 1963, *RIAA,* Vol. XVI, p. 63: tacit consent means a certain course of conduct consisting of certain actions or certain attitudes having "the same effects on the resulting juridical situation between the Parties as consent properly speaking would have." See also ICJ, *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, 18 November 1960, p. 213; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections*, Judgment, 13 December 2007, *I.C.J. Reports 2007*, p. 832 at para.. 79-80.

[194] See the Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, Award of 17 September 2007, *RIAA*, Vol. XXX, para. 282, 285, 285, 299 and 306-307.

[195] Said intention was acknowledged by Peru: see letter sent by Peru to the International Court of Justice on 26 July 2016, which refers: "the firm intention of finding a definitive solution to Bolivia's landlocked situation". para. 4.3, **BR, Annex 370**.

CHAPTER 4

THE OBLIGATION TO NEGOTIATE UNDER GENERAL INTERNATIONAL LAW

167. As Bolivia made clear in the Application instituting proceedings, its claim is based on specific commitments that Chile undertook "beyond its general obligations under international law"[196]. In the Memorial, Bolivia reaffirmed that Chile's obligation to negotiate sovereign access to the sea "is more exacting than a general obligation to negotiate under international law"[197]. This is the reason why, in the Memorial, Bolivia elaborated both "the basic principles underlying every duty to negotiate under international law" and the "more specific aspects of the obligation to negotiate which are applicable in the present case"[198].

168. The general obligation to seek the settlement of disputes, primarily by negotiation, is a fundamental rule of international law[199]. "[N]egotiations are discussions held with a view to reaching a mutually acceptable settlement of some matter in issue between two (or more) states"[200]. This obligation applies to any pending issue between two (or more) countries which needs to be settled. It is *a fortiori* applicable when both parties agree that there is a pending issue between them which needs to be settled through negotiations.

169. In the present case, on many occasions both States called for negotiations on sovereign access to the sea and there is no doubt that, from the late nineteenth century up to the present day, Bolivia's claim has been acknowledged by Bolivia and Chile as constituting a pending issue between the two countries[201]. This is why, in particular, they entered into negotiations to find a formula for Bolivia's sovereign access to the sea and why, on a more general level,

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[196] Application instituting proceedings, para. 31.

[197] BM, para. 221-226.

[198] BM, para. 229.

[199] See UNGA Resolution 2625 (XXV), 24 October 1970. See also, *inter alia*, P. Daillier, M. Forteau, A. Pellet, *Droit international public*, LDGJ, 2009, p. 925: "L'obligation de négocier s'impose d'abord en soi dès que deux sujets du droit international sont en litige, parce qu'elle constitue le minimum de ce qui est attendu d'eux pour régler pacifiquement tout différend. A ce titre, la négociation directe entre Etats en conflit constitue la technique de droit commun : elle trouve à s'appliquer en toutes circonstances, même sans texte.". See also Part I, Chapter 2(A 1).

[200] R. Jennings, A. Watts (eds), *Oppenheim's International Law*, Longman, London, 1996, p. 1182.

[201] See in particular CR 2015/19, 6 May 2015, pp. 27-36, para. 5-30.

they consistently kept the issue on their bilateral agenda. As Chile put it in 1983, Chile "again stressed that any relationship between both countries necessarily involved addressing the maritime problem"[202]. Moreover, this pending issue has been considered by the OAS Permanent Council in 1975 and then by the OAS Assembly as "a matter of Continental concern" which calls for an "equitable solution (…) whereby Bolivia will obtain appropriate sovereign access to the Pacific Ocean"[203].

170. The general obligation to negotiate which applies in such circumstances is reflected in Article 2, paragraph 3, and Article 33 of the UN Charter. It has been reaffirmed on many occasions, in particular in the 1970 Declaration on Principles of International Law and the 1982 Manila Declaration. The obligation also applies to Bolivia and Chile by virtue of Articles 24 and 25 of the OAS Charter of 30 April 1948.

171. In previous judgments, the ICJ has stressed that respect for the principle enshrined in Article 33 of the UN Charter is "essential in the world of today"[204] and that negotiation "merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes"[205]. According to the Court, "[t]here is no need to insist upon the fundamental character of this method of settlement"[206].

172. According to the relevant provisions, the maintenance of peace is not the only goal that negotiations must pursue. According to Article 2, paragraph 3, of the UN Charter, international disputes must be settled by peaceful means in such a manner that international peace and security "*and justice*" are not endangered. In a similar vein, the 1970 Declaration on Principles of International Law provides that States shall "seek early *and just* settlement" of their disputes.

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[202] CCM, Annex 262, p. 1747.

[203] See BM, Annexes 190 to 201.

[204] *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14* at p.145, para. 290.

[205] *North Sea Continental Shelf, Judgment*, 20 February 1969, *I.C.J. Reports 1969*, p.3 at p. 47, para. 86.

[206] *Ibid.*

173. In addition, the obligation to negotiate under general international law is not a mere procedural formality. It is a legal obligation, which must be undertaken in good faith and which consists of a number of requirements which have been identified in Bolivia's Memorial and that Chile did not challenge in the Counter-Memorial[207]. The obligation to negotiate requires in particular:

> "que les Etats cherchent rapidement une solution en s'abstenant d'invoquer des moyens dilatoires ; qu'ils ne se découragent pas de l'échec d'une première tentative et qu'ils persévèrent en recherchant d'autres modes de règlement ; qu'il s'abstiennent pendant toute la durée de la procédure ou des procédures, non seulement de recourir à la force, mais d'aggraver la situation ; qu'ils recherchent une solution 'équitable', c'est-à-dire qu'ils respectent la souveraineté de l'adversaire, essaient loyalement de comprendre sa position et acceptent de renoncer à la satisfaction de certains intérêts en contrepartie des sacrifices acceptés par l'autre."[208]

174. This obligation clearly applies in the present case. Bolivia gave up its maritime territory to Chile in the expectation that it would have a sovereign access to the sea restored to it. Since the nineteenth century, the "maritime issue" has been at the heart of both States' foreign policy and has remained a pending issue between the Parties, which has not been settled yet.

175. In the Principles and Guidelines for International Negotiations adopted in 1998[209], the United Nations General Assembly stressed that negotiations shall be conducted in a manner "conducive to the achievement of the stated objective of negotiations", that "States should adhere to the mutually agreed framework for conducting negotiations" and that they should remain "focused throughout on the main objectives of the negotiations"[210]. These general requirements have been given a specific content in the present case since Bolivia and Chile have agreed, beyond their obligations under general international law, to negotiate *on a specific agreed outcome (to put an end to Bolivia's landlocked status)*. This *lex specialis* is

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[207] See BM, para.. 229-237. See Part I, Chapter 2 (B 2).

[208] V. J.-P. Cot, A. Pellet (ed.), *La Charte des Nations Unies. Commentaire article par article,* Economica, Paris, 3rd ed., 2005, p. 429.

[209] See Resolution 53/101.

[210] *Ibid.*, para. 2.

based both on acts and conduct expressing an intention to be bound and on estoppel and legitimate expectations, as will be shown in the following chapters.

CHAPTER 5

ACTS AND CONDUCT EXPRESSING

CHILE'S INTENTION TO NEGOTIATE SOVEREIGN ACCESS TO THE SEA

176. This chapter summarizes the evidence supporting Bolivia's submission that Chile intentionally undertook a binding commitment to negotiate a sovereign access to the sea. That binding commitment emerges from the whole course of conduct between Bolivia and Chile on this matter. Within that course of conduct are clear examples of commitments resulting from bilateral agreements – notably those that occurred in 1950 and 1975 – and from unilateral declarations made by Chile.

177. In disregard of the Parties' consistent and continuous course of conduct, the Counter-Memorial asserts that there have been only "sporadic", "historical diplomatic exchanges and political discussions", which did not constitute an undertaking, promise, representation or any other commitment under international law[211]. In Chile's words, "Chile's position is simple: historical willingness to negotiate creates no legal obligation"[212]. This argument however disregards the specific historical context within which the question of sovereign access emerged and the clear intention of the Parties to give effect to a historical understanding and agreement between them that Bolivia should not remain landlocked as a result of the 1879 War of the Pacific.

178. In light of this historical context and course of conduct, there can be no doubt that the Parties' intention throughout these years was to resolve the outstanding matter of Bolivia's sovereign access to the sea by means of a negotiated settlement. The formation of a legal obligation does not depend on some abstract, clear-cut distinction between "political expressions of willingness" and "legal obligations", as Chile contends[213]. It depends on the circumstances in which there is an expression of a commitment to do something in particular.

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[211] See CCM, in particular para.. 1.1-1.3.

[212] CCM, para. 1.28.

[213] See for instance CCM, para. 4.3.

179. Of course, Chile adits, as it must, that in some circumstances, an expression of willingness does in fact create legal obligations, namely when there is "an identifiable international agreement or some other recognized source of international legal obligation"[214]. Chile also acknowledges that "drawing the line between [the display of political goodwill and legal undertakings] is often difficult in practice"[215].

180. The Parties are generally in agreement concerning the principles applicable to the identification of agreements or unilateral acts in international law[216]. As Chile rightly put it, "a legal obligation to negotiate can only arise if, objectively construed, that is the intention of the States concerned"[217]. Accordingly, it is Bolivia's case that, when "objectively construed", Chile's agreements, declarations and conduct since the nineteenth century unequivocally reflect a commitment by Chile to negotiate sovereign access to the sea.

181. Chile's main argument is to caution the Court that political and diplomatic exchanges should not be considered as undertakings because "States must feel free to explore in good faith potential compromise solutions through political and diplomatic exchanges"[218]. Bolivia does not challenge the fact that mere diplomatic exchanges do not necessarily give rise to legal obligations. That is exactly why Chile's willingness to enter into formal negotiations with Bolivia, on a matter as exceptional and consequential as sovereign access to the sea, expresses a commitment rather than a mere offer to talk. Obviously Chile *had* the sovereign right *not* to make any promise, undertaking, or representation to grant Bolivia sovereign access to the sea. In the exercise of its sovereign prerogatives however, Chile did in fact commit itself to finding such a solution on multiple occasions.

182. Following the 1879 War of the Pacific and subsequent to the 1904 Treaty, Chile could have made it clear that having occupied Bolivia's coastal territories, it would not negotiate sovereign access to the sea across territories to the north, and that Bolivia must resign itself to being a landlocked State. But that is *not* what Chile did: it entered into negotiations on

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[214] CCM, para. 1.28.

[215] CCM, para. 4.3, fn. 182.

[216] Bolivia's position on applicable law has been set out in the Memorial at para.291-334.

[217] CCM, para. 4.1 and para. 4.5. See also in particular para. 4.7.

[218] CCM, para. 4.23.

"potential compromise solutions through political and diplomatic exchanges" pursuant to agreements and declarations that recognized its historical undertaking and commitment to granting Bolivia sovereign access to the sea. In fact, it is difficult to find any parallel in international law for such an unusual and consequential undertaking by a State to agree expressly and repeatedly that it is willing to negotiate sovereign access across its territory pursuant to a historical compromise. It is this exceptional character of the undertaking that underscores Chile's consent to bind itself to finding a solution, rather than making empty political promises as the Counter-Memorial suggests.

A. The consistent and continuous agreements, declarations (including unilateral acts) and conduct expressing Chile's intention to negotiate sovereign access to the sea

183. As a preliminary matter, it is noted that many elements in Chile's past conduct, including facts invoked in the Counter-Memorial, contradict Chile's new legal thesis that its "political and diplomatic exchanges" were devoid of *any* legal effect.

184. *First*, a number of statements in the Counter-Memorial reflect Chile's recognition that it has *agreed* to negotiate sovereign access to the sea. In other words, it has not been willing merely to entertain the possibility of such access, but has in fact committed itself to finding a solution to Bolivia's landlocked status.

185. Chile acknowledges in the Counter-Memorial that on many occasions it expressed its "willingness" to enter into negotiations in order to grant Bolivia sovereign access to the sea. It relies on a quotation of Sir Hersch Lauterpacht to establish that there is an "important distinction between an intention to create a legal obligation and a political expression of willingness to act in a particular way"[219] or between "statements of policy" and "instruments intended to lay down legal rights and obligations"[220]. Chile however, did not limit itself to political expressions of a mere willingness to discuss sovereign access to the sea; rather, it expressed its *willingness to satisfy* that objective through negotiations, consistent with an intention to be bound.

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[219] CCM, para. 4.3.

[220] *Ibid.*

186. In this context, Chile's historical willingness to negotiate constitutes a legal commitment. In particular, the Counter-Memorial contains a number of specific admissions, such as the following:

a. In the 1940s, "Chile is recorded as stating that it was open to consider and study Bolivia's proposals, and indeed that it was open to negotiation"[221];

b. By adopting the 1950 Notes, Chile was "open to entering into a negotiation aimed at finding a formula that could make it possible to give to Bolivia a sovereign access to the Pacific Ocean"[222];

c. "In stating [in these notes] that it would act consistently with its prior position, Chile was confirming that it would study Bolivia's proposals in a negotiation (…)"[223];

d. "The aim of Chile's note of 20 June 1950 was to stand by *and give effect* to those prior statements of policy, i.e. by way of proposing *formal negotiations*"[224];

e. Chile also admits that in the course of the Charaña process, there have been "guidelines for negotiation that were expressly accepted"[225] and that the "core of the proposal" presented by Chile in 1975, which was "accepted", was that "a cession of coastal territory from Chile to Bolivia 'would be considered'"[226];

f. In 1978, Chile's view was that "[n]egotiations had then continued, and in all the discussions, including most recently in September 1977 in New York, there was a consensus to continue negotiations" on sovereign access to the sea[227];

g. In 2006, the Presidents of Bolivia and Chile "have expressed their intention to develop a comprehensive and constructive dialogue, without exclusions, between

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[221] CCM, para. 6.5.

[222] CCM, para. 6.2, letter b).

[223] CCM, para. 6.10, letter c).

[224] CCM, para. 6.11 *in fine* (emphasis added).

[225] CCM, para. 7.7, letter a).

[226] CCM, para.. 7.16-7.17.

[227] CCM, para. 7.45, letter b).

> Bolivia and Chile" and "[i]n this context, they agreed that the agenda comprised all issues relevant to the bilateral relationship, highlighting (…) the maritime issue" as a separate item from "free transit"[228].

187. It is also noted that Chile does not dispute that there have been several "recommendations" issued by the OAS to Bolivia and Chile to negotiate sovereign access to the sea[229]. Although these are not binding as such, it does not mean that they are without any legal effect[230]. As considered in further detail below, Chile must consider these resolutions in good faith in regard to negotiating Bolivia's sovereign access to the sea[231].

188. *Second*, Chile's declarations, statements and agreements regarding sovereign access to the sea, as to be detailed further below, were not made in a vacuum or without a clear understanding of the importance of the issues at stake. They came as a reply to specific, unequivocal requests, publicly made by Bolivia, to have a sovereign access to the sea consistent with the historical understanding between the Parties that Bolivia must not remain landlocked. These exceptional requests were accepted and duly considered by Chile, at the highest levels of State authority. If Chile did not have the intention to satisfy Bolivia's request through negotiations, it could easily have refused to consider such an exceptional matter, or at least it could have remained silent. But, on the contrary, Chile's Heads of State and Foreign Ministers repeatedly told Bolivia in clear and specific terms that they were willing and committed to finding a way to grant Bolivia sovereign access to the sea.

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[228] CCM, para. 9.13-9.14.

[229] See CCM, para. 8.7.

[230] The Court has recognized that resolutions which are not binding can still have "normative value" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226 at p. 254, para. 70) and that, "when they are adopted by consensus or by a unanimous vote, … [they] … may be relevant for the interpretation of" existing agreements (*Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 226 at p. 248, para. 46). More generally, it is "incontestable que l'exécution ou le refus d'exécution d'une recommandation n'est pas juridiquement indifférent. L'une et l'autre attitudes sont, au contraire, susceptibles de produire des effets de droit", M. Virally, "La valeur juridique des recommandations des organisations internationales", *AFDI*, 1956, p. 87. See further Part II, Chapter 5 section F.

[231] See Part II, Chapter 5, section F.

189. *Third*, Chile's conduct confirms that it recognized the existence of an obligation to negotiate. As recalled in the Memorial, on 26 October 1979, Bolivia "referred to several specific agreements to negotiate sovereign access to the sea" embodying "commitments" of the Parties as agreed in 1920, 1923, 1950, 1956, 1961 and 1975[232]. Far from objecting to Bolivia's assertions, the reaction of the Chilean representative to the OAS a few days later, on 31 October 1979, was to emphasize that "[o]n repeated occasions, I have indicated Chile's willingness to negotiate with Bolivia a solution to its aspiration to have a free and sovereign access to the Pacific Ocean"[233].

190. *Fourth*, contrary to Chile's suggestion that there has been no undertaking between Bolivia and Chile on sovereign access to the sea, it is significant to note that statements made or agreements concluded by the two countries referred to previous statements and agreements on the same matter, confirming a long-standing understanding between the Parties that they must negotiate in order to end Bolivia's landlocked status[234].

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[232] See BM, para. 166.

[233] See BM, para. 167.

[234] For example, see (i) the Exchange of Notes of 1950 (BM, para. 127-129 and **BR, Annexes 265 and 266**). It recognized that both Parties had "accepted the cession to [Bolivia] of its own access to the Pacific Ocean". Chile stated that, "with these precedents", "[f]rom the quotes contained in the note I answer, it follows that the Government of Chile, together with safeguarding the legal situation established by the Treaty of Peace of 1904, has been willing to study, through direct negotiations with Bolivia, the possibility of satisfying the aspirations of the Government of your Excellency and the interests of Chile." Chile stated that "my Government will be consistent with that position and (…) is willing to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean (…)" (ii) the Trucco Memorandum in 1961 (**BR**, **Annex 284** (emphasis added)). Chile pointed out that it "has been willing, together with safeguarding the legal situation established in the Treaty of Peace of 1904, to study through direct efforts with Bolivia, the possibility of satisfying the aspirations of the latter and the interests of Chile" and that "Note No. 9 of our Ministry of Foreign Affairs, dated in Santiago on 20 June 1950, is *clear testimony of those purposes*" (iii) in 1987, the Minister of Foreign Affairs of Chile stated that "the minutes subscribed, on that occasion [the 1975 Joint Declaration of Charaña], by the President of Chile and Bolivia embodied the *commitment* to move forward with the dialogue at different levels (….) *in order to find* a formula for the many vital issues both countries faced, for instance, *the one related to the landlocked status that affects Bolivia* (…)" (BM, Annex 169 (emphasis added).

191. *Fifth*, Chile does not seriously engage in the Counter-Memorial with Bolivia's arguments that a great number of Chilean statements constitute unilateral acts and promises that are binding in international law[235]. Some of these declarations were directly in response to requests from Bolivia, and can therefore be viewed either as bilateral agreements or unilateral acts. Others were statements and undertakings made at Chile's own initiative.

192. These solemn declarations and commitments are attributable to the highest level representatives of Chile[236], and were made known to and accepted by the Bolivian authorities[237]. Taking into account the context and circumstances in which they were made, there was an intention to make a formal commitment to negotiations on sovereign access to the sea, as is clear from their unequivocal wording. The following examples, from times both before and after the status of Tacna/Arica was resolved in the 1929 Treaty of Lima, leave no doubt as to Chile's intentions.

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[235] On these unilateral acts, see BM, para. 392-396. There is no doubt that unilateral acts can create rights and obligations under international law. See BM, para. 304-334.

[236] i.e. Presidents of Chile (Alessandri, González Videla, Pinochet, or Lagos), several Ministers of Foreign Affairs (Matte, Izquierdo, Mathieu, Walker Larraín, Carvajal Prado and Del Valle) and Vice-Ministers (Van Kleveren), who undoubtedly represented Chile. Others are attributable to Ambassadors of Chile (such as the Ambassador of Chile in La Paz, Trucco), authorized by the competent Minister.

[237] The intention to negotiate sovereign access to the sea was expressed by these authorized State representatives in various forms, including memoranda (BM, Annex 22 (Matte Memorandum) and **BR, Annex 284** (Trucco Memorandum), diplomatic notes (BM, Annex 48 and Annex 72) and verbal statements later registered in the official correspondence of the ambassador of Bolivia in Santiago and in the Chancellery in La Paz, (See in particular the declaration made by President González Videla on the 8th of November, 1946, before the Minister for Foreign Affairs of Bolivia, Aniceto Solares, and the Ambassador of Bolivia in Santiago, Ostria Gutiérrez (BM Annex 56); and the declarations made by Ministry of Foreign Affairs Del Valle in April 1984 (see Aide Memoire "Meeting held with Chancellor Jaime del Valle", 26 April 1984, **BR, Annex 325)** and on the 12th of November, 1986, at the opening of the negotiations of Montevideo (see Note from the Permanent Representative of Bolivia to the United Nations, Jorge Gumucio, to the Minister of Foreign Affairs of Bolivia, Guillermo Bedregal, 20 Novermber 1986, **BR, Annex 334)** as well as public declarations (BM, Annex 125; and the declarations of 11 July and 3 August 1950, of Chancellor Walker Larraín (BM Annexes 66 and 68) to put an end to journalistic speculations regarding the agreements concluded with Bolivia in June; and the declaration made by President González Videla on 19 July of that same year (Annex 66).

193. Chile made the following commitments before the 1929 Treaty:

a. "Chile is willing to seek that Bolivia acquire its own access to the sea, ceding to it an important part of that zone in the north of Arica and of the railway line…"

«Chile está dispuesto a procurar que Bolivia adquiera una salida propia al mar, cediéndole una parte importante de esa zona al norte de Arica y de la línea del ferrocarril…»

(Chilean Ambassador at La Paz Bello Codesido, Act of 10 January 1920, Basis IV)[238];

b. "Independently of what was established in the Treaty of Peace of 1904, Chile accepts to initiate new negotiations directed at satisfying the aspiration of the friendly country, subject to the victory of Chile in the plebiscite."

«*Independientemente de lo establecido en el Tratado de Paz de 1904, Chile acepta iniciar nuevas gestiones encaminadas a satisfacer la aspiración del país amigo, subordinada al triunfo de Chile en el plebiscito.*»

(Chilean Ambassador at La Paz Bello Codesido, Act of 10 January 1920, Basis V);

c. "my Government maintains its purpose to listen, with the utmost spirit of conciliation and equity, to the proposals that Your Excellency's Government wishes to submit in order to celebrate a new Pact regarding Bolivia's situation, but without modifying the Peace Treaty and without interrupting the continuity of the Chilean territory.… in light of the concrete proposals that Bolivia submits and when appropriate, the bases of direct negotiations leading, through mutual compensation and without detriment to inalienable rights, to the fulfilment of this longing [the sovereign outlet to the Pacific Ocean]."

«mi Gobierno mantiene el propósito de oír, con el más elevado espíritu de conciliación y de equidad, las proposiciones que quiera someterle el Gobierno de V.E. para celebrar un nuevo Pacto que consulte la situación de Bolivia, sin modificar el Tratado de Paz y sin interrumpir la continuidad del territorio chileno… en vista de las proposiciones concretas que Bolivia presente y en hora oportuna, las bases de una negociación directa que conduzca, mediante compensaciones mutuas y sin desmedro de derechos irrenunciables, a la realización de aquel anhelo.»

(Minister of Foreign Affairs Luis Izquierdo, 6 February 1923)[239];

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[238] CCM, Annex 118.

[239] CCM, Annex 125.

d. "When the situation of Tacna-Arica is resolved, we will be able to give Bolivia a port in return through compensations"

«Cuando resuélvase situación Tacna Arica podemos dar puerto mediante compensaciones.»

(Minister of Foreign Affairs Luis Izquierdo, 7 February 1923)[240];

Bolivia

e. "(…) will always find Chile willing to start new negotiations with the aim of facilitating the access of Bolivia to the sea through its own port."

«(…) *encontrará siempre dispuesto al de Chile para emprender nuevas negociaciones, a fin de facilitar el acceso de nuestra Republica al mar por puerto propio.*»

(Statement of President Arturo Alessandri, 27 February 1923)[241];

f."in the course of the negotiations conducted [with Peru]… 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… the Chilean Government would honour its declarations in regard to the consideration of Bolivian aspirations."

(Minister of Foreign Affairs Jorge Matte, 4 December 1926)[242];

194. Furthermore, after the status of Tacna/Arica was resolved in the 1929 Treaty of Lima, Chile once again confirmed the commitment it had made in the 1920s:

a. "I keep my word with regard to what I have told you (the Ambassador of Bolivia in Santiago, Ostria Gutiérrez) on former occasions. What has been verbally agreed is as if it were already written."

«*mantengo mi palabra acerca de lo que en anteriores oportunidades he expresado a Ud. Lo acordado verbalmente es como si estuviera ya escrito.*»

(President González Videla, 28 July 1948)[243];

b. Chile is "willing to engage in conversations with Bolivia on the issue referred to."

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[240] BM Annex 49.

[241] Cited in BM, Annex 51.

[242] BM Annex 22.

[243] Cited in BM, Annex 63, BR Annex 259.

«*está llano a entrar en conversaciones con Bolivia acerca del problema en referencia.*»

(Minister of Foreign Relations, Walker Larraín, 11 July 1950)[244];

c. "It is my duty, indeed, to inform my people that the President of Chile is willing to initiate the aforementioned conversations"

«*Me hago un deber, sí, en declarar a los ciudadanos de mi patria que el Presidente de Chile está llano a abrir esas conversaciones*»

(President González Videla, 19 July 1950)[245];

d. "Furthermore, I reiterate what Chile has expressed on different occasions: its willingness to give an ear, through direct negotiations, to the proposals that Bolivia may put forward"

«*Reitero, además, lo que Chile ha manifestado en diversas oportunidades: su buena disposición para oir, en gestiones directas, las proposiciones que Bolivia pueda formularle.*»

(Minister of Foreign Affairs, Walker Larraín, 3 August 1950)[246];

e. "The Government of Chile shall be willing to negotiate with the Bolivian Government on regard to the referred proposition [cession of a strip of territory north of Arica]…"

«*El Gobierno de Chile estará dispuesto a negociar con el de Bolivia respecto de la proposición referida...*»

(Minister for Foreign Affairs Carvajal Prado, note of 19 December 1975)[247];

f. "[W]e initiated negotiations aimed at satisfying the aspiration of Bolivia to have a sovereign coast without interruption in continuity with the current Bolivian territory."

«*iniciamos negociaciones tendientes a satisfacer la aspiración de Bolivia de tener una costa soberana sin solución de continuidad con el actual territorio boliviano.*»

(President Pinochet, 8 February 1977)[248];

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[244] BM Annex 66.

[245] BR, Annex 269.

[246] Cited in BM Annex 68.

[247] BM Annex 72.

[248] CCM, Annex 217.

g. "My Government maintains unchanged the political will that gave rise to these negotiations [to grant Bolivia a sovereign access to the Pacific]…"
«*Mi Gobierno mantiene inalterable la voluntad política que dio origen a esas negociaciones.…*»

(President Pinochet, 23 November 1977)[249];

h. "I reiterate my Government's intention of promoting the ongoing negotiation aimed at satisfying the longings of the brother country to obtain a sovereign outlet to the Pacific Ocean."

«*le reiteré la intención de mi Gobierno de impulsar la negociación en curso destinada a satisfacer los anhelos de ese país hermano en el sentido de obtener una salida soberana al Océano Pacifico.*»

(President Pinochet, 18 January 1978)[250];

i. "We would like to talk about the maritime issue with Bolivia. We know how relevant it is for Bolivia… [the claim for an access to a maritime coast] is also an important issue… What we are saying is that we are willing to hold this dialogue [and adding that the Chilean Government was] fully aware of the commitment undertaken many years ago to engage in negotiations over an Agenda without exclusions"

«*Queremos hablar del tema marítimo con Bolivia. Sabemos la relevancia que asume para Bolivia…Lo que estamos diciendo es que estamos disponibles para este dialogo…plenamente consciente del compromiso asumido hace ya varios años atrás de hablar con una agenda sin exclusiones*»

(Vice-Minister of Foreign Affairs, Alberto Van Klaveren, 18 July 2006)[251].

195. As the Court held in *Nuclear Tests*, it is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations[252].

196. Chile maintains that in the present case, unilateral acts should be interpreted restrictively because they took place "in a bilateral context"[253]. It relies on *Burkina Faso/Mali*

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[249] CCM, Annex 234.

[250] CCM, Annex 236.

[251] Cited in BM Annex 135.

[252] *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 457 at p. 472, para. 46. See Part II, Chapter, 4 above.

[253] CCM, para. 4.21.

where the Court took the view that because "there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity", a unilateral declaration could not be interpreted "as a unilateral act with legal implications in regard to the present case"[254]. But the present case may be clearly distinguished from the facts in *Burkina Faso/Mali*: first, there are many consistent statements and declarations, extending over a prolonged period of time; second, these statements and declarations have generated or reaffirmed bilateral agreements between Bolivia and Chile (in particular the 1950 Exchange of Notes and the Joint Declarations of 1975 and 1977)[255].

197. In this regard, these consistent statements and declarations made over the course of a century also serve to contradict Chile's assertion in the Counter-Memorial that the events subsequent to the 1904 Treaty may be characterized as "five discrete and very different periods", each of them being "a product of its own particular political and historical context"[256], or as "sporadic diplomatic and political exchanges, and, occasionally, actual negotiations"[257]. There is in effect a unity between the bilateral agreements and unilateral declarations insofar as they cumulatively reinforce Chile's commitment to resolve Bolivia's landlocked status by means of a negotiated settlement. Chile cannot now so bluntly refashion the facts, which clearly establish: (i) the continuity of Chile's undertakings to negotiate sovereign access to the sea since the nineteenth century; and (ii) the existence of numerous consistent agreements and unilateral declarations expressing its commitment to negotiate.

198. It is against this factual and legal background of a consistent and continuous course of conduct that Bolivia will respond in the following sections to Chile's arguments on specific agreements and statements that it attempts to fragment into "five periods", but all of which are linked to the original historical bargain and the commitment that it generated on the part of Chile.

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[254] *Frontier Dispute (Burkina Faso/Mali), Judgment, I.C.J. Reports 1986*, p. 554 at p. 574, para. 40.

[255] Part III, Chapter 5(C) and (E) below.

[256] CCM, para. III.2 (p. 81).

[257] CCM, para. 1.3.

B. The 1920 Act and the 1926 Matte Memorandum

199. The Memorial set forth the reasons why both the 1920 Act and the 1926 Matte Memorandum constitute agreements to negotiate sovereign access to the sea[258]. Chile objects to this assertion in the Counter-Memorial on three grounds: namely, that (i) the 1920 Act contains a reservation stating that it is not binding; (ii) its text does not reflect a commitment regarding sovereign access to the sea; and (iii) the subsequent practice, in particular the Matte Memorandum, does not confirm Bolivia's interpretation of the 1920 Act[259]. As set forth below, these three assertions are not supported by the facts.

1. The text of the 1920 Act

200. Chile argues that the 1920 Act contains "an explicit statement of the intention not to create rights or obligations"[260]. Chile relies on the penultimate paragraph of the Act which states that "(…) the present declarations do not contain provisions that create rights, or obligations for the States whose representatives make them (…)"[261].

201. *First*, if Chile is correct that such a clause was included to prevent the creation of any rights or obligations, it suggests *a contrario* that in the absence of such a clause, Chile's other agreements or statements should be interpreted as giving rise to rights and obligations to negotiate sovereign access to the sea. In fact, such a clause is *not* included in *any* of the subsequent agreements or statements of Chile, including the 1950 Exchange of Notes and the 1975 and 1977 Joint Declarations of Charaña.

202. *Second*, the said clause should not be read in isolation. Read with regard to the full text and context of the 1920 Act, it is clear that the reservation refers to the modality of sovereign access rather than the agreement to negotiate such access. Contrary to Chile's assertions, there is no doubt as to the agreement that the Parties negotiate Bolivia's own access to the sea. The only disagreement is in regard to the specific modalities of the access. As reflected in the 1920 Act, Bolivia had invited Chile to negotiate on the concrete modalities

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[258] BM, para. 346-357.

[259] See CCM, Ch. 5.

[260] CCM, para. 5.8., as well as para.. 5.4-5.7.

[261] BM, Annex 101.

and conditions of sovereign access, including the compensation to be given to Chile. It was clear that this "should be the subject of a prior agreement, to avoid disagreements over details delaying the application of the core matter". That is why, in the following paragraph of the Act, Bolivia pointed out that because of the distinction between the "core of the matter" and the "details" thereof, "the present declarations do not contain provisions that create rights, or obligations for the States whose representatives make them". In other words, any proposals on the specific modalities of sovereign access would not be binding until the conclusion of a formal agreement, and such an agreement would obviously require prior negotiations that Chile agreed to undertake. This is clearly expressed by the statement that "Chile is willing to make all efforts for Bolivia to acquire an access to the sea of its own"[262].

203. This interpretation is confirmed by the statements made before the League of Nations one year later. In 1921, Chile recalled that "Bolivia can seek satisfaction through the medium of direct negotiations"[263] and that, by doing so, Bolivia will "exercise the only *right* it can assert: namely, *the right of negotiations with Chile*"[264]. Chile categorically recognized an obligation to negotiate sovereign access with Bolivia.

204. Contrary to Chile's assertion[265] furthermore, the substance of the exchanges confirms the understanding of the Parties as to the objective of the agreed negotiations. Following the conclusion of the 1920 Act, Chile made the following statements:

a. "[the Chilean Envoy] repeats the terms which were submitted in general terms to the Honourable Mr Dario Gutiérrez last September to procure an agreement which would allow Bolivia to satisfy its aspiration of obtaining its own exit to the Pacific (…)";

b. "Chile is willing to make all efforts for Bolivia to acquire an access to the sea of its own, by ceding a significant part of the area to the north of Arica as well as the railway line that is located within the territories subject to the plebiscite established by the Treaty of Ancón" and "accepts opening new negotiations

[262] BM, Annex 101, p. 394.

[263] BM, Annex 160.

[264] BM, Annex 161 (emphasis added).

[265] CCM, para. 5.10.

aimed at fulfilling the aspiration of its friend and neighbour, subject to Chile's victory in the plebiscite" [266];

c. "These considerations explain and justify the terms in which the representative of Chile has framed the terms it proposes as a practical means of offering Bolivia, within what is possible, all that could effectively lead to the fulfilment of its legitimate expectation (…)", "thus leaving behind its landlocked status."[267]

2. The correspondence preceding the adoption of the 1920 Act

205. The intention behind the 1920 Act is confirmed by the correspondence preceding its conclusion. In the Counter-Memorial, Chile glosses over the statements that are invoked in Bolivia's Memorial, and asserts that Bolivia has represented one document "as having been authored by Chile's Minister" and that that document "does not support the assertion that Bolivia makes" in paragraph 98 of the Memorial[268].

206. In paragraph 98 of the Memorial, Bolivia stated that "In May 1919, [the Ministry of Foreign Affairs of Chile] stated that Bolivia's claim for its own port on the Pacific Ocean on terms aligned with the 1895 settlement was legitimate and just, and that Chile could fulfil that wish on the basis of sufficient and fair compensation"[269]. In support, Bolivia relied on an internal contemporaneous Bolivian note, which reported the said statement by the Chilean representative[270] and clearly supported Bolivia's assertion[271]. Bolivia did not claim that the note itself was a Chilean document. Chile does not challenge the veracity of the Bolivian note.

207. In addition, Chile does not seriously engage with the other documents preceding the 1920 Act which Bolivia relied upon in its Memorial and which also confirm its interpretation

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[266] The respected Chilean diplomat and historian Oscar Pinochet de la Barra acknowledges: "Chile assumed a commitment under Article V [of the 1920 Act]" O. Pinochet de la Barra, *Chile and Bolivia ¡How much longer!* 2004 p. 40, **BR, Annex 352**.

[267] BM, Annex 101 and CCM, Annex 118.

[268] CCM, para. 5.11, regarding BM, Annex 42.

[269] BM, para. 98.

[270] BM, Annex 42.

[271] See BM, Annex 42, pp. 179-180.

of the Act[272]. This is true in particular of the Chilean Memorandum of 9 September 1919, the terms and intention of which are clear and specific[273].

3. The subsequent practice, including the 1926 Matte Memorandum

208. Chile's claim that the subsequent practice does not establish any commitment on its part to negotiate on sovereign access to the sea[274] is wrong.

209. Chile maintains that Bolivia failed to cite a passage from Chilean Delegate Rivas-Vicuña's letter[275] stating that the President of Chile informed a Bolivian representative "that he did not recognize 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," adding that "the aspirations of Bolivia might be satisfied by other means, and that his Government was quite ready to enter into negotiations on this subject in a sincere spirit of peace and conciliation"[276]. According to Chile, this statement that it was "quite ready" to negotiate on practical means to improve Bolivia's access to the sea, without granting it a port, "is not a basis on which Bolivia can claim that Chile expressed an intention to undertake a legal commitment to negotiate concerning sovereign access"[277].

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[272] See BM, para. 95-98.

[273] See BM, Annex 19. The next month, Bello Codesido told the US Charge d'Affaires in Bolivia that "Chile has formally promised Bolivia a port, the grant to take place upon the settlement of the controversy between Chile and Peru". See Telegram 723.2515/503 from the Chargé d'Affaires of the United States in Bolivia Goold to the Secretary of State, 6 October 1919, **BR, Annex 235**. Conrado Ríos Gallardo, who would in turn become Foreign Minister of Chile, described the objectives of Bello Codesido's mission in Bolivia in the following terms: "[Chile] has never refused to listen to the aspiration of Bolivia… on the contrary, has promised to satisfy it in the field of mutual compensations", adding that "When Chile settled its difficulties with Peru… This is indeed the only moment that Chile expected to satisfy in the realm of reality, not of fantasy, the port aspirations of Bolivia. Mr. Bello Codesido had the mission to say that this time was coming, that Bolivia had to rely on Chile's word and that it should wait for the events to come". See C. Rios Gallardo**,** *After the Peace… The Chilean-Bolivian Relations* (1926)**,** pp. 132 and 215, **BR, Annex 241**.

[274] See CCM, para. 5.21-5.29.

[275] CCM, para. 5.20.

[276] Letter from Manuel Rivas Vicuña, Chilean Delegate to the General Assembly of the League of Nations, 19 September 1922, BM Annex 46, CCM, Annex 123.

[277] CCM, para. 5.20

210. In fact the expression "was quite ready to enter into negotiations" does demonstrate Chile's agreement to enter into direct negotiations with Bolivia[278]. This statement followed the other declarations of this period, rejecting the revision of the 1904 Treaty while at the same time promising to resolve Bolivia's landlocked situation through direct negotiations[279]. The historical context in which these declarations were formulated demonstrates that they referred to the question of sovereign access.

211. In the absence of the plebiscite on the status of Tacna and Arica as envisaged by the 1883 Treaty of Ancón, Chile and Peru resumed direct negotiations in December 1921 to resolve the dispute regarding sovereignty over these territories. In that context, on 20 December 1921, the Bolivian Foreign Minister Alberto Gutiérrez requested the Chilean Government "to hold an international conference composed of representatives of nations directly concerned on this serious issue of the Pacific"[280].

212. Although Chile rejected this request, it recalled that the Bolivian Government had "...been publicly and solemnly invited in Geneva, and later in La Paz and in Santiago, to express directly to Chile their views on their aspirations for a port in the Pacific,"[281] reiterating once again its intention to negotiate directly with Bolivia.

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[278] It should be recalled that in the case of the *Nuclear Tests*, the ICJ stated that France had assumed a binding unilateral commitment based on several declarations of the aforementioned country, including one in which it indicated that "it was ready to proceed to underground tests". *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974,* p. 457 at p. 266, para. 40.

[279] This is confirmed by considering Alessandri's own account of his conversation with Pinilla: "I told him that if he came to ask me for a revision of the Treaty of 1904, it was preferable that he not waste his time and not make me waste mine, because I, on behalf of Chile, would never accept the revision of the Treaty, without prejudice to hearing in a new negotiation something about the aspirations of Bolivia, based on compensations." See A. Alessandri Palma, *Memories of Government*, *Volume I*, 1967, pp. 76-77, **BR, Annex 294**.

[280] See Note from the Minister of Foreign Affairs of Bolivia, Alberto Gutiérrez, to the Minister of Foreign Affairs of Chile, Ernesto Barros Jarpa, 20 December 1921, **BR, Annex 236.**

[281] Note from the Minister of Foreign Affairs of Chile, Ernesto Barros Jarpa, to the Minister Plenipotentiary of Bolivia to Chile, Macario Pinilla, N° 1725, 21 December 1921, **BR, Annex 237**. In January 1922, the Chilean Foreign Minister, Ernesto Barros Jarpa, told the Bolivian Chargé d'Affaires in Santiago, Salinas Lozada, that once Tacna and Arica were definitely transferred to Chile, the proposals made to Bolivia by

213. Bolivia subsequently requested the Government of Uruguay to interpose good offices with Chile and Peru so that it could be included in the Conference held in Washington in 1922. After carrying out the corresponding negotiations, Uruguay forwarded a Memorandum to Bolivia stating that: "Chile believes that it is not appropriate to discuss this issue jointly with Peru at the Washington meeting because of the legal nature of the issue to be addressed there; but reiterates that it is willing, in this case, to consider solutions directly with Bolivia"[282].

214. Chile describes the Note of 6 February 1923, as a simple "invitation" to submit proposals[283]. However, when the Chilean Foreign Minister stated that his Government "maintains its purpose to listen" to Bolivia's proposals "to celebrate a new Pact" on sovereign access "without modifying the Peace Treaty and without interrupting the continuity of the Chilean territory", it is evident that it is assuring the Bolivian Government that it agrees to initiate negotiations to address Bolivia's landlocked situation[284].

215. The same can be said of the excerpt from that Note, in which the Chilean Chancellor states that his Government "will devote great efforts to consult... the bases of direct negotiations leading, through mutual compensation and without detriment to inalienable rights, to the fulfilment of this longing"[285]. The use of the simple future tense denotes the commitment to pursue a course of conduct towards the resolution of this matter.

Bello Codesido could be extended to fulfill Bolivia's aspiration. See Note from the Chargé d'Affaires of the Bolivian Legation to Chile, Juan Salinas Lozada, to the Minister of Foreign Affairs of Bolivia, Alberto Gutiérrez, N° 117, 27 January 1922, **BR, Annex 239**.

[282] Also, the Chilean Foreign Minister expressed to the Minister of Uruguay in Santiago that: "...the good disposition of Chile gave Bolivia high hopes for success in its aspirations, as long as it seeks the satisfaction of these aspirations within an environment of cordiality, friendly bonding and reciprocal concessions." See Information Service of the Ministry of Foreign Affairs of Chile, *Chile and the Aspiration of Bolivia for a Port in the Pacific* (1922), pp. 155-157, **BR, Annex 238.**

[283] CCM, para. 5.25.

[284] Note Nº 20 from the Chilean Minister of Foreign Affairs of 6 February 1923 to the Minister Plenipotentiary of Bolivia in Chile, Ricardo Jaimes Freyre, BM Annex 48, CCM, Annex 125.

[285] Note Nº 20 from the Chilean Minister of Foreign Affairs of 6 February 1923 to the Minister Plenipotentiary of Bolivia in Chile, Ricardo Jaimes Freyre, BM Annex 48, CCM, Annex 125.

216. As to the Chilean Note of 22 February 1923, Chile considers that the expression "my Government's willingness to discuss the proposals that the Bolivian Government wishes to present in this regard" does not demonstrate the intention to create a legal obligation[286]. The expression of "willingness" however, may clearly constitute a legally binding commitment[287]. In the present case, the said willingness reflects Chile's agreement to enter into direct negotiations with Bolivia to satisfy its claim for a sovereign access to the sea, provided, as the Note made clear, that the access is not located in the former Bolivian territories which were ceded under the 1904 Treaty[288].

217. Regarding the press statement of Chile's President dated April 1923[289], it is clear that when the President of Chile pointed out that nothing was legally owed to Bolivia, he specifically referred to the revision of the 1904 Treaty, which Bolivia pursued at that time, and not to the question of the Chilean commitments to negotiate sovereign access to the sea. In fact, the President of Chile reiterated his country's willingness to negotiate with Bolivia "in the form and terms clearly and frequently posed in the Note of the Ministry of Foreign Affairs of Chile, addressed to the Bolivian Minister in Chile, on 6 February [1923]"[290].

4. *The 1926 Matte Memorandum*

218. Similarly Chile's assertion that the Matte Memorandum does not support Bolivia's claim[291], and that Bolivia's acceptance of the offer it contains cannot be viewed as an agreement[292], is unsupported by the facts.

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[286] See CCM, para. 5.27.

[287] In its Eighth Report to the ILC on unilateral acts of States, Special Rapporteur Rodriguez Cedeño analyzed for instance "a declaration whereby Cuba expressed its willingness to supply the requested vaccines and to send them immediately", without rejecting its status as a binding unilateral act by the mere fact that it was an expression of willingness. Eighth Report on Unilateral Acts of States, by Mr. Victor Rodriguez Cedeño, Special Rapporteur, Document A/CN.4/557, 26 May 2005, p. 35, para. 38.

[288] Note Nº 435 from the Chilean Minister of Foreign Affairs of 22 February 1923, CCM, Annex 126**.**

[289] See CCM, para. 5.28.

[290] "President Alessandri exposes the guidelines of Chile's international policy", *El Mercurio* newspaper, Wednesday, 4 April 1923, BM Annex 125, CCM, Annex 127.

[291] CCM, para. 5.32-5.36.

[292] CCM, para. 5.37-5.38.

219. The chain of events that preceded the Matte Memorandum demonstrates that both (i) the proposal of US Secretary of State Frank B. Kellogg[293], which was consistent with the repeated declarations made by Chile concerning Bolivia's sovereign access to the sea, and (ii) the Chilean acts that preceded the Kellogg proposal, are part of a clear course of conduct by Chile aimed at satisfying Bolivia's sovereign access to the Pacific Ocean.

220. By 1926, Bolivia and Chile had resumed bilateral talks concerning sovereign access, on the understanding that Bolivia would support Chile to prevail in the Tacna/Arica plebiscite required by the 1883 Treaty of Ancón[294]. However, the plebiscite could not be carried out; and given that Chile and Peru were unable to reach an agreement on the said provinces, on 11 April 1926, the Ambassador of the United States of America in Chile suggested that the Secretary of State propose to Chile and Peru the "cession to Bolivia, *in fulfillment of assurances made repeatedly and publicly* since the beginning of the plebiscitary proceedings by spokesmen of both countries that Bolivian aspirations for a port on the Pacific would be considered sympathetically"[295]. This is a third party affirmation of Chile's "repeated" and "public" "assurances" during this period to negotiate Bolivia's sovereign access to the sea.

221. On 15 April 1926, the US Secretary of State proposed to Chile and Peru to transfer the provinces of Tacna and Arica "to a South American State not a party to these negotiations"[296],

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[293] BM, para. 115-118.

[294] See Note from the Minister of Foreign Affairs of Bolivia, Alberto Gutiérrez, to the Minister Plenipotentiary of Bolivia to Chile, Eduardo Diez de Medina, N° 200, 31 March 1926, **BR, Annex 240.**

[295] See Telegram 723.2515/2124 of the U.S. Ambassador in Chile, W. Miller Collier, to the U.S. Secretary of State, Frank B. Kellogg, 11 April 1926, **BR, Annex 244** (emphasis added). Chile had expressed on several occasions to the United States its intention to solve the Bolivian maritime problem once the dispute regarding Tacna and Arica was over. On a meeting held on 19 February 1926, the Minister of Foreign Affairs of Chile told the US Ambassador in Santiago that: "at once after acquiring definite title to Arica, it would negotiate with Bolivia to give that country a port". See Telegram 723.2515/1952 from the Ambassador of the United States in Chile, W. Miller Collier, to the U.S. Secretary of State, Frank B. Kellogg, 20 February 1926, **BR, Annex 242**. In April 1926, the Chilean delegate to the Tacna and Arica Plebiscitary Commission told the US Delegate "that Chile will surelly (*sic*) win plebiscite and that then she will consider doing something for Bolivia". See Telegram 723.2515/2118 from the U.S. Secretary of State, Frank B. Kellogg, to the Ambassador of the United States in Chile, W. Miller Collier, 10 April 1926, **BR, Annex 243**.

[296] See Telegram 723.2515/2143a from the U.S. Secretary of State, Frank B. Kellogg, to the U.S. Consul at Arica, Von Tresckow, 15 April 1926, pp. 384-385, **BR, Annex 245**. Bolivia was aware of the diplomatic

and, on 4 June 1926, the cession of a corridor to the sea for Bolivia, the delimitation and extension of which would be subject to the Parties' agreement[297].

222. The evidence demonstrates that Chile agreed with the United States about its specific proposals to grant Bolivia a sovereign access to the sea,[298] and later made this known to Bolivia[299].

223. Against this background, on 30 November 1926, US Secretary of State Kellogg proposed once again to Chile and Peru to transfer Tacna and Arica to Bolivia[300].

224. As explained in the Memorial, Chile and Bolivia both accepted the 1926 Kellogg proposal[301]. It constituted an offer by Chile to negotiate sovereign access to the sea[302]. Regarding the "idea of granting a strip of territory and a port to the Bolivian nation", Chile affirmed that:

> "Chile has always been disposed to listen to all propositions for settlement which might contribute toward such lofty aims and at the same time might offer

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exchanges between the United States, Chile and Peru and thus sought to take part in these negotiations. To this end, the President of Bolivia sent a letter to the President of the U.S. on 19 April 1926, in which it informed that the proposal made by the Secretary of State of the U.S. to Chile and Peru "agrees with the offer made to my Government by the Government of Chile of the port of Arica, or some other port under Chilean sovereignty". See Letter from the President of Bolivia, Hernando Siles, to the President of the United States, Calvin Coolidge, 19 April 1926, **BR, Annex 246**.

297 Minutes of the Meeting of the Plenipotentiaries of Peru and Chile, Under the Extension of Good Offices of the U.S. Secretary of State, Frank B. Kellogg, 4 June 1926, **BR, Annex 247**.

298 In June 1926, Chile presented to the United States specific proposals for settlement, including a "Bolivian corridor four kilometers wide extending from Bolivian boundary to Village of Palos on the Pacific Ocean, this corridor to follow present boundary between Departments of Tacna and Arica so that one-half of the corridor strip would be on each side of it." See Telegram 723.2515/2415 from the U.S. Secretary of State, Frank B. Kellogg, to the Ambassador of the United States in Chile, W. Miller Collier, 9 June 1926, p. 476. **BR Annex 248**.

299 Chilean Memorandum of 23 June 1926, BM Annex 20, p. 21.

300 Memorandum from the US Secretary of State, Frank B. Kellogg, of 30 November 1926, BM Annex 21. pp. 505-509.

301 BM, para. 119-120.

302 See BM, para. 104-120 and para. 350-357.

> compensation proportionate to the sacrifice of that part of its legitimate rights which such proposals import".[303]

225. As in the preceding instances, Chile agreed to resolve Bolivia's landlocked condition and pursued a course of conduct consistent with that objective. On the one hand, the terms of Chile's response demonstrates its consent to negotiate a formula that makes Bolivia's sovereign access to the sea possible, by way of a "strip of territory". On the other hand, Chile confirmed that it had followed a course of conduct consistent with that objective by stating that "[it] has always been disposed to listen to all propositions for settlement which might contribute toward such lofty aims". Bolivia thus expected Chile to negotiate sovereign access, independently of whether the modality of such access involved "a strip of territory and a port" or some other practical solution.

226. Chile argues that the language of the Memorandum "was without prejudice to Chile's legal rights"[304]. This however is fully compatible with an undertaking *to negotiate,* that is to say to negotiate the possible terms of a future agreement. The following extract of the Memorandum that Chile emphasizes in the Counter-Memorial[305] is clear in that regard. Chile stated that it

> "now desires to attest, once more, that in discussing such propositions she does not abandon those rights, but solely has considered the possibility of sacrificing them freely and voluntarily on the altar of a superior national or American interest. In this sense the Chilean Government agrees to consider, in principle, the proposal, thereby giving a new and eloquent demonstration of its aims of peace and cordiality"[306].

227. Chile also asserts that Bolivia's acceptance of the Chilean offer a few days later, on 7 December 1926,[307] cannot constitute an agreement because the Memorandum was not addressed to Bolivia but to Secretary of State Kellogg[308]. This is not correct. It should be noted that the Memorandum was officially conveyed by Chile through diplomatic channels

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[303] BM, Annex 22.

[304] CCM, para. 5.36.

[305] CCM, para. 5.35.

[306] BM, Annex 22, p. 109.

[307] See BM, Annex 53.

[308] CCM, para. 5.38.

to Bolivia,[309] and constitutes at least a unilateral promise and representation of Chile's position. In fact, in the Note dated 7 December 1926, which is expressly addressed to Chile, Bolivia stated that it had "the honour to acknowledge receipt of the note addressed by Your Excellency on 5 December … along with which I have received the Memorandum that His Excellency the Minister of Foreign Affairs of Chile has drafted (…)".[310] In the same Note, Bolivia concurred with Chile's Memorandum that negotiations were required and that the agreed objective was "to recover its maritime sovereignty elements, through pacts or conventional agreements or diplomatic covenants freely consented with neighbouring nations".

C. The 1950 Exchanges of Notes

1. The nature and content of the Notes

228. As Bolivia demonstrated in the Memorial, the 1950 Exchange of Notes constitutes a treaty under international law, the terms of which are clear and unequivocal[311]. The Bolivian note, after recalling "different occasions" in which Chile "accepted the cession to (Bolivia) of its own access to the Pacific Ocean", proposed that:

> "the Governments of Bolivia and Chile formally enter into a direct negotiation to satisfy the fundamental need of Bolivia to obtain its own and sovereign access to the Pacific Ocean, thus solving the problem of the landlocked condition of Bolivia on bases that take into account the mutual benefits and true interests of both peoples"[312].

229. The Chilean Note in response, confirms previous commitments to negotiate sovereign access to the sea and concludes as follows:

> "… it follows that the Government of Chile, together with safeguarding the legal situation established by the Treaty of Peace of 1904, has been willing to study, through direct negotiations with Bolivia, the possibility of satisfying the aspirations of the Government of Your Excellency and the interests of Chile.

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[309] BM, Annex 53.

[310] BM, Annex 53.

[311] See BM, para. 123-135 and para. 358-369.

[312] Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Chile, Horacio Walker Larrain, N° 529/21, 1st June 1950, **BR, Annex 265.**

> At the present opportunity, I have the honor 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 willing to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character that effectively takes into account its interests"[313].

230. Three elements of this Exchange of Notes are particularly important:

a. *First*, they *confirm* a "consistent" and pre-existent position on the part of Chile on this matter, which flows from the precedents which are listed in the first substantive paragraph of the Note, and according to which Chile "has been willing to study, through direct negotiations with Bolivia, the possibility of satisfying" its aspirations;

b. *Second*, by exchanging the Notes, Chile clearly expressed that it "is willing to formally enter into a direct negotiation" and thus its intention to be bound in a formal instrument;

c. *Third*, it is agreed that the negotiations have a specific objective: namely, they are "aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean".

231. Chile attempts to discredit the legal value, and the very existence, of the agreement arising from the Exchange of Notes[314]. It tries to blur the direct connection between the Bolivian Note of 1 June 1950 and its own Note of 20 June 1950. The title of Chapter 6 ("Chile's statement of openness to negotiate of 20 June 1950") only mentions the Chilean Note, seemingly to avoid the suggestion that it was in fact a response to the antecedent Bolivian Note. According to Chile "The notes are different in terms, and Chile's note of 20 June could in no sense be taken as agreeing to Bolivia's note of 1 June"[315]. In addition, Chile maintains that "the language used by Chile is not that of legal obligation, but is markedly

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[313] Note from the Minister of Foreign Affairs of Chile, Horacio Walker Larrain, to the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, N° 9, 20 June 1950, **BR, Annex 266.**

[314] CCM, I, para. 1.24 *b*.

[315] CCM, I, para. 1.24 *b*.

tentative in nature […] Openness to negotiations does not transform into a legal obligation when neither side manifests an intent to be bound".

232. Chile's claim that there was no agreement because Bolivia did not reply to the "counter-proposal" of the Chilean Note of 20 June 1950[316] does not withstand scrutiny in light of the facts. It is simply not true to suggest that Bolivia made a "proposal" before Chile presented a "counter-proposal". The *travaux préparatoires* of the Notes clearly demonstrate that the two Notes were prepared and negotiated *together* and that the draft Notes were exchanged between the two States before final approval[317]. This was considered an exchange of mutual commitments demonstrating a clear intention to be bound.

233. As set out in the Memorial, 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[318]. To this end, the Bolivian Ambassador submitted the draft of the Bolivian note to the Chilean Minister of Foreign Affairs Vergara Donoso[319].

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[316] CCM, I, para. 6.12.

[317] BM, I, para. 123-126.

[318] On 1 June 1948, the President of Chile, during a meeting held with the Bolivian Ambassador, stated that they had no trouble in formalizing the negotiations that had been commenced. On that day, Chilean Chancellor Vergara Donoso declared "his full agreement" to "formalizing the negotiations, opening that stage by means of exchange of notes". Note Nº 455/325 from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Bolivian Minister of Foreign Affairs, Adolfo Costa Du Rels, 2 June 1948, **BR, Annex 256**. On 17 June 1948, the Bolivian Ambassador and the Chilean Foreign Minister agreed on "the advisability of specifying, by means of notes, the result of the negotiation carried out with the president of the Republic" of Chile. On this basis, the Bolivian Ambassador proposed "two stages: one to agree upon, in principles, the transfer to Bolivia of an own access to the sea, and another one to specify the territorial aspect." Note Nº 515/375 from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Adolfo Costa Du Rels, of 28 June 1948, **BR, Annex 257**.

[319] Note Nº 515/375 from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Adolfo Costa Du Rels, **BR, Annex 257**. In July 1948, the President of Chile proposed to delay the negotiations owing to internal policy circumstances in Chile, stating however that he was not looking for a pretext "to get out of my commitment (…) My unwavering determination to reach the goal verbally agreed with you". Note Nº 598/424 from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Adolfo Costa Du Rels, 15 July 1948, **BR, Annex**

234. On 24 May 1950, the Bolivian Ambassador Ostria Gutiérrez, sent to the Chilean Minister of Foreign Affairs, Walker Larraín, a draft note identical to that sent on 28 June 1948 to his predecessor, Vergara Donoso[320]. That draft was accepted by Chile. Likewise, the Chilean draft note in reply was sent to Ambassador Ostria Gutiérrez on 9 June 1950[321]. A minor modification suggested by Ambassador Ostria Gutiérrez was accepted by the Chilean Minister[322]. Although dated 1 June 1950, the Bolivian Note was formally sent to the Chilean Minister on 20 June 1950, that is, the exact date of the Chilean Note, which was formally delivered to the Bolivian Ambassador.[323] This cannot be qualified as an offer and a counter-offer as suggested by Chile, because the content of both notes was previously agreed by both Chile and Bolivia. The two Notes constitute a single instrument, an international agreement arrived at after considerable deliberation between the parties.

235. Further, so far as the subject-matter of the present case is concerned, the two Notes embody the same commitment and, as such, constitute a treaty:

a. In the first paragraphs of its Note, Bolivia recalls the previous statements or agreements of the Parties on the question of the sovereign access to the sea (in 1895, 1920, 1922, 1923, 1946 or 1949); similarly, in the first paragraph of its Note, Chile recalls the terms of the acts and declarations which Bolivia referred to in its note;

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258. Later that month the Chilean President told the Bolivian Ambassador that he "keep my word with regard to what I have told you on former occasions. What has been verbally agreed is as if it were already written." See Note Nº 648/460 from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Adolfo Costa Du Rels, 28 July 1948, **BR, Annex 259**.

[320] See Note Nº 457/310 from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, 25 May 1950, **BR, Annex 260**.

[321] See Note Nº 510/349 from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, 10 June 1950, **BR, Annex 262**.

[322] After the word "compensaciones" (compensation) it was added "que no tengan carácter territorial" (of a non-territorial character). A. Ostria Gutiérrez, *Apuntaciones sobre negociaciones portuarias con Chile*, 1998, p. 55, **BR Annex 342**. See also Note Nº 544/371 from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, 17 June 1950, **BR, Annex 263**.

[323] Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, N° 550/374, 20 June 1950, **BR, Annex 264**. Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, N° 559/381, 20 June 1950, **BR, Annex 267**.

b. Bolivia then refers to "such important precedents" and Chile to "these precedents";

c. On the basis of these precedents, Bolivia made the following proposal, which Bolivia submitted to the "acceptance" of the Government of Chile:

> "that the Governments of Bolivia and Chile formally enter into direct negotiation to satisfy the fundamental need of Bolivia to obtain its own and sovereign access to the Pacific Ocean, thus solving the problem of the landlocked condition of Bolivia on bases that take into account the mutual benefits and true interests of both peoples"[324].

d. Similarly, Chile, states that "[w]ith these precedents",

> "I have the honor of expressing to Your Excellency that *my Government will be consistent with that position* and (…) is willing to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character that effectively takes into account its interests"[325].

236. Chile also claims that in its Note, Chile stated that it will have, "opportunely", "to consult Peru, in compliance with the Treaties concluded with that country"[326]. Once again, it is not a "counter-proposal", but only a statement of fact. In addition, Chile did not say in the 1950 Note that its undertaking to negotiate was made upon Peru's approval, or that "in accordance with the Supplementary Protocol to the 1929 Treaty, Peru's consent would be necessary" as it alleges in the Counter-Memorial[327]. The only thing Chile said in the 1950 Note is that, "opportunely", it will have "to consult" the Government of Peru. It is clear, therefore, that Chile's undertaking "to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access" was unconditional and fully met the initial proposal made by Bolivia. The 1950 Exchange of Notes thus constitute an agreement for the purpose of the present case. In that

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[324] Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Chile, Horacio Walker Larrain, N° 529/21, 1st June 1950, **BR, Annex 265.**

[325] Note from the Minister of Foreign Affairs of Chile, Horacio Walker Larrain, to the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, N° 9, 20 June 1950, **BR, Annex 266.**

[326] CCM, para. 6.9 and 6.10, letter f).

[327] CCM, para. 6.2, letter c).

agreement, 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.

237. Chile alleges that the Notes are nothing more than a statement of policy or a "political expression of willingness"[328]. This is in plain contradiction with the terms of the Notes which state that Chile "will be consistent with that position and (…) is willing to formally enter into a direct negotiation". This is a clear intent to act in a certain way, which has been formalized in an exchange of notes carefully negotiated and drafted by the highest authorities of the two countries.

2. The conduct of the Parties before the conclusion of the Notes

238. The binding character of the 1950 Notes is further confirmed by the circumstances leading to their formation. The record of discussions and contacts held at the highest level between the Bolivian Ambassador in Santiago, Ostria Gutiérrez, and the Chilean President, González Videla, and the successive Ministers of Foreign Affairs[329], reveals the detailed and prolonged process of formation of an agreement to negotiate a sovereign access to the Pacific Ocean, which was formalized in the Exchange of Notes in 1950[330]. These Notes even included a series of bases for the negotiation, for example that the Bolivian compensation would not have a territorial character.

239. Chile has questioned the value of the statements formulated by Chilean President González Videla, noting that the documentary record "merely" shows that on several occasions, Chile was open to considering and studying Bolivia's proposals and that it was indeed open to negotiation[331]. But the records of the talks between Bolivia and Chile in this period show that Chile did not merely express a simple desire, but expressed its acceptance to negotiate on Bolivia's sovereign access to the sea. It was actually in the course of the

[328] CCM, para. 6.11.

[329] Germán Vergara Donoso, then Germán Ignacio Riesco and, finally, Horacio Walker Larraín.

[330] For these negotiations, see BM, Annexes 57-65 and 126.

[331] CCM, para. 6.5–6.6.

negotiation of the Notes of 1950 that the exclusion of territorial compensation was determined by the parties.[332]

3. The subsequent practice

240. Contrary to Chile's assertions in its Counter-Memorial[333], the agreement of 1950 was confirmed as such by the subsequent conduct of the Parties. Both Chile and Bolivia acknowledged after 1950 that the Exchange of Notes constituted an agreement entailing legal effects. A fine illustration is that Bolivia registered the Exchange of Notes in the Department of International Treaties of the Ministry of Foreign Affairs [334] Bolivia and Chile, on multiple occasions, expressed that the Notes of 1950 reflected an "agreement". The understanding of the Parties as to the object and purpose, content and implications of the Notes is the same.

241. Gabriel González Videla himself, Chile's President when the agreement of 1950 was negotiated, left a valuable testimony with regard to the note of 20 June and the final goal of a negotiation on Bolivia's sovereign access to the sea:

> "The Chilean note translates my state of mind with regard to the attitude I followed when I accepted to hold direct talks with the Government of Bolivia to study the way to satisfy its port aspirations. […] The idea of the "corridor" was not intended to solve a pending territorial question, as was the case of Peru with regard to Tacna and Arica provinces, but to find a formula that could satisfy Bolivia's aspiration for an own and sovereign access to the Pacific Ocean"[335].

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[332] See Note Nº 457/310 of 25 May 1950, from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, **BR, Annex 260**; Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, Nº 470/322, 27 May 1950, **BR, Annex 261**; Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, Nº 510/349, 10 June 1950, **BR, Annex 262.** Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, Nº 544/371, 17 June 1950, **BR, Annex 263**.

[333] CCM, paras. 6.7-6.16.

[334] Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, Nº 646/433, 13 July 1950. **BR, Annex 268.**

[335] G. González Videla, *Memoirs*, Santiago, Gabriela Mistral, 1975, p. 902, **BR, Annex 299**.

242. Further,[336] the Chilean Minister of Foreign Affairs declared in an interview on 17 July 1950 that:

> "I hereby declare that has been an invariable rule of the Foreign Ministry to declare that, even though it is true that we have no pending problem whatsoever with Bolivia, we are willing to hold friendly conversations regarding its port aspiration. These are not my words – adds Mr. Walker. These are the statements that all my predecessors have made, namely, Mr. Luis Izquierdo, Mr. Jorge Matte, President Alessandri and Mr. Agustín Edwards. The Chilean thesis has been more or less the following: 'Chile does not accept that the Bolivian aspiration for a port on the Pacific should be taken to International Congresses or Conferences, but Chile is willing to study in direct and friendly negotiations with that country the possibility of satisfying its longings on basis of compensations for Chile."[337]

243. The Minister added, with regard to the agreement of 1950, that: "Yes. We have agreed to initiate conversations".[338]

244. Both countries agreed to publish the Notes of June 1950 by late August that year to clarify their scope[339]. To this end, both countries' negotiators made lengthy statements, both in Chile and Bolivia.

245. On 30 August 1950, the Bolivian negotiator declared with regard to what had been agreed to that, on the one hand, it was necessary to "formalize the direct negotiation; i.e. that Bolivia proposed Chile the need to resolve, through a friendly understanding, its fundamental

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[336] Some other statements of Chile's President and Foreign Minister were already submitted to the Court in the Memorial. BM para. 132-134; BM Annexes 66, 67 and 68.

[337] See "The Foreign Minister Asserts: Chile is willing to study the Bolivian longing on bases of reciprocal compensations", *VEA* magazine, 19 July 1950, **BR, Annex 270.**

[338] See "The Foreign Minister Asserts: Chile is willing to study the Bolivian longing on bases of reciprocal compensations", *VEA* magazine, 19 July 1950, **BR, Annex 270.** See also *VEA* magazine, 19 July 1950, "González Videla declares: All that has been agreed is to initiate conversations with Bolivia, Arica will always remain free", **BR, Annex 269.**

[339] After the publication of the Notes in the press, the British Embassy in La Paz reported to the Foreign office that the Notes "contain the formal agreement" of the Government of Chile to "enter into negotiations with Bolivia to find a means of satisfying Bolivia's 'Pacific' aspirations" and that the Chilean Note constituted an "undertaking". Note from the British Embassy in La Paz to the American Department of the Foreign Office, 1 September 1950, **BR, Annex 272.**

need for an own and sovereign outlet to the Pacific Ocean"[340] and, on the other, "it was essential that the Government of Chile accept to formalize that direct negotiation intended to resolve the problem of Bolivia's landlocked condition".[341] He then affirmed "that is what was done and what was obtained with the exchange of notes between the Governments of Bolivia and Chile in June this year".[342]

246. In that same statement, the Bolivian Ambassador interpreted the Notes of 1950 as shaping an agreement by stating that:

> "The importance of those notes flows from their own text and can be easily synthesized from their main paragraphs, namely: 1) in the Bolivian note, by proposing: 'that the Governments of Bolivia and Chile formally enter into a direct negotiation to satisfy the fundamental need of Bolivia to obtain its own and sovereign access to the Pacific Ocean'; 2) in the Chilean note, by accepting to 'formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean'"[343]

247. He also emphasized with regard to the Notes that "That is all that has been agreed to between Bolivia and Chile. Nothing more than what those notes record"[344].

248. In the same vein, on 1 September, Chile's Chancellor reiterated the scope and nature of the agreement of 1950 in a new Note addressed to the President of the Commission of Foreign Affairs of the Chilean Senate. That information was made public in the press on the following day: "In the press and in both Chambers' commissions, I informed and reiterated that I had accepted to open negotiations with Bolivia, which is precisely what the notes that have been published record"[345].

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[340] Statements made to the press by the Ambassador of Bolivia to Santiago, Alberto Ostria Gutiérrez, 30 August 1950, **BR, Annex 271**.

[341] *Ibid*.

[342] *Ibid*

[343] *Ibid*.

[344] *Ibid*.

[345] Note from the Chargé d'Affairs of Bolivia to Chile, Jorge de la Barra, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, Nº 832/505, 4 September 1950, **BR, Annex 273.**

249. Just a few days later, Minister Walker Larrain stated: "I have consented to opening negotiations in the terms that are recorded in the note I have had published […]", noting:

> "I must add that draft notes sent by the Bolivian Embassy and the Minister on opening negotiations are archived in the Foreign Ministry, and that I have even been informed in the Ministry that the most recent one had been drafted by Mr. Riesco himself. From inquiries I have made today, it turns out that their wording corresponds to his predecessor.
>
> As far as I am concerned, this aspect bears no importance, for the only thing I am concerned with proving is that this is not a demarche that was started while I served as Foreign Minister, but that it had been sorted out earlier. And this is recorded in [specific] documents."[346]

250. Finally, with regard to journalistic speculations in Chile related to possible compensation from Bolivia, he stated that "in any case, it is too early to talk about projects on utilization of electrical energy to collect ground water and foster industry or others, because we have only agreed to enter into conversations with Bolivia and no proposal authorizing a consideration on compensations that Chile would accept has been received yet"[347].

251. In their written pleadings, Bolivia and Chile agree that after 1950, "no further progress was made in the negotiations"[348]. In the Counter-Memorial, Chile argues that a reason for the absence of negotiations after 1950 was "Bolivia's change in position"[349]. However, the documents invoked by Chile to support its allegation (press articles and a Chilean internal report) do not show that Bolivia considered that the 1950 Notes were no longer in force or that they do not constitute an undertaking to negotiate. These documents show that the new Government of Bolivia was facing urgent domestic matters at that time, which made it more difficult to give priority to the negotiations on sovereign access to the sea[350].

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[346] See "Chancellor maintains statements made with regard to Bolivia", *La Nación* (Chile), 5 September 1950, **BR, Annex 274**. See also "Let us not divide ourselves by political parties in resolving our foreign affairs", *El Imparcial* (Chile), 13 September 1950, **BR, Annex 276**.

[347] *Ibid*.

[348] See BM, para. 135; CCM, para. 6.17.

[349] See CCM, para. 6.18-6.21.

[350] See CCM, Annexes 148, 149, 152 and 169.

252. In any event, the media speculation on the details of the agreement of 1950 made its immediate enforcement more difficult. After a meeting held on 6 September 1950 by the Chancellor of Chile and the Ambassador of Bolivia, the latter informed the Bolivian Chancellery that the former "was supportive of entering into a waiting period" before proceeding with the negotiation[351]. Agreeing to the request made by the Chilean Chancellor, the Bolivian negotiator declared in January 1951 that:

> "A brief break followed the exchange of notes, but this does not mean that negotiations have been interrupted, inasmuch as ideas are still being exchanged with the Chilean Government, which retains a favourable position that has been officially expressed in the note of June 1950"[352].

253. In spite of that, both States held firm to their understanding with regard to the binding nature of the notes of 1950. In March 1951, the statement delivered by US President Harry Truman referred to a formula for the question of Bolivia's access to the sea which had been discussed with the President of Chile, Gabriel González Videla[353].

254. On 29 March 1951, the President of Chile referred both to the statement of the US President and to the negotiations with Bolivia, which had resulted in the agreement of June 1950. With regard to the first he stated that, "President Truman referred to our conversation and highlighted my suggestion as one of the examples that can clearly and objectively exemplify the benefits that can be expected from the cooperation of the peoples of America"[354]. With regard to the second matter, he recounted some of the events that have already been addressed in Bolivia's Memorial[355], stating that:

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[351] See Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, Nº 844/513, 9 September 1950, **BR Annex 275**.

[352] "Ambassador Ostria spoke of the Chilean-Bolivian port problem in La Paz", El Diario Ilustrado (Chile), 6 January 1951, **BR, Annex 277**. By late 1951, while he was in La Paz, Ambassador Ostria Gutiérrez made the following statements to "El Diario" newspaper: "The negotiations - the initial phase of which was formalized with the notes of 1 and 20 June 1950 - have entered a waiting period. Naturally, international affairs cannot be resolved in a single day, as is the case of private questions." A. Ostria Gutiérrez, *Apuntaciones sobre las Negociaciones Portuarias con Chile (Notes on port negotiations with Chile)*, 1998, p. 202, **BR, Annex 342**.

[353] Available at: http://www.trumanlibrary.org/publicpapers/index.php?pid=269&st=Bolivia&st1=

[354] Statement by the President of Chile, H. E. Mr. Gabriel Gonzalez Videla, regarding the port negotiations, 29 March 1951, **BR, Annex 278**.

"Emphasizing the Americanist feelings that inspire us, as well as the deep affection we have towards the Bolivian people and the loyalty we owe to its democratic Government, we placed on record in our response 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".[356]

255. The Chilean President ended his statement by asserting:

"I am entirely responsible, legally and constitutionally, for the demarche the precedents of which I have just explained. I have the deep conviction that it will lead us to highly advantageous results"[357].

256. The Bolivian Chancellery clarified in the Communiqué of 30 March 1951:

"4º.- That the only thing that has been agreed to so far between Bolivia and Chile is contained in the notes exchanged in Santiago between the Bolivian Ambassador, Mr. Alberto Ostria Gutierrez and the Minister of Foreign Affairs of Chile, Mr. Horacio Walker Larrain, on 1 and 20 June 1950, which were published past 31 August and in which our country proposes that the Governments of Bolivia and Chile formally enter into a direct negotiation to satisfy the fundamental need of Bolivia to obtain its own and sovereign access to the Pacific Ocean, thus solving the problem of the landlocked condition of Bolivia" and Chile accepts "to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean, and for Chile to obtain compensations of a non-territorial character that effectively takes into account its interests."[358]

257. In the same vein, in May 1951, the President of Chile affirmed in an annual address to his country that:

"For many years and whenever it saw a favourable opportunity to do so, Bolivia has expressed its aspiration to obtain an outlet to the Pacific and, invariably, Chile has responded that, without modifying our unbreakable doctrine of respect for treaties, it was willing to give an ear to any concrete proposal by that country, provided that it is made in a direct manner.

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[355] BM paras. 106-107, 110, 111, 119, 123-125.

[356] Statement by the President of Chile, H. E. Mr. Gabriel Gonzalez Videla, regarding the port negotiations, 29 March 1951, **BR, Annex 278**.

[357] *Ibid*.

[358] Communiqué of the Ministry of Foreign Affairs of Bolivia regarding the statement made by the President of Chile, 30 March 1951, **BR, Annex 279**.

> My government, consistent with that policy and inspired in an effective Pan-Americanist spirit, responded, in the Note of 20 July 1950, to the communication that, on 1st of that month, was made on behalf of his country by the Bolivian Ambassador in Chile, His Excellency Alberto Ostria Gutiérrez, stating that '*[it] is willing to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character that effectively takes into account its interests*"[359].

258. In 1958, during the UN Conference on the Law of the Sea, Bolivia sent the agreement of 1950 as additional information to the Conference, under the label "Treaties between Bolivia and Chile". The official records of that Conference note that Bolivia informed that:

> "On 1 and 2 June 1950, Mr. Walter Larrain, the Chilean Chancellor, and Mr. Alberto Ostria Gutiérrez, Ambassador at Santiago, exchanged Notes in which – after referring to the orientation of Chile's international policy with respect to Bolivia's desire to obtain its own outlet to the Pacific Ocean, and recalling the terms of the Treaty of 18 May 1895 and the instrument of 10 January 1920, signed but not ratified by the legislatures; and the statements made by Mr Agustin Edwards, Chilean delegate to the League of Nations, in 1920, by President Arturo Alessandri in 1922, and by Mr. Luis Izquierdo, Minister for Foreign Affairs, in 1923; and also the reply by Mr. Jorge Matte to Mr. Secretary of State Kellogg's proposal of 15 April 1926 that Chile and Peru should cede Tacna and Arica to Bolivia – Mr. Walter Larrain stated that his Government, bearing this situation in mind, and imbued with fraternal sentiments towards Bolivia, 'is prepared formally to enter into direct negotiations with a view to seeking a formula whereby Bolivia can be given its own sovereign outlet to the Pacific Ocean, and Chile can obtain compensation not of a territorial character but in a form which effectively meets its interests'"[360].

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[359] Report by Chilean President, H.E. Gabriel González Videla, to the National Congress inaugurating the regular period of sessions, 21 May 1951, p. 56, **BR, Annex 280** (emphasis added).

[360] The documents submitted by Bolivia were distributed as document UN Doc. A/CONF.13/29/Add.1 of 3 March 1958. (p. 329), **BR, Annex 283**. Bolivia also referred before the OAS to the agreement reached in 1950 and Chile did not object (BM, Annex 203). On 12 November 1987, before the OAS, Bolivia referred to "the commitments of 1950, through the formal exchange of notes of the Foreign Affairs Ministry in which Chile undertook to effectively 'look for a formula that could make it possible to give Bolivia access to the Pacific Ocean (…)'" and stated that "This agreement that commits the trust of the Chilean State in its relation with Bolivia, as well as the whole of the international community, bestows upon Chile the obligation to engage in negotiations already settled on searching for solutions to this geographical confinement, under the conditions agreed upon in the 1950 Notes" (BM, Annex 210).

Chile did not object to Bolivia's characterization of the legal nature of the agreement of 1950.

D. The reiteration of the agreement reached in 1950 in the 1961 "Trucco Memorandum"

259. As early as July 1961, Chile had reiterated in the "Trucco Memorandum" its commitment to negotiate sovereign access to the sea resulting from the 1950 Notes[361].

260. In the Memorial, Bolivia pointed out that Ambassador Trucco was well qualified to acknowledge the undertakings resulting from the 1950 Notes since "he had been Under-secretary of the Ministry of Foreign Affairs when the aforementioned Note was signed"[362]. It is not surprising then that in this Memorandum, Chile stated again that:

> "Chile has always been willing, together with safeguarding the legal situation established in the Treaty of Peace of 1904, to study, through direct efforts with Bolivia, the possibility of satisfying the aspirations of the latter and the interests of Chile".
>
> "Note Nº 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 'willing to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character that effectively takes into account its interests'"[363].

261. In February 1962, after having "carefully considered" this Memorandum, Bolivia took "note of the Chilean viewpoint" expressed in the Memorandum as regards Chile's preference for direct negotiations, rather than recourse to "international organizations"; and on that basis Bolivia expressed "its full agreement to initiate, as soon as possible, direct negotiations aimed at satisfying the fundamental need of the Nation for its own and sovereign access to the Pacific Ocean, on the basis of compensation that, without having territorial character, takes into account the reciprocal conveniences and effective interests of both countries"[364].

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[361] See BM, paras. 136-137.

[362] BM, para. 370.

[363] **BR, Annex 284**.

[364] See Memorandum from Ministry of Foreign Affairs of Bolivia to the Chilean Embassy in La Paz, G.M. 9-62/127 9 February 1962, **BR, Annex 285** and CCM, Annex 159.

262. Chile alleges in the Counter-Memorial that the Trucco Memorandum "was not an official note, that it was unsigned, and that it only contained an exposition of Chile's view at that time"[365]. Chile relies on a speech that the Foreign Minister of Chile delivered in March 1963[366]. However, in that speech the Minister mischaracterized the 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'"[367].

263. It is clear that the Trucco Memorandum was more than an internal document. First, it was, according to Chile, "provided (…) to Bolivia at a bilateral meeting in July 1961"[368]. Second, the items contained in the Memorandum "had been approved by Minister of Foreign Affairs [of Chile]" and Ambassador Trucco communicated them to the Bolivian Foreign Minister under "express instructions" from his Chancellery[369]. Third, Bolivia replied to it through another memorandum which was communicated to Chile and whose terms show that Bolivia "expresses its full agreement" to the offer made by Chile. Accordingly, the Trucco Memorandum cannot be considered as an "internal document" or an "Aide Mémoire". It is an *international* act, which reflects an agreement between the two countries providing for direct negotiations on sovereign access to the sea.

E. The Charaña Joint Declarations

264. In 1975 and in 1977, Bolivia and Chile jointly adopted declarations which, once again, reaffirmed, in precise and unequivocal terms, their intention to negotiate sovereign access to the sea[370]. Chile contends that these declarations, and more largely "the Charaña process of 1975 to 1978 (…) at no time created or confirmed any legal obligation to negotiate"[371]. This assertion, again, stands in marked contrast with the terms of the said declarations. The process of Charaña was the consequence of a freely agreed obligation to negotiate. The text of the

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[365] CCM, para. 6.25.

[366] CCM, para. 6.25 at fn 378.

[367] BM, Annex 171.

[368] See CCM, para. 6.23 *in fine*.

[369] Note from the Chilean Ambassador to Bolivia to the Minister of Foreign Affairs of Chile, 15 February 1962, CCM Annex 160, pp 33-35.

[370] See BM, I, para. 376-382. See also BM, para. 138 *in fine*; and *infra*, d

[371] CCM, para. 7.55.

1975 Joint Declaration and the circumstances surrounding its conclusion, coupled with the subsequent exchange of notes and declarations and the conduct of the Parties, demonstrate the legal character of the agreement.

1. The 1975 Joint Declaration

265. The first Joint Declaration, dated 8 February 1975[372], signed by the respective Presidents of the two countries, contains two substantial legal provisions, namely, a) to seek formulas to solve Bolivia's landlocked condition, and b) to resume diplomatic relations.

266. It states that the meeting between them "made it possible to identify important points of agreement (…)" and that:

> "Both Heads of State, within a spirit of mutual understanding and constructive intent, have decided to continue the dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia, taking into account the mutual interests and aspirations of the Bolivian and Chilean peoples."

It is striking that the only substantive issue mentioned in the Declaration among the "vital issues that both countries face" is "the landlocked situation that affects Bolivia."

267. Contrary to Chile's assertion that Bolivia's landlocked situation "is one which could be addressed by a variety of means, including by augmentation of Bolivia's right of access to the sea"[373], the reference to the landlocked situation of Bolivia in the Joint Declaration obviously refers to the issue of Bolivia's sovereign access to the sea. The Charaña process that immediately followed that Declaration focused accordingly on the possible modalities with respect to that *sovereign* access. At no stage during the Charaña process did Chile give any indication that it considered that the objective of the negotiations was to find formulas for a *non-sovereign* access[374].

268. The wording of the Joint Declaration is clear. First, the intention to be bound follows from the use of the terms "have decided" ("*resuelto*"). These words mean that "[they have]

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[372] See BM, Annex 111.

[373] CCM, para. 7.11, letter a) *in fine*.

[374] See BM, para. 144.

agreed" to continue the dialogue with the firm purpose to "search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia". Second, the Parties reproduced a phrase which Chile used to define the scope of the obligation to negotiate sovereign access to the Pacific in 1950 and 1961, namely, "search for formulas to solve". This indicates that the negotiation under the terms of the Declaration required whatever might be necessary to find a solution for Bolivia's landlocked condition. Third, the insertion of the words "landlocked situation that affects Bolivia" are a clear recognition of the pending question concerning Bolivia's sovereign access to the Pacific Ocean. This formula had already been referred to by Bolivia in 1950, and had not been rejected by Chile.

269. In addition, in the Joint Declaration the Parties decided to normalize diplomatic relations. According to the Vienna Convention on Diplomatic Relations and customary international law, "the establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent"[375].

270. The fact that the expression "have decided to" has been used in the Declaration both for the normalization of diplomatic relations and for the negotiations on sovereign access to the sea, show that the intention of Bolivia and Chile was to *consent* to and to *agree* on the content of the Declaration. It would be unacceptable that the terms "have decided" be given a legal meaning only for the resumption of diplomatic relations, but a political meaning for the question concerning the search for "formulas to solve" the "landlocked situation that affects Bolivia".

271. The Joint Declaration is very similar to the minutes in *Qatar v. Bahrain* that the Court qualified as being a treaty. It is "not a simple record of a meeting" and does not "merely give an account of discussions and summarize points of agreement and disagreement". By identifying important "points of agreement" between the parties and by deciding ("decided") to continue the dialogue on an agreed objective, the declaration "enumerate[s] the

[375] Article 2, Vienna Convention on Diplomatic Relations (1961) 500 UNTS 95.

commitments to which the Parties have consented" and "thus create[s] rights and obligations in international law for the Parties". As such, it "constitute[s] an international agreement"[376].

272. After the Joint Declaration was signed in February 1975, the Press Secretary of the Government of Chile, Federico Willoughby, declared during a visit to Bolivia that Chile had "a commitment with Bolivia after the Charaña meeting"[377]. A few days later, referring to the Joint Declaration, the same Chilean representative stated that Bolivia and Chile were studying a solution to Bolivia's landlocked condition, and that one of the fundamental tasks of the diplomatic missions was to start "from the premise that international agreements recently entered into will be complied with"[378].

2. Confirmation and reiteration of the Agreement of Charaña

273. Consistent with the mutual understanding of 1975, the Bolivian Ambassador in Santiago, Guillermo Gutiérrez Vea Murguía, declared on 8 April 1975 that his diplomatic mission would try to comply "in the most efficient way possible, with the spirit of Charaña, which is reflected in the agreement that gave place to a resumption of relations"[379] between the two countries. Thereafter, the adoption of Resolution Nº 157 of the OAS Permanent Council confirmed the purpose of the Joint Declaration of Charaña[380].

274. The negotiation carried out between 1975 and 1978 reflected the object of the agreements on sovereign access to the Pacific Ocean. The Bolivian proposal of 26 August 1975 and Chile's response of 19 December 1975 both contemplated that the object of the negotiation was the "cession to Bolivia of a sovereign maritime coast"[381].

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[376] See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, 1st July 1994, ICJ Reports 1994*, p. 121, para. 25.

[377] "Chile is determined to face the landlocked condition problem with frankness", *Ultima Hora* (Bolivia), 1 March 1975, pp. 8-9, **BR, Annex 300**.

[378] "Bolivia and Chile work together to solve the landlocked condition problem", *Hoy* (Bolivia), 4 March 1975, **BR, Annex 301**.

[379] "Bolivia and Chile will try to materialize the spirit of Charaña, said Gutiérrez", *Hoy* (Bolivia), 9 April 1975, **BR, Annex 302.**

[380] BM, para. 142 and 143.

[381] BM, Annexes 174 and 73.

275. Similarly, and consistent with the purpose of the agreement to negotiate sovereign access, the Bolivian proposal was submitted to "carry on the negotiation aimed at giving a solution to the Bolivian Landlocked condition". Chile's response recognized the goal of the understanding by stating that "the territorial cession that permits the sovereign access to the sea represents the full and definite solution to the landlocked situation of Bolivia", thus confirming that the object and goal of the negotiation was sovereign access to the Pacific Ocean.

276. Chile's position during the *Maritime Dispute* case confirms that the negotiations between Bolivia and Chile in the period extending from 1975 to 1978 addressed the object of the agreement to negotiate, that is, the sovereign access to the Pacific Ocean. During the oral proceedings of the present case, Chile's representative referred to the "negotiations in 1975-1976, for the grant of a corridor to the sea for Bolivia"[382], referring to Chile's specific proposal in December 1975 for a land corridor. This proposal also involved "'a territorial sea, economic zone and continental shelf' for Bolivia. Peru was consulted by Chile, because Peru's prior agreement was required by the Protocol to the 1929 Treaty of Lima for territorial cessions"[383]. These negotiations were inextricably linked to the Joint Declaration of 8 February 1975.

277. While negotiations were being carried out, several statements and bilateral instruments confirmed the object and goal of the negotiations[384]. In 1976, the Chilean Representative, in his intervention before the General Assembly of the United Nations, asserted that "we have initiated negotiations *on mutually agreed and public bases* with this sister nation [Bolivia], with a view to finding a permanent solution to the problem posed by Bolivia's wish *to have a sovereign outlet to the Pacific Ocean*"[385].

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[382] See *Maritime Dispute (Peru v. Chile)*, Public sitting held on Friday 7 December 2012, declaration made by Mr. Georgios Petrochilos on behalf of Chile, para. 12.

[383] See *Maritime Dispute (Peru v. Chile)*, Public sitting held on Friday 7 December 2012, declaration made by Mr. Georgios Petrochilos on behalf of Chile, para. 12.

[384] BM, para. 155-159.

[385] Verbatim Record of the 18th Plenary Meeting, 31st Session of the United Nations General Assembly, UN Doc. A/31/PV.18, 5 October 1976, para. 190 (emphasis added), **BR, Annex 311.**

278. On 10 June 1977, the Ministers of Foreign Affairs of the two countries adopted another joint declaration, which is of particular importance[386]. This declaration constitutes an additional commitment to negotiate a sovereign access. In the 1977 Joint Declaration, they "accorded the following":

> - "The dialogue established through the Declaration of Charaña" was aimed at "seeking of concrete solutions for their respective issues, especially the one regarding the Bolivian landlocked situation";
>
> - "In this connection, they note that pursuant to that spirit, negotiations have been engaged aiming at finding an effective solution that allows Bolivia to access the Pacific Ocean freely and with sovereignty";
>
> - "(…) they resolve to deepen and activate dialogue, committing themselves to making everything possible so as to take this negotiation to a happy conclusion, as soon as possible";
>
> - "Consequently, they reaffirm the need of continuing with the negotiations from their current status, aiming at reaching the objective they have undertaken (…)."[387]

279. Given that negotiations did not result in a solution to Bolivia's landlocked condition[388], soon after the rupture of diplomatic relations the Ministry of Foreign Affairs of Chile published a document which, referring to the Charaña meeting, affirmed:

> "At the conclusion of this meeting, an Act was subscribed to which established the commitment to continue 'the discussion at various levels in order to find solutions for the vital matters confronting both countries, such as the question of the landlocked position of Bolivia, on the basis of reciprocal agreement and attending to the aspirations of the Bolivian and Chilean people'"[389].

280. Several years later, when the Joint Declaration was concluded and the Charaña negotiation was carried out, Mr. Patricio Carvajal, Chile's Chancellor, placed on record that

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[386] BM, Annex 165.

[387] BM, Annex 165.

[388] For the reasons for the failure of the negotiations of Charaña, see Part III Chapter 7(B)(2).

[389] Ministry of Foreign Affairs of Chile, *History of the Chilean-Bolivian negotiations 1975-1978,* Santiago, 1978 p. 6, **BR, Annex 316.**

this instrument was a "General Agreement for an outlet to the sea for this country [Bolivia]"[390].

281. The two Declarations confirm the undertaking resulting from the 1950 Notes. Chile asserts that the Joint Declarations and the 1950 Notes are "inconsistent" because the Charaña process was conditioned on compensation for Chile in the form of an exchange of territories while the 1950 Notes were limited to compensations of a non-territorial character[391]. But the 1975 and 1977 Joint Declarations do not specify the nature of possible compensations, what they do contain, like the 1950 Notes, is the commitment to negotiate in order to find formulas for a sovereign access to the sea.

282. Chile has subsequently regarded the 1975 Joint Declaration as an international agreement. First, Chile included it in its official publication entitled "*Treaties, Conventions and International Agreements of Chile 1810-1976, Bilateral Treaties, Chile-Bolivia*"[392]. Second, Chile annexed the Declaration in its Rejoinder in the *Maritime Dispute* with Peru under the label "International Treaties and Inter-State Acts"[393]. Chile responds that the Declaration was not ratified or otherwise treated as a treaty by Chile and Bolivia under their domestic law. But unless provided otherwise, an agreement does not need require ratification; and, in any event, the inclusion of the Declaration on the Treaty Series is a clear testimony of the importance of that Declaration.

283. The same is true as regards the resolutions of the OAS and the Statement of Chile of August 1975 reaffirming "the spirit of the Joint Declaration of Charaña"[394]. In September 1975, the President of Chile informed the President of Bolivia that he "knows of the repeated declarations I have made of the sincere and unchanging purpose of my Government to

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[390] P. Carvajal Prado, Charaña: *An agreement between Chile and Bolivia and the third party at odds*, Valparaiso, Arquen ed., 1994, p. 27, **BR, Annex 340**.

[391] CCM, para. 7.22.

[392] BM, para. 141 (and fn. 198) and para. 378.

[393] See *Maritime Dispute (Peru v. Chile)*, Rejoinder of the Government of Chile of 11 July 2011, Vol. II, Annex 4.

[394] See BM, para. 143, and CCM, para. 7.12-7.13.

examine with yours a positive and lasting solution for the issue of Bolivia's landlocked condition"[395].

284. Chile considers that the statement of the President of Bolivia of December 1975 according to which "the Act of Charaña does not include a categorical commitment by Chile to resolve Bolivia's landlocked situation" shows that the Act cannot be viewed as binding upon Chile[396]. However, in the context of the said statement the adjective "categorical" does not mean "binding" but rather "unconditional". The context shows that what the Bolivian President meant is that the agreement reached in Charaña was not, as such, to grant a sovereign access to the sea, but to enter into negotiations aiming at finding formulas for a sovereign access to the sea. The statement of the President of Bolivia accordingly constitutes a confirmation of Chile's undertaking to negotiate such an issue:

> "My first encounter with General Pinochet was in Brazil, and there, at one point during the protocol proceedings that we were invited to, I spoke to him about Bolivia's maritime problem, and he told me: 'General, believe me, I will do everything, everything possible so that we can arrive at a solution, an agreement between the two countries.' Then, in Charaña; the Act of Charaña does not include a categorical commitment by Chile to resolve Bolivia's landlocked situation, but once again, Gen. Pinochet told me that he had a strong personal interest in finding a solution to this problem because he could see that the Chilean people and the Bolivian people could very well develop brotherly relations from the time they complemented each other economically and geographically. So personally, I am grateful to President Pinochet because he has kept his word"[397].

285. In a letter sent in February 1977 to the President of Bolivia, the President of Chile stressed again the importance of the agreement reached in Charaña in 1975, in the following unequivocal terms:

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[395] BM, Annex 70.

[396] CCM, para. 7.11, letter c).

[397] CCM, Annex 184, at p. 1026. . On 23 March 1978, six days after the rupture of diplomatic relations, President Banzer referred to "fulfillment of the word committed" and added that "the word and the commitment that others assumed with Bolivia was always taken for granted." Address by the President of Bolivia, Hugo Banzer, 23 March 1978, **BR, Annex 317**. See also the Public Explanation made by President Banzer in regard to the rupture of diplomatic relations with Chile on 30 March 1978, **BR, Annex 318.**

> "In celebrating today, 8 February, the second anniversary of our meeting in Charaña, I have wanted to send a sincere greeting to the Bolivian sister nation and especially to Your Excellency.
>
> The memory of an event as important to the history of our relations must be a motive for reflection, so that in the light of what has happened, we can analyse the results obtained and seek to secure the achievements reached for the sake of sacred duty of serving our people".
>
> (…)
>
> Inspired in the most profound americanist spirit, we initiated negotiations aimed at satisfying the aspiration of Bolivia to have a sovereign coast without interruption in continuity with the current Bolivian territory.
>
> (…)
>
> Your Excellency knows the dedication I have devoted to this important matter and the effort I have employed to advance it as quickly as possible to a solution of the problems that have been arising, after having reached an agreement on the general terms of the negotiation"[398.]

286. Furthermore, on 9 September 1977, the Presidents of Bolivia, Chile and Peru issued a further joint declaration stating that "they agreed to instruct their respective Ministries of Foreign Affairs to continue their efforts aimed at reaching a solution to this problem", i.e. "the progress of the negotiations aimed at solving the problem of Bolivia's landlocked situation"[399]. At the OAS General Assembly, on 24 October 1979, the Chilean representative affirmed that in 1975 the Government of Chile had committed itself seriously and in the best of faith to negotiate in order to grant Bolivia a sovereign access to the Pacific Ocean[400]. Also, in April 1987, the Chilean Foreign Minister, Jaime del Valle, acknowledged that the Act of Charaña constituted a "commitment"[401]. The current Minister of Foreign Affairs of Chile also characterized the Joint Declaration of 1975 as a "commitment" in 1986[402].

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[398] CCM, Annex 217 (emphasis added).

[399] CCM, Annex 224.

[400] Minutes of the 6th Plenary Meeting, 9th Regular Session of the OAS General Assembly, 24 October 1979, Vol. II, OEA/SER.P.IX.0.2., **BR, Annex 319**.

[401] See BM, Annex 169.

[402] H. Muñoz, *The Foreign Relations of the Chilean Military Government*, Santiago, Prospel-Cerc, 1986, p. 142, **BR, Annex 327.**

287. Lastly, it is recalled that between 1962 and 1975, Bolivia conditioned resumption of diplomatic relations upon Chile's compliance of its promise to negotiate sovereign access to the sea[403]. This is exactly the object and purpose of the 1975 Joint Declaration, in which the Presidents of the two States, on the one hand, decided to "continue the dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia" and, on the other hand, "in order to achieve the objectives noted in this Joint Declaration, … decided to normalize diplomatic relations between their two countries at the ambassadorial level"[404]. The fact that Chile accepted to restore diplomatic relations necessarily implies that it accepted to undertake negotiations on sovereign access to the sea.

F. The agreements and unilateral acts within the OAS

288. In the Counter-Memorial, Chile downplays the significance and legal relevance of the conduct of the Parties within, and the resolutions adopted by, the OAS by arguing that "[t]he issue was political, not legal" and that the said resolutions are not binding[405].

289. Bolivia does not dispute that resolutions of the Assembly of the OAS are not, *as such*, binding[406]. As Chile put it, the resolutions of the OAS Assembly are not binding "in and of themselves"[407]. The reason is that the Assembly of the OAS has no competence to create legal obligations[408]: hence the Assembly did not take a decision but only recommended to both States that they negotiate sovereign access to the sea. But the fact that the Assembly cannot oblige States to adopt a specific course of conduct does not mean that its resolutions have no legal effect at all.

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[403] See BM, para. 138; CCM, para. 6.27. This is clearly underscored in the Speech of the President of Bolivia, Hugo Banzer Suarez, before the 1975 UN General Assembly. See Verbatim Record of the 2379th Plenary Meeting, 30th Session of the United Nations General Assembly, UN Doc A/PV.2379, 8 October 1975, Paras. 77-78, **BR, Annex 303**.

[404] BM, Annex 111.

[405] See CCM, Ch. 8, in particular para. 8.3. and 8.18.

[406] See CCM, para. 8.18-8.22.

[407] CCM, para. 8.20 (quoting CCM, Annex 357).

[408] See CCM, para. 8.19.

290. *First*, it is recalled that the legal effect of international organizations' resolutions cannot depend on "generalizations covering all resolutions." On the contrary, "one must consider all the circumstances with respect to a particular resolution before an evaluation can be made"[409].

291. *Second*, the resolutions of the OAS are *at least* in the present case recommendations addressed to Bolivia and Chile, which have to be taken into account in good faith[410], in particular for the purpose of assessing and interpreting existing agreements or unilateral acts of the Parties[411]:

> "(…) as Judge Hersch Lauterpacht lucidly put it in his separate opinion appended to the Court's 1955 Advisory Opinion on the *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa:*
>
> It is one thing to affirm the somewhat obvious principle that the recommendations of the General Assembly… addressed to the Members of the United Nations are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other [fn. 240: I.C.J. Reports (1955), pp. 90, 118].
> And, indeed, as part of 'international soft law', recommendations produce legal effects, not only as part of the customary process, but also in and by themselves. (…) as Judge Lauterpacht noted, 'while not bound to accept the recommendation, [the addressee] is bound to give it due consideration in good faith. If… it decides to disregard it, it is bound to explain the reasons for its decision' [fn. 242: I.C.J. Reports (1955), pp. 90, 119. Cf. also ibid., p. 120: 'Whatever may be the content of the recommendation and whatever maybe the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the

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[409] B. Sloan, "General Assembly Resolutions Revisited (Forty Years Later)", *British Yearbook of International Law*, Vol. 58 (1987), at p. 42.

[410] *Ibid.*, at pp. 121-123.

[411] See Part II, Chapter 3; see also B. Sloan, op. cit. at p. 43: "(…) it is still quite a different thing to say that resolutions are recommendations and therefore not legally binding and to say that they are merely recommendations and may therefore be ignored. The latter is clearly in violation of obligations under the Charter of good faith and duty to co-operate."

> General Assembly' – especially so when a series of recommendations point at the same conclusions.]"[412].

A fortiori, repeated resolutions framed in the same terms which call for a specific course of action cannot lack any legal effect[413]. This is particularly true in the present case where, as shown below, the Assembly of the OAS not only "recommended", but also "urged" Bolivia and Chile to negotiate, which is stronger language.

292. *Third*, the conduct of the Parties related to the drafting and adoption of the said resolutions can reflect, crystallize or generate an agreement between the two parties. In that regard, Chile's proposition that the vote in favour of the adoption of a resolution "cannot transform that resolution into a legally binding instrument for States that vote in favour of it"[414] is far too absolute. As the ICJ pointed out in a similar context, everything depends on the circumstances in which the vote was cast, "particularly where statements were made by way of explanation of vote"[415]. The wording of the resolution and the votes or patterns of voting on resolutions on the same subject-matter are equally relevant to assess the legal effect to be attributed to conduct of the parties in relation to the adoption, and reiteration, of recommendations adopted by an international organization[416].

293. *Fourth*,

> "There may (…) be circumstances in which, in the absence of intent, a State may still, as a result of its affirmative vote or even its acquiescence, be bound by a resolution. If an affirmative vote gives rise to reasonable

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[412] A. Pellet, "Article 38", *in* A. Zimmermann and others (ed.), *The Statute of the International Court of Justice: a commentary*, Oxford: Oxford University Press, 2006, at pp. 712-713. The same applies, *mutatis mutandis*, to OAS resolutions.

[413] According to B. Sloan, "Generally speaking recommendations in Pan-American practice have not been considered binding. Declarations and resolutions on the other hand 'have in many cases been regarded *de facto* as creating binding obligations, so that a state neglecting to comply with them may be called to account by the other parties to the declaration'" ("The Binding Force of a "Recommendation' of the General Assembly of the United Nations", *British Yearbook of International Law*, Vol. 25 (1948), at p. 8).

[414] CCM, para. 8.23.

[415] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment, 5 October 2016, para. 56.

[416] *Ibid.*

> expectations on the part of other States concerning a course of conduct, or if actions following the adoption of a resolution give rise to such expectations, and if the other States have acted upon these expectations, a State may be estopped or precluded from denying an obligation."[417]

294. In such a case, the recommendatory nature of a resolution does not preclude legitimate expectations: "while the character of a resolution has some relevancy, it is not the principal factor. It is the conduct of States that is important. (…) even sponsorship or strong advocacy of a recommendation may give rise to expectations that those who strongly support the recommendatory resolution will act accordingly"[418]. In that regard, the following elements are particularly important: the terms and intent of the resolution, especially the fact that it is worded in precise legal language; the "voting patterns (degree of support)"; and the "cumulative factor – repetition and recitation"[419].

295. In the present case, as Chile points out in the Counter-Memorial, from 1979 to 1989, "the OAS adopted eleven resolutions on the 'maritime problem' of Bolivia, one each year"[420]. The wording of the resolutions is clear, specific and unequivocal as regards the necessity of having negotiations in order to grant Bolivia a sovereign access to the sea. The resolutions adopted by the Assembly of the OAS (a body representing, today, 35 sovereign States, which is according to the Charter of the OAS "the supreme organ of the Organization of American States") contain the following relevant elements:

> a. "it is of continuing hemispheric interest that an equitable solution be found whereby Bolivia will obtain appropriate sovereign access to the Pacific Ocean"[421];

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[417] B. Sloan, "General Assembly Resolutions Revisited (Forty Years Later)", *British Yearbook of International Law*, Vol. 58 (1987), at p. 65. On estoppel, see *infra*, Chapter 6.

[418] *Ibid.*, at p. 123.

[419] *Ibid.*, at pp. 128-129; p. 130; and p. 132.

[420] CCM, para. 8.1. See BM, Annexes 191 to 201; and CCM, Annexes 250, 254, 257, 259, 266, 272, 282, 287, 300, 304 and 306.

[421] AG/RES. 426 (IX-O/79), Access by Bolivia to the Pacific Ocean, 31 October 1979 (BM, Annex 191); See also AG/RES. 481 (X-O/80), The Bolivian Maritime Problem, 27 November 1980 (BM, Annex 192); AG/RES.560 (XI-O/81), Report on the Maritime Problem of Bolivia, 10 December 1981 (BM, Annex 193); AG/RES.602 (XII-O/82), Report on the Maritime Problem of Bolivia, 20 November 1982 (BM, Annex 194); AG/RES.686 (XIII-O/83), Report on the Maritime Problem of Bolivia, 18 November 1983 (BM, Annex

b. "it is necessary to achieve the foregoing objective"[422];

c. "the need persists to attain the foregoing objective"[423];

d. "it continues to be necessary to achieve the objective set forth in the preceding declaration"[424];

e. The Assembly resolves "[t]o recommend to the states most directly concerned with this problem that they open negotiations for the purpose of providing Bolivia with a free and sovereign territorial connection with the Pacific Ocean"[425];

f. The Assembly resolves "[t]o urge those states most directly concerned with the problem of Bolivia's access to the sea to initiate a dialogue, through the appropriate channels, to find the most satisfactory solution"[426];

g. The Assembly resolves "[t]o urge Bolivia and Chile (…) to begin a process of rapprochement (…) directed toward (…) overcoming the difficulties that separate them – including, especially, a formula for giving Bolivia a sovereign outlet to the Pacific Ocean (…)"[427];

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195); AG/RES.701 (XIV-O/84), Report on the Maritime Problem of Bolivia, 17 November 1984 (BM, Annex 196); AG/RES.766 (XV-O/85), Report on the Maritime Problem of Bolivia, 9 December 1985 (BM, Annex 197); AG/RES.873 (XVII-O/87) Report on the Maritime Problem of Bolivia, 14 November 1987 (BM, Annex 199); AG/RES.930 (XVIII-O/88), Report on the Maritime Problem of Bolivia, 19 November 1988 (BM, Annex 200); and AG/RES.989 (XIX-O/89), Report on the Maritime Problem of Bolivia, 18 November 1989 (BM, Annex 201).

[422] AG/RES. 426 (IX-O/79), Access by Bolivia to the Pacific Ocean, 31 October 1979 (BM, Annex 191).

[423] AG/RES.602 (XII-O/82), Report on the Maritime Problem of Bolivia, 20 November 1982 (BM, Annex 194).

[424] AG/RES.686 (XIII-O/83), Report on the Maritime Problem of Bolivia, 18 November 1983 (BM, Annex 195).

[425] AG/RES. 426 (IX-O/79), Access by Bolivia to the Pacific Ocean, 31 October 1979 (BM, Annex 191); AG/RES.602 (XII-O/82), Report on the Maritime Problem of Bolivia, 20 November 1982 (BM, Annex 194).

[426] AG/RES. 481 (X-O/80), The Bolivian Maritime Problem, 27 November 1980 (BM, Annex 192); AG/RES.560 (XI-O/81), Report on the Maritime Problem of Bolivia, 10 December 1981 (BM, Annex 193).

[427] AG/RES.686 (XIII-O/83), Report on the Maritime Problem of Bolivia, 18 November 1983 (BM, Annex 195); AG/RES.766 (XV-O/85), Report on the Maritime Problem of Bolivia, 9 December 1985 (BM, Annex

h. The Assembly resolves to "again urge the states directly involved in this problem to resume negotiations in an effort to find a means of making it possible to give Bolivia an outlet to the Pacific Ocean (…)"[428];

i. The Assembly reiterates "its interest in the success of the negotiations aimed at solving the maritime problem of Bolivia", i.e. the finding of "a formula that will give Bolivia a free and sovereign territorial outlet to the Pacific Ocean"[429];

j. The Assembly resolves "[t]o reaffirm the importance of finding a solution to the maritime problem of Bolivia"[430];

k. "[T]he objective indicated in the abovementioned resolutions must be achieved (…)" or "must be accomplished (…)"[431].

296. Chile objects that when the first resolution was adopted in 1979, "[n]either Bolivia nor any other Member State suggested that Chile had previously assumed any legal obligation to negotiate with Bolivia"[432]. This assertion is wrong. The first resolution (No. 426) was adopted on October 31, 1979[433]. Five days earlier, on 26 October 1979, Bolivia made clear to the General Commission of the General Assembly of the OAS that "in so many occasions Chile agreed on negotiating that issue" (i.e. "finding a solution that would grant Bolivia its own

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197); AG/RES.873 (XVII-O/87) Report on the Maritime Problem of Bolivia, 14 November 1987 (BM, Annex 199).

428 AG/RES.930 (XVIII-O/88), Report on the Maritime Problem of Bolivia, 19 November 1988 (BM, Annex 200).

429 AG/RES.701 (XIV-O/84), Report on the Maritime Problem of Bolivia, 17 November 1984 (BM, Annex 196).

430 AG/RES.989 (XIX-O/89), Report on the Maritime Problem of Bolivia, 18 November 1989 (BM, Annex 201).

431 AG/RES.816 (XVI-O/86), Report on the Maritime Problem of Bolivia, 15 November 1986 (BM, Annex 198); AG/RES.873 (XVII-O/87) Report on the Maritime Problem of Bolivia, 14 November 1987 (BM, Annex 199); AG/RES.930 (XVIII-O/88), Report on the Maritime Problem of Bolivia, 19 November 1988 (BM, Annex 200); AG/RES.989 (XIX-O/89), Report on the Maritime Problem of Bolivia, 18 November 1989 (BM, Annex 201).

432 CCM, para. 8.5.

433 BM, Annex 191.

sovereign access to the Pacific Ocean") and referred for that purpose to a long list of agreements and undertakings of Chile (1895, 1920, 1923, 1950, 1956, 1961, and 1975)[434]. This statement is highly relevant to interpreting the resolution adopted five days later by the Assembly, according to which "it is necessary to achieve the foregoing objective", and containing a recommendation to "open negotiations for the purpose of providing Bolivia with a free and sovereign territorial connection with the Pacific Ocean"[435]. Through this resolution, the Assembly gave all the support it was able to provide (i.e. to recommend, as is its competence) to Bolivia's request.

297. Similarly, Chile alleges that the sponsor of the resolution "insisted that the problem was 'political in its origin and political in its consequences… and political must be the resolution'"[436]. This statement (i) does not mean that there is no right to have negotiations on sovereign access to the sea (the modalities of which require to be negotiated and agreed upon by competent political authorities) and (ii) in any event Chile fails to mention that the sponsor of the resolution (Venezuela) also stated that "[f]or the past 100 years, [it has] supported Bolivia's *Right* to the Sea"[437]. Peru also supported the resolution.[438] The draft resolution was eventually adopted by the General Committee as follows: "25 votes in favour; no votes against, no abstentions"[439].

298. Bolivia established in the Memorial that, in addition to the legal effect that OAS resolutions have on their own, the conduct of Bolivia and Chile upon the adoption of the said resolutions is constitutive of an agreement[440]. Chile's answer in the Counter-Memorial is that it "never voted in favour of any of the eleven recommendatory resolutions" (it "voted against seven of the resolutions", "refused to participate in the vote concerning Resolution 602 of 1982" and "on three occasions, Chile did not oppose consensus")[441]. This claim is ill-founded.

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[434] See BM, Annex 203.

[435] BM, Annex 191.

[436] CCM, para. 8.5.

[437] CCM, Annex 248, p. 1643 (emphasis added).

[438] CCM, Annex 248, pp. 1644-1645. See also CCM, Annex 264, p. 1772.

[439] CCM, Annex 248, p. 1648.

[440] BM, para. 164-197 and 383-387, in particular para. 167, 173-174 and 385-386.

[441] CCM, para. 8.24.

299. It is clear from Chile's statements before the Assembly that Chile did not vote for the resolutions because it was against negotiations on the sovereign access to the sea, but because it considered that it was an issue for *direct bilateral* negotiations only. Chile's objection was procedural, not substantial. Chile's statements before the OAS are unequivocal. Chile:

a. objected to some resolutions or did not participate to the vote because it did not accept the competence of the OAS to deal with this issue[442];

b. at the same time Chile reiterated that it was willing and had the intention to satisfy Bolivia's aspiration through bilateral negotiations[443].

300. On 31 October 1979, Chile's representative stated for instance that

> "On repeated occasions I have indicated Chile's willingness to negotiate a solution with Bolivia a solution to its aspiration to have a free and sovereign access to the Pacific Ocean. The means to achieve that purpose is direct negotiation, conducted in the field of seriousness and mutual respect, without influence, suggestions or instructions imparted by others"[444].

301. On 18 November 1986, Chile equally stated that:

> "even on the substantive issue, we have repeatedly stated that we want to enter into dialogue with our brothers from Bolivia. That is why by mutual agreement, we have initiated a phase of rapprochement. Where we disagree is the issue of this Organization's competence to handle this matter, which is exclusively within the competence of Bolivia and Chile, because there is a treaty between them, and we maintain that this treaty is in full force and effect."[445]

302. Chile's conduct within the OAS is thus a clear confirmation of its undertaking to negotiate sovereign access to the sea. In addition, in some instances, Chile directly

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[442] See CCM, Annex 259, p. 1705, which Chile quotes only partially at para. 8.12 of the Counter-Memorial; or CCM, Annex 281, p. 1868: "the Chilean Delegation requests that the record in the minutes show that its negative vote is because this organization lacks jurisdiction to handle this matter." See also CCM, Annex 248, p. 1629; Annex 252; Annex 258, p. 1699; or Annex 259, p. 1705.

[443] See in particular CCM, Annex 249, pp. 1653-1654; Annex 260, point 7; Annex 261, p. 1729 (last paragraph); Annex 264, pp. 1765-1766; Annex 267, p. 1783 (point C); or Annex 285, pp. 1914-1915 and 1916-1917.

[444] BM, Annex 204, p. 746.

[445] CCM, Annex 285, pp. 1916-1917.

participated in the drafting of the resolution and joined the consensus upon its adoption. This shows that Chile agreed on the terms of the resolution and the recommendations it contains. In international law, nothing prevents States from accepting a recommendation with the effect of giving rise to rights and obligations[446]. More generally, the conduct of the parties in relation to a recommendation can qualify as an agreement on its own[447]. This is particularly true so far as OAS Resolution 686 of 1983 is concerned, which is now considered in more detail.

303. OAS Resolution Nº 686 of 1983 was approved by consensus and negotiated with great care by Bolivia and Chile through the good offices of Colombia[448]. It was considered to be an agreement by the Secretary General of the OAS, Alejandro Orfila[449]. Chile limits itself to noting that it did not vote in favour of the Resolution, and that it simply "did not oppose consensus within the OAS General Assembly, but joined declarations or explanations with respect to the content and the legal status of the resolutions adopted"[450]. Likewise, it contends, in relation to the process emerging from Resolution Nº 686, that "[t]his was all purely a matter of politics and diplomacy, not law, and both States acted accordingly"[451].

304. While Chile submitted a reservation to its preamble, the rest of the content of the Resolution was approved. The context in which that Resolution was formulated, coupled with the subsequent conduct of the Parties, are both clear evidence that this instrument was the means by which Bolivia and Chile agreed anew to negotiate Bolivia's sovereign access to the

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[446] See (as regards the acceptance of a recommendation to negotiate giving rise to rights and obligations) PCIJ, *Case of the railway traffic between Lithuania and Poland, PCIJ, Advisory Opinion of 15 October 1931, Série A/B, No. 42,* p. 116. See also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986*, p. 14 at pp. 99-100, para. 188; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations,* Cambridge University Press, 2005, pp. 181-182.

[447] See J. Castañeda, «Valeur juridique des résolutions des Nations Unies », *Recueil des cours,* Vol. 129 (1970-I), at pp. 302-312.

[448] See BM, para. 174 and para. 385.

[449] See "Orfila praises Colombia's initiative in regard to Bolivia's landlocked condition", *Ultima Hora* (Bolivia), 21 November 1983, **BR, Annex 321**.

[450] CCM, para 8.24.

[451] CCM, para 8.31.

Pacific Ocean. As a result, the binding nature of that Resolution emerges from the Parties' consent.

305. On 1 October 1983, the Chancellors of Bolivia and Chile held a meeting in which Bolivia submitted a proposal to reach an agreement at the coming OAS General Assembly. It proposed that a third country submit a declaration inviting the Parties to start a frank dialogue, and that "Bolivia and Chile reply favourably to this invitation, solemnly affirming their *commitment* to seek solutions". Chile's Chancellor declared that it agreed with Bolivia's proposal and that, through this channel, satisfactory solutions to the maritime issue would be explored[452].

306. Between 16 and 18 November 1983, the delegations of Bolivia and Chile to the OAS met to negotiate a draft that became Resolution 686. Even the reservation made by Chile with regard to the preamble was negotiated so as to reach an agreement between the Parties[453]. The manner in which the Resolution would be presented and accepted by the Parties was also agreed upon[454]. This procedure that was agreed to beforehand, took place at the fourth session of the General Commission. The resolution was adopted by the OAS General Assembly[455] and Chile submitted a reservation on the preamble, as agreed by the Parties in advance.

307. In the Counter-Memorial, Chile concedes that it "expressed its support for the draft resolution" but argues that it had "some reservations" and joined the consensus "precisely because it understood the aim and effect of the resolution to be circumscribed"[456]. This is not

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[452] Report of Jorge Gumucio Granier, Permanent of Representative of Bolivia to the United Nations, regarding the meeting between the Ministers of Foreign Affairs of Bolivia and Chile, Ortiz Mercado and Schweitzer, 1 October 1983, pp. 3-4 (emphasis added) BM Annex 178, CCM, Annex 262.

[453] Note from the Permanent Representative of Bolivia to the United Nations, Jorge Gumucio, to the Minister of Foreign Affairs of Bolivia, José Ortiz Mercado, MRB 58/84, 16 February 1984, **BR, Annex 324**. See also, U. Figueroa Pla, *The Bolivian maritime claim before international fora*, RIL Editorial, Santiago, 2007, pp. 208-211, **BR, Annex 360**.

[454] Ibid., p.211.

[455] Minutes of the Fourth Session of the General Commission of the OAS, allocution by Chile's Minister of Foreign Affairs, Miguel Schweitzer, 18 November 1983, p. 368, pp. 371, BM Annex 206, CCM, Annex 265. Minutes of the Fourth Session of the General Commission of the OAS, allocution by the Minister of Foreign Affairs of Chile, Miguel Schweitzer, 18 November 1983, p. 368, pp. 372, BM Annex 205, CCM, Annex 264.

[456] CCM, para. 8.13.

an accurate picture of Chile's statement before the OAS. Chile had, indeed, one reservation; but beyond that reservation, it did not qualify its support for the Resolution:

> "(…) the proposed resolution submitted to us by our distinguished friend, the Foreign Minister of Colombia, has the support of my Government, although we must state our objection to the preamble, because of the principles that we have repeated in these Assemblies, as we find that it alludes to resolutions that my Government has never accepted. (…) my Delegation, faced with Bolivia's aspiration and our position, in order to replace eloquence and rhetoric, so common among us, would like to replace it with tangible demonstrations of good will, good neighborliness, and we welcome the Colombian suggestion set forth in this resolution, with the objection mentioned earlier"[457].

Contemporary Chilean records of the process of adoption of the 1983 Resolution confirm that Chile agreed on the core of the Resolution, i.e. negotiations on sovereign access to the sea[458].

308. The Parties were well aware that a commitment had been reached, although there would be disagreements on its execution. While Bolivia considered that, by virtue of Resolution 686, the negotiations on sovereign access should have commenced simultaneously to the rapprochement process, Chile considered that the Resolution had to be implemented in three stages: rapprochement, normalization of relations, and negotiation on sovereign access.

309. This is clear from a letter of 15 December 1983, sent to Colombia's Chancellor, Rodrigo Lloreda, in which the Chilean Chancellor, Schweitzer, rejected some of the criteria formulated by the President of Bolivia:

> "I do not need to point out to you that this interpretation moves away from the commitment adopted by the Foreign Ministers of Chile and Bolivia. As expressed explicitly in the respective resolution of OAS, the first thing to be sought is the rapprochement and diplomatic normality between the two countries and then consider the pending disputes"[459].

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[457] CCM, Annex 264, p. 1769.

[458] See CCM, Annex 267, p. 1785, points E and F.

[459] Letter from the Minister of Foreign Affairs of Chile, Miguel Schweitzer, to the Minister of Foreign Affairs of Colombia, Rodrigo Lloreda, 15 December 1983, **BR, Annex 322**.

310. In any event, the Parties continued their contacts to implement Resolution 686. To this end, the Foreign Ministers of both countries held several meetings[460].At this last meeting in New York on 2 October 1984, in the presence of the Colombian Minister of Foreign Affairs, both Parties agreed to issue a Joint Communiqué stating that "they reached an agreement on the main aspects of context and procedure for carrying out Resolution No. 686", and that the meeting of Bogota would be held within 90 days[461]. The conduct of the Parties is clear evidence that they had accepted the Resolution and that they considered it binding.

311. To conclude, the OAS resolutions and the related conduct of the Parties (i) resulted in another agreement to negotiate sovereign access to the sea, and (ii) confirm and support existing commitments to negotiate sovereign access to the sea.

G. The undertakings post-1990

312. So far as the period post-1990, and in particular the 2006 '13-Point Agenda',[462] are concerned, Chile considers that none of the relevant statements or declarations made throughout this period are relevant to establish the existence of an undertaking to negotiate sovereign access to the sea[463].

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[460] U. Figueroa, *Bolivia's maritime claim before international fora*, 2007, **BR, Annex 360.** p. 221-222. See also See also Aide Memoire "Meeting held with Chancellor Jaime del Valle", 26 April 1984, **BR, Annex 325.**

[461] The Draft Joint Communiqué is reproduced in CCM, Annex 261, Annex A, Summary of Chilean-Bolivian Discussions. The draft Joint Communiqué itself did not specify the procedural agreements reached, but they are recorded in an internal report of the Ministry of Foreign Affairs of Bolivia. Among other points, it was agreed that: a) the negotiations to solve pending issues, in particular to find a formula for giving Bolivia a sovereign outlet to the Pacific Ocean, would begin with a meeting of the Foreign Ministers in Bogotá; b) Simultaneously, the Foreign Ministers would approve a list and schedule for rapprochement actions to eliminate factors that could eventually disturb the bilateral dialogue; c) Peru would be invited to join the conversations in the event that the proposals concerning sovereign access involved a territory falling within the scope of the Additional Protocol to the 1929 Treaty. 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**.

[462] BM, Annex 118.

[463] CCM, Chapter 9.

313. At the same time, however, Chile acknowledges in the Counter-Memorial that it "accepted to prepare an agenda without exclusions in the 2000 Algarve Declaration" and "included the 'maritime issue' in the 13-Point Agenda in 2006"[464].

314. According to Chile the sixth point in the Agenda, "the maritime issue", was deliberately described "extremely broadly, and did not include any reference to 'sovereign access'"[465].

315. However, "the maritime issue" clearly refers to "sovereign access", as opposed to non-sovereign access, i.e. the improvement of the transit regime under the 1904 Treaty. It was understood by both Parties that the "maritime issue" was an umbrella term that included the pending issue of the sovereign access to the sea, as illustrated by declarations of the Presidents of the two countries of December 2005[466] and of the Minister of Foreign Affairs of Chile in June 2007,[467] and by the fact that Point 6 of the Agenda entitled "Maritime issue" is distinct from Point 3 on "Free transit"[468]. In addition, within the OAS, the terminology used has been "the Maritime Problem of Bolivia"[469] or "Bolivia's maritime issue"[470]. The formula used in the 13-Point Agenda echoes these formulas.

316. The relevant elements and documents that Bolivia presented in the Memorial establishing that both Parties agreed in the 2000 Algarve Declaration to negotiate sovereign access[471] are not discussed by Chile in Chapter 9 of its Counter-Memorial. These elements include the statement by the Minister of Foreign Affairs of Chile in April 2006 that Chile does not exclude the possibility to grant Bolivia a sovereign access to the sea[472], and the statement of July 2006 of the Minister of Foreign Affairs of Chile who, referring to Bolivia's claim for an access to the maritime coast, underlined that his Government "is fully aware of the

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[464] CCM, para. 9.3.

[465] CCM, para. 9.15.

[466] See BM, Annexes 80 and 81.

[467] See BM, Annex 136.

[468] BM, Annex 118.

[469] See for instance BM, Annexes 194 to 201.

[470] See for instance BM, Annexes 203 and 206.

[471] See BM, para. 199-214.

[472] BM, Annex 132.

commitment undertaken many years ago to engage in negotiations over an Agenda without exclusions" with its Trans Andean neighbour[473].

317. To conclude, throughout the past century Chile has repeatedly and consistently asserted that it has undertaken a commitment to negotiate with Bolivia on sovereign access to the sea. This commitment results from multiple legal sources, either explicit agreements (in particular the 1950 Notes and the 1975 and 1977 Joint Declarations) or tacit agreements or acquiescence (in particular the absence of any protest from Chile against the declarations made by Bolivia before the OAS in 1979, the information submitted by Bolivia to the 1958 Conference on the Law of the Sea or the declaration made by Bolivia upon the signature of the UNCLOS[474]), unilateral acts, and a combination of declarations and recommendations of the General Assembly of the OAS.

318. Chile's mantra is that this impressive array of declarations, agreements and conduct is purely "political". This assertion is not only wrong in legal terms, as was demonstrated above; it is also not *credible*. Chile fails to answer a simple, decisive question: if Chile's declarations were supposed to have no effect at all, *why* for so many decades did Chile's highest authorities repeatedly say that Chile was willing to enter into negotiations on sovereign access to the sea, and *why* did they repeatedly say that there is a need for Bolivia to have a sovereign access to the Pacific Ocean? Chile's highest authorities (presumably acting in good faith) took the sovereign decision to make these declarations, to enter into these agreements, and to reiterate them on a number of occasions. This necessarily indicates that they were supposed to mean something and to be given effect. As such, they express Chile's *intent* to negotiate on sovereign access to the sea, which created rights for Bolivia.

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[473] BM, Annex 135 (emphasis added).

[474] See *supra*, paras. 149 and 258 fn. 359.

CHAPTER 6

ESTOPPEL AND LEGITIMATE EXPECTATIONS

319. As demonstrated above, the obligation to negotiate sovereign access to the sea results from a number of agreements or unilateral acts attributable to Chile evidencing its intention. But even if, *quod non*, these commitments did not exist, Bolivia would be in a position to invoke estoppel as an alternative legal basis for the said obligation. Chile's repeated declarations constitute a *representation* on which Bolivia can legitimately rely, and Chile's abrupt denial of the existence of the obligation since 2011 frustrates Bolivia's legitimate expectations resulting from this representation.

A. The nature of estoppel and legitimate expectations

320. As has been recently recalled,

> "Estoppel is a general principle of law that serves to ensure, in the words of Lord McNair, 'that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold – *allegans contraria non audiendus est*.' [475] The principle stems from the general requirement that States act in their mutual relations in good faith and is designed to protect the legitimate expectations of a State that acts in reliance upon the representations of another."[476]

321. Chile, after more than a century of official statements, declarations and agreements attributable to its highest authorities, stating that there was a need to engage in negotiations regarding Bolivia's landlocked status, suddenly denied the very existence of these commitments. In those circumstances, Bolivia reasonably invoked in its Memorial estoppel and legitimate expectations[477].

322. Chile devotes only one footnote in the Counter-Memorial to estoppel and legitimate expectations. According to this footnote, Chile contends that:

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[475] *A.D. McNair, "The Legality of the Occupation of the Ruhr", 5 British Year Book of International Law 17, 35 (1924), Fn. 548*

[476] *Chagos Marine Protected Area (Republic of Mauritius v. United Kingdom),* Award, 18 March 2015 (162 *ILR* 1), para. 435.

[477] See in particular BM, para. 332, 334, 396 and 436.

> "For present purposes, it is sufficient to note that (…) Bolivia has not developed this assertion by reference to any relevant legal authority; and (…) the weight of authority, discussed above, emphasizes that what is crucial is the intention of the declaring State, objectively assessed, and does not suggest that such intention can be deduced from any expectation of another State."[478]

323. Both assertions are incorrect. As regards the first one, Bolivia has provided relevant legal authority in the Memorial[479]. As regards the second one, it clearly makes no sense to refer to the rules applicable to the identification of the intention of the declaring States when estoppel or legitimate expectations are at stake, since the purpose of estoppel and legitimate expectations is precisely to provide a basis for obligations *other than* the intention to be bound. This element has been reiterated on many occasions.

324. In this regard, in 1962, Judge Fitzmaurice pointed out that:

> "(…) in those cases where it can be shown that a party has, by conduct or otherwise, undertaken, or become bound by, an obligation, it is strictly not necessary or appropriate to invoke any rule of preclusion or estoppel, although the language of that rule is, in practice, often employed to describe the situation. (…) The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's subsequent conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound"[480].

325. In 2015, the Arbitral Tribunal in the *Chagos* arbitration held accordingly that it:

> "does not consider that a representation must take the form of a binding unilateral declaration before a State may legitimately rely on it. To consider otherwise would be to erase any distinction between estoppel and the doctrine on binding unilateral acts. (…) The sphere of estoppel (…) is not that of unequivocally binding commitments (for which a finding of estoppel would in any event be unnecessary (see *Temple of Preah Vihear (Cambodia v. Thailand), Judgment of 15 June 1962, Separate Opinion of Sir Gerald Fitzmaurice, I.C.J. Reports 1962*, p. 52 at p. 63), but is instead concerned with the grey area of representations and commitments whose original legal intent may be ambiguous or obscure, but

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[478] CCM, p. 63, fn. 204.

[479] See BM, p. 135, fn. 407.

[480] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, Separate Opinion of Judge Fitzmaurice, p. 63.

> which, in light of the reliance placed upon them, warrant recognition in international law".[481]

326. The fact that an obligation can arise on the basis of estoppel from declarations or conduct, even in cases where the said declarations or conduct did not express an intention to be bound or where there is room for doubt in that regard, is reflected in the decision of the Tribunal in the *Chagos* arbitration, which concluded that the commitments were binding on the United Kingdom *because* of estoppel:

> "The Tribunal, therefore, holds that the United Kingdom is estopped from denying the binding effect of these commitments, which the Tribunal will treat as binding on the United Kingdom in view of their repeated reaffirmation after 1968"[482].

327. In the present case, the obligation to negotiate results *both* from general international law, treaties, agreements, and unilateral acts,[483] and from the operation of estoppel and legitimate expectations. It is not necessary to adjudge that Chile is estopped, since there are agreements and binding unilateral declarations. For the sake of completeness, however, Bolivia will show in this section that, even if there were no such agreements and binding unilateral acts, *quod non*, estoppel, as defined in international law (B), would in any case apply in the present case (C).

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[481] *Chagos Marine Protected Area (Republic of Mauritius v. United Kingdom),* Award, 18 March 2015 (162 *ILR* 1), para. 445-446. See also S. Carbone, "Promise in International Law: A Confirmation of its Binding Force", *Italian Yearbook of International Law*, Vol. 1 (1975), at 167 and 169; H. Das, "L'*estoppel* et l'acquiescement: assimilations pragmatiques et divergences conceptuelles", *Revue belge de droit international*, 1997-2, at 608 (fn. 3) and 609-610.

[482] *Ibid.*, para. 448. See also M. Virally, « Rapport provisoire sur la distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée obligatoire », *Annuaire de l'Institut de Droit international*, 1983, Vol. 60-I, pp. 182-183 : « (…) la Commission n'a pas à s'occuper de la question de savoir si le principe de la bonne foi ou l'estoppel peut faire produire certains effets de droit à des textes qui, par ailleurs sont dépourvus de portée juridique, puisque cela ne change pas leur nature. C'est aussi mon sentiment en ce qui concerne l'estoppel, dont le jeu tient aux apparences qui ont été créées et auxquelles un tiers a pu se fier de bonne foi et qui sert à protéger ce dernier (…). Il s'agit donc d'un mécanisme qui 'greffe' en quelque sorte un effet juridique sur un acte qui n'était pas destiné à le produire ».

[483] See supra, Chapters 2 and 3.

B. The conditions and effects of estoppel and legitimate expectations

328. International law is well-established as regards the existence of estoppel and legitimate expectations, and their main components. The fact that creating legitimate expectations and then frustrating them can give rise to legal obligations under international law has been acknowledged by a number of international courts or tribunals.

329. For example, more than a century ago, the Mixed Claims Commission Italy-Venezuela decided in the *Affaire Aboilard (France/Haïti)* that:

> "(…) il y a eu, tout au moins, faute grave de la part du gouvernement haïtien d'alors (…) à créer des attentes légitimes qui, ayant été trompées par le fait du gouvernement lui-même, ont entraîné un préjudice dont réparation est due"[484].

330. Subsequently, international courts and tribunals have referred to estoppel as a general principle of international law and, today:

> "A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency."[485]

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[484] Award, 26 July 1905, *RIAA*, Vol. XI, p. 80. See also the *Corvaïa Case*, *RIAA*, Vol. X, 1903, p. 633. (Unofficial translation: "There has been, however, a serious fault on the part of the Haitian government … in creating legal expectations which, having been disappointed by the government itself, have led to prejudice which requires compensation")

[485] J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. Oxford University Press, 2012, p. 420. See also, among many others, Separate Opinion of Judge Ajibola, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment*, 3 February 1994, *I.C.J. Reports 1994*, pp. 96-114; *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, Partial Award on the Merits, PCA Case No. 34877, 30 March 2010, para. 348-353; European Court of Justice, Opinion of Advocate General Mazák delivered on 8 May 2008, Case C203/07 P, *Hellenic Republic v Commission of the European Communities*, para. 81 (fn. omitted): "What seems to be most relevant to the case before the Court is that good faith requires that the intention expressed be consistent with the real intention, and, more generally, that the legal reality be consistent with the legal appearance (that is to say, consistent with the appearances created by statements or conduct on the part of the legal actors). This effect of the principle of good faith seems to coincide with the principle '*allegans contraria non est audiendus*', commonly known as the principle of estoppel under international law."

331. As the then Vice-President of the ICJ, Judge Alfaro, noted in 1962:

> "The principle, not infrequently called a doctrine, has been referred to by the terms of 'estoppel', 'preclusion', 'forclusion', 'acquiescence'. I abstain from adopting any of these particular designations, as I do not believe that any of them fits exactly to the principle or doctrine as applied in international cases";[486]
>
> "Judge Basdevant has given a definition of estoppel in his '*Dictionnaire de la terminologie du droit international*' which is doubtless very accurate. Here it is:
>
> 'Terme de procédure emprunté à la langue anglaise qui désigne l'objection péremptoire qui s'oppose à ce qu'une partie à un procès prenne une position qui contredit soit ce qu'elle a antérieurement admis expressément ou tacitement, soit ce qu'elle prétend soutenir dans la même instance";[487]
>
> "Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (allegans contraria non audiendus est). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (nemo potest mutare consilium suum in alterius injuriam). (…) (…) The acts or attitude of a State previous to and in relation with rights in dispute with another State may take the form of an express written agreement, declaration, representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation";[488]
>
> "The primary foundation of this principle is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith. Again, I submit that such inconsistency is especially inadmissible when the dispute arises from bilateral treaty relations"[489.]

332. To some extent, estoppel in international law is less refined than in some domestic legal systems. As the Arbitral Tribunal stressed in the *Chagos* case,

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[486] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, Separation Opinion of Vice-President Alfaro, p. 39.

[487] *Idem.*

[488] *Ibid.*, p. 40.

[489] *Ibid.*, p. 42.

"in contrast to at least some forms of estoppel in municipal law – the principle in international law does not distinguish between representations as to existing facts and those regarding promises of future action or declarations of law"[490].

333. In addition, estoppel in international law does not have a procedural character only; it also has a substantive one. Vice-President Alfaro in 1962 noted that:

"The principle that condemns contradiction between previous acts and subsequent claims is not to be regarded as a mere rule of evidence or procedure. The substantive character of the rule finds support in the writings of several authors"[491].

334. Similarly, Judge Fitzmaurice considered in 1962 that:

"The principle of preclusion is the nearest equivalent in the field of international law to the common-law rule of estoppel, though perhaps not applied under such strict limiting conditions (and it is certainly applied as a rule of substance and not merely as one of evidence or procedure)"[492].

335. In the *Argentine-Chile Frontier Case*, the Court of Arbitration also considered that:

"It seems clear from the decision of the International Court of Justice in the *Case concerning the Temple of Preah Vihear (…)* and especially from the learned Separate Opinion of Vice-President Alfaro in that case, that there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence, according to which 'a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation' (…). This principle is designated by a number of different terms, of which 'estoppel' and 'preclusion' are the most common. But it is also clear that these terms are not to be understood in quite the same sense as they are in municipal law"[493].

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[490] *Chagos Marine Protected Area (Republic of Mauritius v. United Kingdom)*, Award, 18 March 2015 (162 *ILR* 1), para. 437.

[491] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, Separation Opinion of Vice-President Alfaro, p. 41.

[492] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, Separate Opinion of Judge Fitzmaurice, p. 62

[493] *Report of the Court of Arbitration, 24 November 1966, RIAA*, Vol. XVI, p. 164. See also, expressing the same idea, *Decision regarding delimitation of the border between Eritrea and Ethiopia*, Decision of 13 April 2002, *RIAA*, Vol. XXV, p. 111, para. 3.9.

336. The *conditions* of estoppel are also well-established today:

> a) "(…) some essential elements required by estoppel: a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it";[494]
>
> b) "An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice (…)";[495]
>
> c) "estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and d) such reliance was legitimate, as the representation was one on which that State was entitled to rely."[496]

337. In addition, it is important to note that estoppel does not require or presuppose that the representations made by a State are fraudulent. Contrary to fraud, which consists in "any false statements, misrepresentations or other deceitful proceedings"[497], estoppel is based on the mere existence of representations made by a State, where good faith "must be presumed".[498] It

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[494] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene, Judgment,* 13 September 1990, *I.C.J. Reports 1990,* p. 118, para. 63.

[495] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment,* 11 June 1998, *I.C.J. Reports 1998*, pp. 303-304, para. 57.

[496] *Chagos Marine Protected Area (Republic of Mauritius v. United Kingdom),* Award, 18 March 2015 (162 *ILR* 1), para. 438.

[497] See ILC, Draft Articles on the Law of Treaties, *ILC Yearbook,* 1966, Vol. II, p. 245, para. (3) of the commentary of Draft Article 46 on "Fraud".

[498] See on the principle that "good faith must be presumed": *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p.213 at p. 267, para. 150; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 at p. 105, para. 278; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644 at pp. 692-693, para. 168; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99 at p. 154, para. 138; see also *The Philippines v. China*, Award, 12 July 2016, para. 1200; *Chagos Marine Protected Area Arbitration*

is precisely because the good faith of the State making representations must be presumed that the said representations are capable of creating legitimate expectations.

338. As regards the legal *effects* of estoppel (or similar principle such as preclusion), international courts and tribunals have consistently held that a State is precluded from claiming that a right, an obligation or a situation does not exist, if there is a change of attitude of the said State and if its past conduct is not consistent with the new claim. It has been decided indeed that:

> "(…) only the existence of a situation of estoppel could suffice to lend substance to this contention, – that is to say if the Federal Republic *were now precluded from denying the* applicability *of the conventional régime, by reason of past conduct, declarations, etc.*, which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice";[499]

Or that

> "The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation"[500].

339. While estoppel focuses on the position of the State taking up a stance, and holds it to its commitments, the doctrine of legitimate expectations focuses on the position of States that have relied upon the views taken up by another State, and treats them as entitled to rely upon commitments made by the other State. The doctrine of legitimate expectations has been widely applied by arbitral tribunals in the context of investment protection, For instance, the tribunal in *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*[501] concluded, after a survey of national laws, that the doctrine is part of international law.

(Mauritius v. United Kingdom), Award, 18 March 2015, para. 447; *Lac Lanoux* (Spain/France), Award, 16 November 1957, RIAA, Vol. XII, p. 305.

[499] *North Sea Continental Shelf Cases, Judgment,* 20 February 1969, *I.C.J. Reports 1969*, p. 26, para. 30 (emphasis added).

[500] *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, Judgment, 14 March 2012, ITLOS Reports, Case No. 16, para. 124.

[501] ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014, para. 570-576, 662. Cf. R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd ed., Oxford: University Press, 2012, pp. 148-149.

C. Application of estoppel and legitimate expectations in the present case

340. The attitude of Chile as regards the issue of negotiations on sovereign access to the sea is a clear example of estoppel. Before changing its attitude in 2011 Chile made, over a long period of time, a great number of statements which, whatever their form and own legal binding nature,[502] and given their content and the context in which they were made[503], constitute clear and consistent representations which created legitimate expectations for Bolivia.

341. Numerous examples of statements or declarations that make clear that Chile agrees that negotiations have to take place to achieve a specific goal, i.e. to find a formula to grant Bolivia a sovereign access to the sea, can be provided. Since these statements and declarations also constitute binding undertakings, as demonstrated above,[504] *a fortiori* they constitute probative elements for the purpose of estoppel:

a. Chile admits in the Counter-Memorial that the 1950 Notes shows at least that Chile was "open to entering into a negotiation aimed at finding a formula that could make it possible to give to Bolivia a sovereign access to the Pacific Ocean (…)"[505]. Chile adds that "[i]t will be important for the Court to read carefully the documentary record, which merely shows that on various occasions Chile is recorded as stating that it was open to consider and study Bolivia's proposals, and indeed that it was open to negotiation"[506]. Chile also insists on Chile's President "*desire* to reach an agreement that would gradually please Bolivia's aspirations";[507]

b. In 1917, the Government of Chile expressed to the newly elected President of Bolivia the following: "My Government is hoping to find, when the time comes, the

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[502] See supra, Chapter 3

[503] Bolivia's core national interest in having a sovereign access to the sea was expressed by Bolivia, publicly and widely, as early as 1884 when the Truce Pact was concluded between Bolivia and Chile. See BM, para. 65, and BM, Annex 103.

[504] See supra, Chapter 3

[505] CCM, para. 6.2, letter b).

[506] CCM, para. 6.5.

[507] CCM, para. 6.5, letter b). See also para. 6.10, letter d).

means to fulfil the most fundamental aspirations of the Bolivian and Chilean peoples";[508]

c. In the Chilean Memorandum of 9 September 1919, Chile stated unequivocally that, "[i]ndependently of what was established in the Peace Treaty of 1904" and "subject to Chile's triumph in the plebiscite", "Chile *accepts* to initiate new negotiations *aimed at satisfying the aspirations of the friendly country*". More precisely, echoing promises already made at the end of the nineteenth century,[509] Chile stated in the memorandum that:

"The situation created by the Treaty of 1904, the interests in that zone and the security of its northern border impose on Chile the need to retain the maritime coast that is indispensable to it; but, 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, ceding to it an important part of that area to the north of Arica and of the railway line within the territories submitted to the plebiscite stipulated in the Treaty of Ancón*";[510]

d. In the 1920 Act dated 10 January 1920,

"The Minister of Chile stated that, as he had *already* had the opportunity to express to the Ministry of Foreign Affairs of Bolivia by fulfilling the agreeable and honourable mission that has been entrusted to him before this Government, there exists on the part of the Government of Chile the best wish to favour a policy of sincere and closer rapprochement with Bolivia; that *for this purpose* he reproduces *the bases that he submitted*, in general terms, to the Honourable Mr. Darío Gutiérrez last September, *to search for an agreement that would allow Bolivia to satisfy its aspiration of obtaining its own outlet to the Pacific*, independently of the definitive situation created by the provisions of the Treaty of Peace and Amity of 20 October 1904.

(…)

Bolivia, which is not a direct party to the dispute of the Pacific, could, by means of an agreement with Chile, which would naturally and logically derive from the existing ties between the two countries, *acquire the expectation of integrating to its*

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[508] O. Pinochet de la Barra, *Chile and Bolivia: How Much Longer!* Santiago, LOM Editions, 2004, pp. 38-39, **BR, Annex 352.**

[509] See for instance BM, Annex 189.

[510] CCM, Annex 117 (emphasis added); BM, Annex 19.

territory an important and extensive maritime province, escaping its landlocked situation".[511]

In the *same Act*, the Minister of Foreign Affairs of Bolivia was careful to state that:

"maintaining the freedom of both Governments to direct their diplomatic efforts in a way which best takes into account their respective interests and addresses, if necessary, the powers or other entities that may cooperate most effectively in the achievement of their wishes, it is the duty of his country to reiterate to Chile what was previously stated, persuaded that in case Bolivia had the expectation of acquiring the Port of Arica an agreement could be executed that would take into account the common purpose of further consolidating the friendship between the two nations".[512]

e. In the note of the Minister of Foreign Affairs of Chile dated 20 June 1950, he declared that:

"From the quotes contained in the note I answer, it flows that the Government of Chile, together with safeguarding the legal situation established by the Treaty of Peace of 1904, has been willing to study, through direct negotiations 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 honor 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 *willing to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access to the Pacific Ocean*, and for Chile to obtain compensation of a non-territorial character that effectively takes into account its interests".[513]

f.In the Memorandum dated 10 July 1961, Chile reasserted that:

"Chile has always been willing, together with safeguarding the legal situation established in the Treaty of Peace of 1904, to study, through direct efforts with Bolivia, the possibility of satisfying the aspirations of the latter and the interests of Chile. (…) Note Nº 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 'willing to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own and sovereign access

[511] CCM, Annex 118 (emphasis added); BM, Annex 101.

[512] CCM, Annex 118; BM, Annex 101.

[513] **BR, Annex 266**.

to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character that effectively takes into account its interests'"[514].

g. In the Memorandum of 26 November 1976, Chile stated that it was taking appropriate steps:

"In order to reach a successful conclusion in the ongoing negotiation with Bolivia, which satisfies the aspiration of that country to have a sovereign maritime coast linked to the Bolivian territory through a strip of equally sovereign territory";[515]

h. In the Joint Declaration of Charaña of 8 February 1975,

"Both heads of state, in that spirit of mutual understanding and constructive motivation, have 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".[516]

i. In the Note of the President of Chile of 30 September 1975, the President mentioned "the need to find an immediate, satisfactory, and fair solution for the Bolivian proposal" and stated that Bolivia "knows of 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 condition";[517]

j. The President of Chile reiterated in his Note dated 8 February 1977 that:

"Inspired in the most profound americanist spirit, we initiated negotiations aimed at satisfying the aspiration of Bolivia to have a sovereign coast without interruption in continuity with the current Bolivian territory.

(…)

In face of these difficulties, I deem convenient to redouble our efforts and our goodwill, to move forward from the current state of the negotiations and reach the goal we have set".[518]

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[514] **BR, Annex 284**.

[515] CCM, Annex 212; BM, Annex 26.

[516] CCM, Annex 174; BM, Annex 111.

[517] BM, Annex 70.

[518] CCM, Annex 217; BM, Annex 74.

k. In the Joint Declaration of the Minister of Foreign Affairs of 10 June 1977, "the two Ministers *agreed* to the following":

"They emphasize that the dialogue established via the Declaration of Charaña reflects the endeavouring of the two governments to deepen and strengthen the bilateral relations between Chile and Bolivia by seeking concrete solutions to their respective problems, especially with regard to Bolivia's landlocked situation.

Along these lines, they indicate that, consistently with this spirit, they initiated negotiations aimed at finding an effective solution that allows Bolivia to count on a free and sovereign outlet to the Pacific Ocean.

Taking as a basis both Ministers' constructive analysis of the course of negotiations regarding Bolivia's vital problem, they resolve to deepen and activate their dialogue, committing to do their part to bring this negotiation to a happy end as soon as possible.

Consequently, they reaffirmed the need to pursue the negotiations from their current status, seeking to reach their proposed objective, in order to consolidate peaceful coexistence and broad comprehension that promotes understanding, as well as coordinated development in the zone".[519]

l. In the Note of the President of Chile of 23 November 1977, Chile stated that:

"My Government appreciates the *special importance* that the current negotiations to give Bolivia a sovereign outlet to the Pacific Ocean have in the context of our relations. My Government *maintains unchanged the political will that gave rise to these negotiations* and is *willing to move ahead with them* in accordance with the desires and with the intensity that Your Excellency deems advisable".[520]

m. The President of Chile "reiterated" in his Note of 18 January 1978 "my Government's intention of promoting the ongoing negotiation aimed at satisfying the longings of the brother country to obtain a sovereign outlet to the Pacific Ocean", stressing that they were "negotiations that we are *committed to*", and he concluded his note by stating that:

"The negotiation in which we are engaged is not easy. It will demand patience and reciprocal goodwill, as we knew when we started it. The importance of the final

[519] CCM, Annex 222 (emphasis added); BM, Annex 165.

[520] CCM, Annex 234 (emphasis added); BM, Annex 76.

result will compensate the time we devote to clarify doubts and difficulties which are inherent to diplomatic efforts of this magnitude".[521]

n. In his statement before the General Assembly of the OAS on 24 October 1979, the representative of Chile declared:

"That Bolivia has an aspiration and not a right; that Chile has been willing to satisfy that aspiration".[522]

o. In his statement before the General Assembly of the OAS on 31 October 1979, the representative of Chile stated once again that:

"In the operative part [of the resolution] there is a recommendation that the States concerned with this problem open negotiations for the purpose of providing Bolivia with a free and sovereign territorial connection with the Pacific Ocean. My country has *always* been *willing to negotiate with Bolivia*."

"On *repeated occasions* I have indicated Chile's *willingness to negotiate a solution with Bolivia to its aspiration to have free and sovereign access to the Pacific Ocean*. The way to reach that goal is direct negotiation, conducted at a level of professionalism and mutual respect, without any interference, suggestions or dictates from anyone".[523]

p. Similarly, in his statement before the General Assembly of the OAS on 18 November 1983, the representative of Chile stated that:

"Any negotiations with Bolivia aimed at satisfying Bolivia's longing for a sovereign outlet to the Pacific Ocean through Chilean territory is a matter for solution directly between Bolivia and Chile, and might possibly require the participation of Peru, if it involves the territories included in the Treaty of 1929, which Chile signed with Peru. Any negotiations of this type must also be the result of a process; a process that involves improving and normalizing the relations between our two countries and that permits us to create the positive political environment that facilitates an action of this nature. *My country is and has always been willing to make a contribution to the beginning of this process*"[524].

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[521] CCM, Annex 236 (emphasis added); BM, Annex 78.

[522] Minutes of the 6th Plenary Meeting, 9th Regular Session of the OAS General Assembly, 24 October 1979, **BR, Annex 319**.

[523] CCM, Annex 249 (emphasis added); BM, Annex 204.

[524] CCM, Annex 264 (emphasis added); BM, Annex 205.

342. In light of the above, the present case is very different from cases where there is no estoppel because the claimant relies only on "a brief silence"[525] or on "a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges"[526]. The present case is far from being based on a 'brief silence' or 'desultory exchanges': it is based on a great number of consistent statements, declarations, agreements, over the course of more than a century, according to which Chile made publicly known to Bolivia 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.

343. The present case bears in that regard a number of similarities to the *Anglo-Norwegian Fisheries* case where the Court held that:

> "The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system. (…)
>
> The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.
>
> The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom"[527].

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[525] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment*, 12 October 1984, *1.C.J. Reports 1984*, p. 246 at p. 308, para. 140.

[526] See *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment*, 20 July 1989, *I.C.J. Reports 1989*, p.15 at p. 44, para. 54.

[527] *Fisheries case (United Kingdom v. Norway), Judgment of December 18th 1951, I.C.J. Reports 1951*, p.116 at pp. 138-139.

344. In the present case, since the end of the nineteenth century, both Bolivia and Chile were "greatly interested" in the issue of sovereign access to the sea and were "concerned particularly" by this issue, which was and still is notorious. In addition, Chile "could not have been ignorant" of the effect its declarations and promises would have for Bolivia in terms of legitimate expectations, nor, "knowing of it, could it have been under any misapprehension as to the significance of its terms". The situation "could only be strengthened with the passage of time".

345. In the *Chagos* arbitration, the Arbitral Tribunal considered that the United Kingdom was bound because it "made repeated representations (…) over the course of over 40 years" and because these representations "were made in statements by the Prime Minister and Foreign Secretary of the United Kingdom, who were unequivocally authorized to speak for it on this matter."[528] The same conclusion applies *a fortiori* in the present case.

346. Given the unambiguous nature of Chile's repeated statements, declarations and promises, there is no doubt that they were representations on which Bolivia was entitled to rely and did rely. 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. This "brought about a change in the *relative* positions of the parties, worsening that of the one, or improving that of the other, or both", thus creating a situation of estoppel[529]. Chile consolidated its position, and drew back from its commitment to negotiate a solution, finally repudiating it in 2011. Since that date, Chile has refused to hold *any* negotiations on sovereign access.

347. That position could equally well be framed in terms of legitimate expectations. Chile induced Bolivia to continue, year after year, pursuing the promise of a solution to its land-locked status. Bolivia believed that Chile would act in accordance with its promises; but Chile now says that there can be no such solution. Chile has declared that the legitimate expectations of Bolivia will not be fulfilled: there will not even be negotiations on a sovereign access.

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[528] *Chagos Marine Protected Area (Republic of Mauritius v. United Kingdom)*, Award, 18 March 2015 (162 *ILR* 1), para. 439.

[529] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, Separate Opinion of Judge Fitzmaurice, p. 63.

348. For Chile to refuse today (as it has since 2011) any negotiation with Bolivia on sovereign access to the sea is a clear breach of Chile's commitments and a clear frustration of Bolivia's legitimate expectations, which is very detrimental to Bolivia. 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. Moreover, the absence, so far, of any sovereign access to the sea means that Bolivia still suffers from its landlocked condition. This situation stands in marked contrast with Chile's repeated assertion that Bolivia needs a sovereign access to the sea and that negotiations are required in order to put an end to Bolivia's landlocked situation. Chile must be considered as being in breach of its promises to negotiate on a sovereign access to the sea.

349. For all the reasons set forth in the present Part of Bolivia's Reply, Bolivia respectfully requests the Court to declare that, by refusing since 2011 any negotiation on sovereign access to the Pacific Ocean[530], Chile is in breach of the obligation to negotiate on sovereign access to the sea, that it has repeatedly and consistently agreed to fulfil, whether by bilateral treaties, tacit agreements, acquiescence or unilateral acts, or resulting from the application of the principle of estoppel and the creation of legitimate expectations that has been frustrated by Chile. Chile must, therefore, be declared by the Court under the obligation to comply with the said obligation to negotiate.

[530] See BM, para. 215-219.

PART III

CHILE'S MISCHARACTERIZATION OF THE HISTORICAL BACKGROUND OF ITS OBLIGATION TO NEGOTIATE A SOVEREIGN ACCESS TO THE PACIFIC OCEAN

CHAPTER 7

CHILE'S LONG-STANDING AND REITERATED COMMITMENT TO NEGOTIATE A SOVEREIGN ACCESS TO THE SEA

350. In the Counter-Memorial Chile's defence on the merits consists in arguing that, even if there were commitments or agreements to negotiate on sovereign access to the sea, there have been only "sporadic diplomatic and political exchanges, and, occasionally, actual negotiations (…)"[531], in "five discrete and very different periods (…)"[532], which were "separated in time"[533]. Chile also argues that on many occasions Bolivia remained silent on the issue of sovereign access to the sea, and that, in any event, after the Charaña process in 1978, which failure is attributed to Bolivia in the Counter-Memorial, negotiations on sovereign access to the sea were no longer an issue between the two countries. According to Chile, the result is that there is no possibility to argue today that there is an obligation to negotiate on sovereign access to the sea.

351. Chile's new narrative is unconvincing both as a matter of law and as matter of fact. As a matter of law, the failure of negotiations at some point in time does not, and cannot, entail the termination of the obligation to negotiate[534]. The obligation to negotiate or to settle a dispute does not disappear by the mere failure – even the repeated failure – of rounds of negotiations. In the present case Chile and Bolivia specifically agreed, on many occasions, throughout a century, to have negotiations aimed at finding a formula to grant Bolivia a sovereign access to the sea. These agreements, promises, unilateral commitments and representations are binding upon Chile[535], whatever the result of *specific rounds* of

[531] CCM, para. 1.3.

[532] CCM, para. III.2.

[533] CCM, para. 1.11.

[534] See *supra*, Part I, Chapter 2.

[535] See *supra*, Part II, Chapter 5.

negotiations on the *modalities* of the sovereign access to the sea. Ups and downs in a negotiating process do not terminate the obligation to negotiate, *a fortiori* when the need for negotiations has been consistently held by both negotiating parties.

352. Chile's historical presentation blatantly mischaracterizes the relevant facts[536], which clearly shows that Chile's promises have not been "discrete" or "sporadic". As it has been already shown, they date back to the end of the nineteenth century as a direct consequence of the War of the Pacific which resulted in a major territorial loss for Bolivia; and have been reiterated by Chilean highest authorities on many occasions throughout the twentieth century[537]. In addition, as Bolivia will show in this Chapter, there have been no "silences", nor any conduct, from Bolivia in the twentieth century which could have had the effect of terminating its claims and its right to have negotiations on sovereign access to the sea (A); the failure of the Charaña process is not attributable to Bolivia (B); and, the conduct of the parties after failure of the Charaña process shows indeed that negotiations on sovereign access to the sea remained an issue between the two parties after 1979 (C) before the change of position of Chile which repudiated in 2011 all its previous agreements, commitments and promises in breach of its own undertakings (D).

A. Chile denies the uninterrupted course of its commitment to negotiate

353. Chile argues in the Counter-Memorial that there have been periods of silence from Bolivia before (1) and after (2) the adoption of the 1950 Exchange of Notes, and between 1963 and 1974 (3). Chile's argument is not entirely clear. Even if such periods of silence would have existed, they did not relinquish the right of Bolivia to rely on Chile's commitments, especially because Chile's undertaking to negotiate a sovereign access to the sea has been systematically reiterated, in 1950 and 1975 in particular.

1. The Process Leading to the Exchange of the 1950 Notes

354. Chile accuses Bolivia of not having raised its claim for an "extended period of silence"[538] after 1929, with "intermittent discussions" occurring only in the late 1940s[539]. This

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[536] Historical clarifications concerning the origin of the dispute between Bolivia and Chile, See **BR, Annex 373.**

[537] See *supra* Part II, See in particular Chapter 5 (Sections B to G).

[538] CCM, para 6.2.

statement, however, deliberately ignores a fundamental historical event. From 1932 to 1935, Bolivia was in the midst of a war with Paraguay (*Chaco War*). This conflict came to a formal end with the signature of a Peace Treaty on 21 July 1938 after three years of intense negotiations[540] following the armistice of 1935. This international situation demanded the greatest diplomatic efforts of Bolivia during most of the decade of the thirties.[541]

355. Despite the complex internal situations, Bolivia continued to persist in its claim. Alberto Ostria Gutiérrez, Bolivian Minister in Lima, presented to Peruvian Foreign Minister, Alberto Ulloa, a Memorandum on 11 June 1936, in which he 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 via Arica.[542] At the same time, during the *Inter-American Conference on Peacebuilding,* held in Buenos Aires in 1936, the Minister of Foreign Affairs of Bolivia, Enrique Finot, stated his duty to call the conference's attention to Bolivia's landlocked position which was for Bolivia the cause of a deep and continuous discomfort, of restlessness and permanent longings, that translate into the necessities of broad life and full sovereignty.[543]

356. Chile claims that Bolivia remained silent during the 1940s. This contention is simply untrue. In April 1941, the Chilean Foreign Minister, Manuel Bianchi, visited La Paz. On that occasion, the Bolivian Chancellor proposed to initiate negotiations on the issue of the port, proposal that was not rejected by the Chilean Chancellor, who stated that in order to achieve this purpose it would be necessary to create a suitable atmosphere in the Chilean public opinion and carry out a rapprochement process between the two States[544].

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[539] CCM, para 6.6.

[540] Treaty of Peace, Friendship and Boundaries between Bolivia and Paraguay, signed at Buenos Aires on 21 July, 1938, **BR, Annex 250**.

[541] J. Dunkerley, *Rebellion in the Veins, Political Struggle in Bolivia, 1952-82*, 1984, **BR, Annex 323**.

[542] Note from the Minister Plenipotentiary of Bolivia in Peru, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Enrique Baldivieso, N° 169, 11 June 1936, **BR, Annex 249**.

[543] Emmett J. Holland, *A Historical Study of Bolivia Foreign Relations 1935-1946*, The American University, Washington D.C., 1967, **BR, Annex 295**.

[544] See A. Ostria Gutiérrez, *A work and a destiny, Bolivia's international policy after the Chaco War*, 1953, pp. 65-67, **BR, Annex 281**.

357. Once both Parties secured that the circumstances of the Second World War should not become a destabilizing factor in their bilateral relations, Bolivia, taking advantage of its belligerent status against the Axe tried to resort to the good offices of the U. Administration to relaunch the negotiation of a sovereign access with Chile.[545] Chile's first reaction was not to accept Bolivia's proposal[546]; the Bolivian Government then clarified that it respected and complied with the 1904 Treaty, however, with independence of the latter, Chile had promised and had committed itself to negotiate a sovereign access to the Pacific Ocean.[547] A year later, on 26 December 1944, the President of Chile, Juan Antonio Ríos, declared to the Bolivian

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[545] During a visit paid by the President of Bolivia, Enrique Peñaranda, to President Roosevelt, on 13 April 1943, the Bolivian ambassador, Luis Fernando Guachalla, submitted a Memorandum to the Secretary of State, Summer Welles, in relation to Bolivia's landlocked condition and the need to secure an "own port on the coast of the Pacific." A. Ostria Gutiérrez, *Notes on port negotiations with Chile*, 1998, p. 4, **BR, Annex 342**.

[546] On 6 May 1943, the Chilean Chancellor, Joaquín Fernández, publicly stated that "there are no pending territorial issues between Chile and Bolivia, which were definitely settled in the Treaty of Peace and Friendship of 1904". Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, N° 280, 7 May 1943, **BR, Annex 251**. Thereafter, however, the Chilean Chancellor proposed the Bolivian Ambassador in Santiago on several occasions to initiate direct negotiations intended to solve the Bolivian port problem independently of the 1904 Treaty. Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, N° 386, 18 June 1943, **BR, Annex 253.** In June 1943, the Bolivian Ambassador proposed "to formalize through notes" the proposal repeatedly formulated by the Chancellor of Chile, to "initiate direct talks independently of the Treaty of 1904". However, Chile delayed the discussion of the matter. Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, N° 403, 25 June 1943, **BR, Annex 254**. Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Bolivia, Pedro Zilveti Arce, N° 369, 11 June 1943, **BR, Annex 252**.

[547] On 15 September 1943, Bolivian Ambassador, Luis Fernando Guachalla, submitted to U.S. Secretary of State, Cordell Hull, a new Memorandum requesting him to send a copy to the Chilean Chancellor, who would soon visit Washington. The following was affirmed in that Memorandum: "Bolivia, faithful to its tradition of respect for international pacts, does not disown the legality of the territorial dominion which Chile exercises over the Pacific coast, in accordance with the public treaties it has entered into" but that it "fosters a direct understanding with Chile on basis 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". Memorandum of the Bolivian Ambassador to the United States, Luis Fernando Guachalla, submitted to the U.S. Secretary of State, Cordell Hull, 15 September 1943, **BR, Annex 255**.

Ambassador, Fernando Campero, that his Government was open to consider a direct proposal to resolve Bolivia's landlocked situation.[548]

2. Events that followed the Agreement of 1950

358. Bolivia did not remain passive after the conclusion of the Exchange of Notes of 1950, and it cannot be said to have relinquished its rights. To the contrary, the conduct of *both* Bolivia and Chile during that period confirms their agreement to have negotiations on sovereign access to the sea, even if the negotiations could not materialize immediately. On 11 April 1952, the national revolution in Bolivia led the *Movimiento Nacionalista Revolucionario* (MNR) to the power, and its priorities entailed an additional extension of the postponement of negotiations. Notwithstanding this, a rigorous examination of the declarations by the Bolivian President, Victor Paz Estenssoro, shows that the Government of the MNR did not renounce to the agreed negotiations, and only postponed their execution so as to negotiate "on an equal footing" with Chile once collected the fruits of policies of development, including good neighbourhood and cooperation.

359. The Counter-Memorial itself refers to words of Paz Estenssoro in his letter to Siles Zuazo, dated 25 September 1950, before becoming President of Bolivia: "over the course of some fifteen or twenty years, we will have turned our Homeland into a nation much more powerful than it is today…We will then be able to approach negotiations with Chile in a peaceful and cordial manner but on an equal footing and for our mutual benefit. Paradoxically, it is not in our best interest to have the port issue immediately resolved but, rather, postpone it to some future point in time"[549]. Indeed, it was during subsequent presidencies Paz Estenssoro that clear exigencies to execute the obligation contracted in June 1950, and confirmed in 1961, were expressed. Before dwelling on them, it is worth recalling that in 1952 the President of Chile, Ibáñez del Campo, instructed his Ambassadors in La Paz

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[548] See Embassy of Bolivia´s Note Nº 242/44 of 29 December 1944, MB, II, Annex 55; CCM, Annex 135. Bolivia's Chancellor, Gustavo Chacon, referred to this statements, recalling that the concern over Bolivia's putting forward its claim before the Mexico and San Francisco Conferences, lead the President of Chile to suggest Bolivia not to do so inasmuch as: "the Bolivian port issue could be solved by mutual agreement… we would give you Arica, what would you give us?". J. Gumucio Granier, *The landlocked condition of Bolivia in the World Fora*, 1993, pp. 94-95, **BR, Annex 337**.

[549] CCM, 6.18, fn. 366.

not to abandon "*the willingness to listen to Bolivia*" regarding the direct proposals that it could formulate about its port issue.[550]

360. In 1953 Bolivia sent a Special Envoy, Jorge Escobari Cusicanqui, to Santiago. On 10 November 1953, in an interview with the Chilean Foreign Minister, Oscar Fenner Marín, the Bolivian Special Envoy proposed that the Presidents of both States sign a joint declaration in which Bolivia and Chile "reiterated their intention to settle through direct negotiations and on bases that take into account the interests of the two Republics, the Bolivian issue of obtaining a sovereign outlet to the Pacific Ocean." He further said that through the joint declaration Chile would only reiterate "a commitment made between Bolivia and Chile in the Notes exchanged in Santiago on 1 June 1950 and 20 June 1950."[551] Faced with these requirement, the Chilean Foreign Minister Oscar Fenner stated that:

> "his Government was sincerely willing to assist in the solution of the Bolivian issue, but that in order to reconcile the concurrent interest of both countries in their purpose of studying the basis for an arrangement, strictly confidential negotiations could be initiated, which –he stressed– should in no way be disclosed until the two Governments consider it convenient and suitable. Previously –he added– it would be necessary to find harmony in the internal environments of Chile and Bolivia."[552]

361. At a second meeting, held three days later, the Chilean Minister stated that "his Government had the broad purpose of assisting in the solution of the port issue of Bolivia", but that difficulties in the Chilean-Peruvian relations, as well as domestic policy problems, prevent this matter from being addressed. In any case, he added that:

> "…did not want Bolivia to interpret his response as a demonstration of indifference towards the Bolivian maritime aspiration, or as a 'step back' from the Chilean Government in the negotiations regarding the port, but that he had the

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[550] Note from the Ambassador of Chile in Bolivia, Manuel Trucco, to the Ministry of Foreign Affairs of Chile, of 15 February 1962, CCM, Annex 160, p. 19.

[551] Report entitled "Declaration regarding the port issue," from the Special Envoy of Bolivia to Chile, Jorge Escobari Cusicanqui, to the Minister of Foreign Affairs of Bolivia, Walter Guevara Arce, of 31 December 1953, p. 3, **BR, Annex 282**.

[552] Report entitled "Declaration regarding the port issue," from the Special Envoy of Bolivia to Chile, Jorge Escobari Cusicanqui, to the Minister of Foreign Affairs of Bolivia, Walter Guevara Arce, of 31 December 1953, p. 7, **BR, Annex 282**.

confidence that once that adverse environment dissipated, Bolivia and Chile could resume these negotiations in order to satisfy the Bolivian claim"[553].

362. That same day, the Bolivian Special Envoy met with Chilean President, Carlos Ibáñez del Campo, who reiterated that it was not convenient to address the port issue of Bolivia at that time. However, in line with what Foreign Minister Fenner stated, Ibáñez del Campo affirmed: "This is a question –he said– that is also of concern to the Government of Chile, which is willing to consider it with due attention in due course."[554] These statements clearly show the agreement existing between Chile and Bolivia to have negotiations on sovereign access to the sea, and to resume them when it would prove possible.

363. On 17 February 1963, Bolivian Minister of Foreign Affairs, José Fellman Velarde, delivered a memorandum to the OAS Council President, Gonzalo Facio, who at the time was working out solutions to resume diplomatic relations between the Parties.[555] The first point reiterated that Bolivia did not seek to modify the legal regime of the 1904 Treaty, and proposed the cession by Chile of "A port enclave, with the attributes of sovereignty recognized by international law, connected or easy to connect to the Antofagasta-La Paz railway." In exchange, Bolivia would be willing to "facilitate to Chile, to the extent that this

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[553] Report entitled "Declaration regarding the port issue," from the Special Envoy of Bolivia to Chile, Jorge Escobari Cusicanqui, to the Minister of Foreign Affairs of Bolivia, Walter Guevara Arce, of 31 December 1953, p. 9, **BR, Annex 282**.

[554] He added that "in order to solve this problem, the cooperation of international entities such as the United Nations and the Organization of American States should be taken into account, and that specially the countries bordering Bolivia could also participate in an Americanist settlement." Report entitled "Declaration regarding the port issue," from the Special Envoy of Bolivia to Chile, Jorge Escobari Cusicanqui, to the Minister of Foreign Affairs of Bolivia, Walter Guevara Arce, of 31 December 1953, p. 10, **BR, Annex 282**.

[555] In October 1962, the Chancellors of Bolivia and Chile, Jose Fellman Velarde and Carlos Martinez Sotomayor, respectively, initiated informal talks on the resumption of diplomatic relations and agreed that the parties would prepare minute drafts on the matter. Chile submitted its draft minutes on 3 November 1962. Bolivia for its part proposed to insert into the text of the minutes a clause establishing that direct negotiations on the maritime problem, under the terms of the Note of 20 June 1950 and the Memorandum of 10 July 1961, should be included among the questions that would be considered after diplomatic relations are resumed. U. Figueroa Pla, *The Bolivian Maritime Claim before International Fora*, 2007**,** pp. 97-98, **BR, Annex 360.**

does not mean serious prejudice, the use of waters of those international courses that are common dominion to both countries."[556]

364. On 27 March 1963, the Chilean Minister of Foreign Affairs denied the legal value of the Memorandum Trucco of 1961[557]. As a reaction, the Bolivian Minister Fellman Velarde, in a public address on 3 April 1963 stated:

> "The exchange of Notes of 1 and 20 June 1950, according to the norms of International Law, constitutes a formal commitment between Bolivia and Chile in order to give Bolivia an own and sovereign outlet to the Pacific Ocean and to give Chile, in return, an appropriate compensation that is not territorial in nature. This commitment is inseparable from the legal regime governing the relations between Bolivia and Chile and is guaranteed, as any other exchange of Notes, by the faith of both States and their national honor."

Fellman Velarde continued:

> "What the Bolivian Government is doing now therefore is not artificially bringing up the issue of its landlocked condition, but calling on the Chilean government to comply with these commitments…
>
> What the Bolivian government wants, in accordance with the solemn commitment that the notes of June 1950 signifies, is to sit down with Chile's representatives at the negotiating table and negotiate an agreement taking into account their mutual interests, an agreement that will be of benefit to Bolivia and of benefit of Chile."[558]

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[556] Note from the Minister of Foreign Affairs of Bolivia, José Fellman Velarde, to the President of the OAS Permanent Council, Gonzalo Facio, 17 February 1963, **BR, Annex 286**.

[557] Speech of the Minister Foreign Affairs of Chile, 27 March 1963, CMC Annex 164.

[558] Speech of the Foreign Minister of Bolivia, Jose Fellman Velarde, in response to the statements made by the Foreign Minister of Chile, Carlos Martinez Sotomayor, 3 April 1963, **BR, Annex 287**. An official publication entitled "Towards the sea: Transcendental documents" prepared by the Press Office of the Ministry of Foreign Affairs of Bolivia in 1963 published, together with the speeches made by both Foreign Ministers, the Notes of June 1950 and the Trucco Memorandum, stating in its introduction that Bolivia "does not request a revision of the 1904 Treaties", but rather "the fulfillment of commitments. And the Note of the Chilean Chancellery of 20 June and the Memorandum of 10 July 1961 are commitments… In international politics, documents bear witness of the word pledged, although these are often overlooked." Press Office of the Ministry of Foreign Affairs of Bolivia, Towards the Sea, transcendental documents (1963), p. 8, **BR, Annex 288**.

365. A comuniqué by the Bolivian Ministry of Foreign Affairs, dated 14 June 1963, stated in its first point the decision to not resume diplomatic relations with Chile "until it complies with the commitments made to Bolivia through the exchange of Notes of June 1950."[559]

366. On 6 August 1963, President Paz Estenssoro, in his intervention before the Bolivian Congress stated—"in regard to the matter of its reintegration with the sea, [Bolivia] demands the fulfillment of the promises made by the Government of Chile in June 1950 and July 1961 […]; when the Government of that country expresses its willingness to comply with the commitments assumed in June 1950, Bolivia will not refuse to resume diplomatic relations between the two countries, with a view to seeking a friendly and fair solution to the Lauca River issue, and to contribute to the creation of a climate conducive to an understanding of mutual coexistence in the port issue."[560]

367. It is incorrect to contend, as the Counter-Memorial does, that Chile rejected in official and clear terms the proposal of Fellman Velarde; at best, there was an informal contact, "una gestión oficiosa" (in the words of Conrado Ríos)[561], initiated when Fellman and Ríos had the opportunity to meet in Asunción where they attended as chiefs of their respective special missions to the investiture of General Stroessner, as the new President of Paraguay.[562] After this meeting, private letters were exchanged.[563] In any event, it should be noted that Conrado

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[559] "Bolivia firmly maintains its decision not to resume relations with Chile", *El Diario* (Bolivia), 15 June 1963, **BR, Annex 289.**

[560] Message from the President of the Republic of Bolivia, Dr. Victor Paz Estenssoro, to the Honorable Congress, 6 August 1963, p. 101, **BR, Annex 290.**

[561] C. Rios Gallardo, An informal Chilean-Bolivian contact, 1966, **BR, Annex 293**.

[562] In a meeting held by Fellman Velarde and Rios Gallardo, the former stated that "the note sent by Foreign Minister Walker and the Trucco Memorandum have opened the door to a port negotiation and I have requested that a statement be made in regard to both documents, but I have not obtained it." C. Rios Gallardo, *An informal Chilean-Bolivian contact*, 1966, p. 37, **BR Annex 293.**

[563] In the Letter of 25 September 1963, sent by Fellman Velarde to Conrado Ríos, the former told the latter that "no Bolivian Government would ever renounce, in the substance more than in the formal aspects, the commitments made by Chile in 1950 and in 1961", **BR, Annex 291**. See also Letter of 4 November 1963, reproduced in CMC, Annex 166). In Letter of 13 January 1964, Fellman Velarde stated that he understood that "the Government of Chile does not want to renounce the rights provided by the 1904 Treaty and I am

Ríos was not member of the Government at that time, nor did he act on its behalf. No other source is provided by Chile to support its contentions in this respect.

3. The Alleged Period of 'Silence' between 1963 and 1974

368. Chile claims that Bolivia's Memorial "says nothing at all about the period from 1963 to 1974".[564] The diplomatic relations had been suspended on 15 April 1962 (due to Chile's execution of its plans to divert waters of Lauca River), and Bolivia had subjected the resumption of those relations to the start of the negotiation of its sovereign access to the Pacific Ocean. However, this would not be a period of "silence" between Chile and Bolivia, as Chile claims. In 1963, the Bolivian Government subjected the resumption of diplomatic relations to the start of direct negotiations on the sovereign access to the Pacific Ocean in conformity with the agreement resulting from the notes of 1950 and the memorandum Trucco of 1961.[565]

369. Despite the difficult circumstances, dominated by an absence of diplomatic relations, the obligation to negotiate expressly invoked by Bolivia in 1962 and 1963, as mentioned above, was reiterated in 1964 and 1967. This shows the selective omissions and loopholes that Chile seeks to create.

370. There were informal contacts, such as the conversations held on 14 August 1965, between the President of Chile, Eduardo Frei Montalva, and Alfredo Alexander Jordán, Bolivia's Ambassador to Spain, requested by the President of Bolivia, Rene Barrientos. According to Pinochet de la Barra, Under-secretary of Foreign Affairs who attended this meeting, the Chilean President stated, when saying good-bye to Ambassador Alexander, that "we must resume relations the soonest possible…" and added "Sir, if it were up to me, Bolivia should have a sovereign access to the sea…"[566]

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confident –he added– that you will also understand that the Bolivian Government does not want to renounce the expectations raised by the Note of June 1950", **BR, Annex 292**.

[564] CCM, para 6.30.

[565] U. Figueroa Pla, *The Bolivian Maritime Claim before International Fora*, 2007, pp. 95-99, **BR, Annex 360**

[566] O. Pinochet de la Barra, *Chile and Bolivia: How much longer!* 2004, p. 72, **BR, Annex 352**.

371. On 8 April 1967, René Barrientos, already acting as Constitutional President of Bolivia, addressed a letter to his Uruguayan counterpart, Oscar Gestido, to explain the other Presidents in the region his absence in the *summit* in Punta del Este because the issue of the landlocked situation of Bolivia had not been included in the agenda. In this letter the President of Bolivia referred to every antecedent of Chile's undertakings to negotiate, stating— "Finally, in the year 1950, in direct negotiations and through an exchange of notes, Bolivia and Chile sealed an express commitment to 'searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests.'" And he added: "The unshakeable belief that the existing commitments must be fulfilled assign meaning to the attitude adopted by Bolivia as to its claim that the obstacles to its full development be overcome, thus seeking to ensure the peace and progress of this part of the continent."[567]

372. The letter was replied to by the Chilean Minister of Foreign Affairs, on 29 May 1967, in regard to the Notes of 1950, he affirmed: "…Negotiations did not even start…"; in regard to the *Trucco Memorandum* he affirmed*:* "it is a document by which Chile reaffirmed once more that it was open to listen to Bolivia in direct talks and rejected the intervention of international organizations in the dispute. The memorandum did not entail any commitment and even if it did, it should be voided, since the first attitude of Bolivia in 1962, after breaking off diplomatic relations with Chile, was resorting to the Organizations of American States" [568].

373. Chile cannot credibly claim that there were periods of silence. Concerning the first point, the fact that negotiations had not even started did not entail the annulment of the obligation to negotiate; the parties' representatives understood that they were entering a waiting period[569]. In 1953, when Bolivia believed that the negotiations could be commenced

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[567] 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.

[568] CCM, Annex 171.

[569] See Note Nº 844/513 of 9 September 1950, from the Bolivian Ambassador in Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs, Pedro Zilveti Arce, **BR, Annex 275**. See also "Ambassador Ostria spoke of the Chilean-Bolivian port problem in La Paz", El Diario Ilustrado (Chile), 6 January 1951,

it found that Chile believed that they should wait for "the proper time"[570]. In 1961, Chile reinserted this question into the bilateral agenda with the Trucco Memorandum. Ostria Gutiérrez, Walker Larrrain and President González Videla, far from affirming that there was no commitment, as asserted by Valdes, stated the opposite, i.e. that there was an "agreement" to negotiate, although the negotiation was pending and nothing had been concretized on its content. Furthermore, the rupture of diplomatic relations and appealing to international organs cannot entail a termination of the agreements entered into by the parties. The conclusion that Bolivia did not rebut the affirmations made by the Chilean Minister "and its failure to do so has probative value"[571], cannot however be accepted. As the Parties had already made known their respective positions, there was no point insisting, and place the other presidents in an endless cross-fire of exchanges.

374. The above mentioned documents clearly demonstrate that, following the *Memorandum Trucco*, and even in the absence of diplomatic relations, Bolivia, through the highest representatives of the State, kept the Notes of 1950 and the *Memorandum Trucco* of 1961 as existing commitments, in force and legally binding under international law. Eventually, Bolivia's position will be supported by the conclusion of the 1975 Joint Declaration.

375. During the mandates of Eduardo Frei Montalva and Salvador Allende, Bolivia and Chile carried out confidential *démarches* to resume diplomatic relations on the basis of reactivating negotiations related to Bolivia's sovereign access to the Pacific Ocean. In November 1970, the Consul General of Bolivia in Santiago, Franz Rück Uriburu, informed the Bolivian Chancellery of the progress made in the negotiation with the Government of President Eduardo Frei. In that report, the procedural agreements entered into to resume diplomatic relations and the negotiation on sovereign access are both described. The first step had to be a "simultaneous statement …by the two Governments to the effect that they are

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BR, Annex 277, and A. Ostria Gutiérrez, Apuntaciones sobre las Negociaciones Portuarias con Chile (Notes on port negotiations with Chile), 1998, p. 202, **BR, Annex 342**.

[570] Report entitled "*Declaration regarding the port issue*" from the Special Envoy of Bolivia to Chile, Jorge Escobari Cusicanqui, to the Minister of Foreign Affairs of Bolivia, Walter Guevara Arze, 31 December 1953, **BR, Annex 282**.

[571] CCM, para 6.16 *d, in fine.*

thereby resuming their diplomatic relations" and simultaneously both "Governments will make the statements they regard appropriate on the resumption of relations"[572]. The next step in the negotiation on sovereign access was communicated in the following terms:

> "Once relations are re-established, the Bolivian diplomatic agent to Santiago will sent a note to the Foreign Minister of Chile, requesting: a) a meeting or b) a written response 'to continue the negotiations specified in the Notes exchanged by the two Governments on 1 and 20 June 1950, signed by the Bolivian Ambassador, Mr. Alberto Ostria Gutiérrez and Chilean Foreign Minister, Mr. Horacio Walker Larraín, to secure a sovereign port for Bolivia on the Pacific Ocean'".[573]

376. In April 1971, at the OAS General Assembly held in San Jose de Costa Rica, the Chancellors of Bolivia and Chile, Huascar Taborga and Clodomiro Almeyda, held talks on the steps to resume diplomatic relations and the question of sovereign access to the sea. To this end, the procedure to be followed was discussed and an agreement was reached to issue "a joint declaration and two subsequent and simultaneous declarations by both Presidents, the wording of which would be alike and would address the negotiations, thus updating the Notes exchanged by both Governments in 1950".[574] In a meeting held on 13 August 1971, between Bolivia's Consul General, Franz Rück Uriburu, and Chilean Chancellor, Clodomiro Almeyda, the former submitted a draft of joint declaration to resume diplomatic relations; point two of the draft read as follows:

> "The Governments of Bolivia and Chile have resolved to continue the negotiations agreed to in the Notes exchanged by both Governments on 1 and 20 June 1950 and signed by the Foreign Minister of Chile. Mr. Horacio Walker Larraín and the Bolivian Ambassador to Chile, Mr. Alberto Ostria Gutiérrez, to which end the two Governments hereby declare that these documents are in full force"[575].

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[572] Report by Bolivia's Consul General in Santiago, Chile, Frank Rück Uriburu, to the Minister of Foreign Affairs and Worship of Bolivia, Emilio Molina Pizarro, of 19 November 1970, **BR, Annex 296.**

[573] Report by Bolivia's Consul General in Santiago, Chile, Frank Rück Uriburu, to the Minister of Foreign Affairs and Worship of Bolivia, Emilio Molina Pizarro, of 19 November 1970, **BR, Annex 296.**

[574] See the Minutes of the meeting held between the Foreign Ministers of Bolivia and Chile in San Jose, Costa Rica, drafted by the Undersecretary of Foreign Affairs of Bolivia, Fernando Laredo, 14 April 1971, **BR, Annex 297**.

[575] Draft of the Joint Declaration submitted by the General Consul of Bolivia in Santiago to the Minister of Foreign Affairs of Chile, 13 August 1971, **BR, Annex 298**.

377. Chile had once again accepted to negotiate with Bolivia a sovereign access to the sea, however, the subscription of the joint declaration was brought to a halt due to the change of Government in Bolivia. Nonetheless, soon after the new Bolivian Government, headed by President Hugo Banzer Suárez, renewed conversations on sovereign access with the Government of Chilean President Salvador Allende. These new talks were carried out by the Directors of the Integration Offices of both countries, Juan Pereira Fiorilo on behalf of Bolivia and Juan Somavía on behalf of Chile. In a confidential report sent to the Bolivian Minister of Foreign Affairs in September 1973[576], Pereira Fiorilo informed that an agreement had been reached with the Chilean representative to discuss in the following meeting of the Bolivian-Chilean Commission:

> "[T]he possibility that Chile gives a corridor between the border with Peru and part of the territory Arica Department (to the north of Arica city) but with the utilization of the Chilean port system in that city, with the following alternatives:
>
> a) Cession of the corridor with full Bolivian sovereignty.
>
> b) In the event that Peru opposes to this, cession of the corridor with the right to utilization, in perpetuity, in accordance with the thesis put forward by Chilean former Foreign Minister Gabriel Valdez Larraín."[577]

378. Unfortunately, the following meeting could not be held, as the Government of President Allende was overthrown by a *coup d'Etat* on 11 September 1973. Two years later, the 1975 Joint Declaration of Charaña made possible to resume negotiations.

B. Chile misinterprets its responsibility for the failure of Charaña

379. Chile concludes Chapter VII of its Counter-Memorial, on the Charaña process, (1975-1978) stating that: "The discussions ultimately failed because Peru was unwilling to consent to the proposal and Bolivia changed its position on the condition of territorial exchange and then brought the negotiations to an abrupt halt […]", According to Chile, Bolivia withdrew from negotiations. Chile also claims that "any legal obligation that could be said to have

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[576] Classified Report STI – Nº 3303 – 73 of 11 September 1973, was published by Juan Pereira Fiorilo himself in 1983. "Reserved report on port negotiations with Allende", *Hoy* (Bolivia), 3 December 1983, **BR, Annex 320**.

[577] "Reserved report on port negotiations with Allende", *Hoy* (Bolivia), 3 December 1983, **BR, Annex 320.**

arisen for Chile through the Charaña process would have been discharged by the fact that over a sustained period the two States engaged in meaningful negotiations. No obligation would have survived the termination of discussions by Bolivia"[578]. This is simply incorrect, and it does not stand the scrutiny of the facts.

380. The Parties established the basis for a negotiation with concrete proposals.[579] Bolivia accepted to negotiate in "general terms" motivated by the conviction that Chile would eventually adjust its position over the course of that process, extended for a period of three years. The finding that the exchange of territories had become a rigid prerequisite for the Chilean Military Junta led to the failure of the negotiations. To the extent that the resumption of diplomatic relations had been conditioned to this process, this failure led to their suspension.

381. However, even if Bolivia were to be responsible for the failure of the round of negotiations of Charaña, this could not terminate the obligation to negotiate. This obligation remains alive so long as no settlement or agreement is reached (1). The conduct of the Parties after 1978 confirms that they still considered negotiations as needed. Even if the responsibility of the failure of a round of negotiations were to be relevant, *quod non*, it is not true to claim that Bolivia is responsible for the failure of the Charaña process (2).

1. The Obligation to Negotiate has not terminated

382. Chile claims that Bolivia is unable to indicate on which date the obligation upon Chile to negotiate a sovereign access to the sea would have emerged[580]. Though continuously denying the existence of such an obligation, Chile assures that, supposing it had ever existed, it would merely have been an obligation "of limited scope and duration"[581], and states that it would be extinguished today. Chile's construct is incorrect. The obligation to negotiate arose at the time that the first unilateral Chilean commitments were made. While Bolivia accepts

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[578] CMC, para. 7.56.

[579] The Bolivian proposal in BM, II, Annex 174 (CCM, Annex 178); Banzer demanded a response (ibid. Annex 69); Pinochet responded to Banzer (ibid., Annex 70); Chile's counterproposal, (ibid., Annex 73); Bolivia's acceptance (ibid., Annex 71).

[580] CMC, para. 1.5. and 4.27.

[581] CMC, para. 4.25.

that questions of inter-temporal law or of precise terminology might be raised in respect of a particular early pledge, the critical question before the Court, however, is not *when* the obligation *first* arose, but *whether* Chile is *at the present time* bound by the obligation. The accumulated evidence of more than a century of dealings between the Parties leaves no room for doubt that the obligation existed, was periodically acted upon, and was reaffirmed, up to the time until its repudiation by Chile led to the institution of these proceedings.

383. As the Bolivian Counsel explained in his reply to the question of Judge Greenwood during the pleadings on the preliminary objection[582], this obligation emerged as early as the first unilateral Chilean pledges were made, each of them having committed Chile as it will be demonstrated with more details below. Afterwards, this obligation was consolidated following a long cumulative process[583]. What is at stake here is the alleged extinguishment of the obligation to negotiate a sovereign access to the sea for Bolivia.

384. Chile, well aware that it will prove difficult to deny an obligation that it has so many times recognized and began to comply with, claims that this obligation cannot possibly have been "unlimited in time"[584]. Stuck in a deep misinterpretation on what is an obligation to negotiate and on how it emerges, Chile argues that "Where there have been good faith, meaningful efforts to negotiate over a period of time that is reasonable in the circumstance, an obligation of conduct will be discharged"[585].

385. To demonstrate that it is thus released from any obligation, Chile tries to take advantage from the *Case of the Railway Traffic between Lithuania and Poland*, affirming that:

> "In *Railway Traffic between Lithuania and Poland*, in holding that there was no obligation to reach a result, the Permanent Court considered that negotiations need only be pursued 'as far as possible'"[586].

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[582] CR 2015/21, pp.33-34.

[583] See infra. Section C.

[584] CMC, para. 4.25.

[585] CMC, para. 4.39.

[586] CMC, para. 4.39.

386. However, the exact terms used by the Permanent Court were the following:

> "The Court is indeed justified in considering that the engagement incumbent on the two Governments in conformity with the Council's Resolution is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements"[587].

The word "only" added by Chile enables it to introduce a restriction which is absent. The Court considers that the commitment of the parties is to pursue negotiations "as far as possible". For Chile, negotiations shall *only* be pursued as far as possible. The nuance is significant.

387. Having embarked upon a process aimed at rejecting any obligation upon itself, Chile cannot but distort the fact-based reality of the long history of its relations with Bolivia to try to convince the Court that, against all evidences, in the case that such an obligation had existed, it would be extinguished today. Chile wrongly believes it can to this end interpret the fact that negotiations were interrupted or suspended during two certain periods of time, in 1950 and 1975. According to Chile, these situations would represent definitive failures and these would be imputable to Bolivia, which would confirm the extinguishment of any obligation upon Chile. This does not correspond to the reality, neither after the Exchange of Notes in 1950[588] nor after the so-called Charaña process that included a Joint Declaration followed by an exchange of letters[589].

388. There are no arguments to support the conclusion that the absence of negotiations following the Exchange of Notes in 1950 may be interpreted as leading to the extinguishment of the obligation to negotiate. These Notes had been long prepared at diplomatic level and did not set any delay to conduct negotiations until final achievement, nor did they in any way prohibit the parties to resume them whatever the duration of the delay.

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[587] Railway Traffic between Lithuania and Poland, Advisory Opinion of 15 October 1931, Series A/B, N° 42, p. 116.

[588] See Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Chile, Horacio Walker Larraín, N° 591/21, 1st June 1950, **BR, Annex 265**, and Note from the Bolivian Ambassador to Chile, Alberto Ostria Gutiérrez, to the Minister of Foreign Affairs of Chile, Horacio Walker Larraín, N° 9, 20 June 1950, **BR, Annex 266**.

[589] See BM, Annexes 111, 71 and 73.

389. Furthermore, Chile fails to tackle the central argument in this respect: if there had been no obligation to negotiate entered into in 1950 and maintained afterwards, why would Chile on 10 July 1961, through its Ambassador in La Paz, Manuel Trucco, have reconfirmed its willingness to examine again a way to provide Bolivia with a sovereign access to the sea?. And why would Chile have accepted again to enter into negotiations on this subject matter in the 70s?

390. The same analysis applies to the statements of Chile regarding the failure of the Charaña process, the responsibility of which it blames on Bolivia. As evidenced below, this thesis was clearly erroneous [590]. The failure of these negotiations resulted from the uncompromising attitude of Chile regarding an exchange of territories and also from the way Chile had interpreted the obligation it had to consult Peru on the issue. This failure cannot have terminated the obligation to negotiate. The Chilean Foreign Minister in its note of 19 December 1975, in reply to the note of his Bolivian counterpart (and as such part of an exchange of letters committing both States) himself establishes a connection between the end of the obligation to negotiate and the conclusion of an agreement:

> "Once the final agreement has been reached, a solemn testimony will be made mentioning that the territorial cession that permits the sovereign access to the sea represents the full and definite solution to the landlocked situation of Bolivia"[591].

391. In reality, the Charaña negotiations were as such the evidence of the continuity of the negotiations process in the common understanding of both States, as well as of the non-extinguishment of the obligation following the 1950 Exchange of Notes. Likewise, Chile entering a new phase of negotiations in the 1980s is further evidence that neither Chile nor Bolivia considered the obligation to negotiate extinguished.[592].

392. All elements regarding the resumption of negotiations as well as the Bolivian concrete proposals then submitted to Chile in 1986 and 1987 can be found in Chile's Counter

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[590] For the detailed analysis of these negotiations, see Section B (2).

[591] BM, Annex 73, CMC, Annex 180.

[592] See CMC, Annex 291.

Memorial.[593] Accepting meetings, receiving proposals, and announcing their consideration, does that not mean negotiating?

393. Further, both the resolutions of the General Assembly of the OAS from 1979 onward, declaring the landlocked situation of Bolivia as of "hemispherical interest", and the declarations by the Chilean representatives shortly after the failure of the Charaña process, are not compatible with the assertion according to which the obligation to negotiate would be extinguished. The Chilean delegate himself declares the opposite and affirms the continuous character of its country's commitment and of its respective subject matter in its declaration of 31 October 1979:

> "On repeated occasions I have indicated Chile's willingness to negotiate with Bolivia a solution to its aspiration to have a free and sovereign access to the Pacific Ocean"[594].

2. Chile's responsibility for the failure of the Charaña process

394. Bolivia will devote the present section to prove that the failure of the Charaña process was not attributable to Bolivia. For this purpose, Bolivia will address: Chile's mistaken description of the question of the territorial exchange (1); then, Chile`s lack of diligence to negotiate with Peru (2); and, finally, Bolivia`s efforts to push forward the negotiation (3).

1) Chile's misleading description of the question of territorial compensation

395. Given the legal nature of the Joint Declaration of Charaña, it is clear that the negotiations between 1975 and 1978 were conducted as a legal consequence of the agreement "to seek formulas for solving the vital matters that both countries face, such as the landlocked situation that affects Bolivia".[595] In this context, Bolivia and Chile presented bases of negotiation in August and December 1975, whose main coincidence was to grant Bolivia sovereign access to the Pacific Ocean.

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[593] CMC, para. 8.38. and 8.39.

[594] BM, Annex 204.

[595] CCM, Annex 174.

396. Contrary to the facts, Chile submits that in the months that followed its reply of 19 December 1975 (submitted orally on the 12th of the same month) "Bolivia repeatedly reaffirmed its acceptance of these guidelines, including the condition of territorial exchange".[596] Bolivia therefore emphasizes that the two relevant issues in this instance are, on the one hand, the parties' agreement for Bolivia to obtain sovereign access to the Pacific Ocean and, on the other hand, the question concerning "compensations" that Bolivia would make to meet the interests of Chile.

397. As for the first issue, it should be noted that there was no discrepancy during the entire negotiation. The terms of the February 1975 Joint Declaration, of Bolivia's August proposal and Chile's December response, and of the numerous statements by the authorities of both parties, and even those of Peru, in the years that followed, are unequivocal proof that there was a firm intention to grant Bolivia sovereign access to the Pacific Ocean.

398. However, the question concerning the compensations that Chile would receive in exchange for granting Bolivia sovereign access to the sea was not the subject of a definitive agreement. Although Bolivia was willing to negotiate all the proposals made by Chile, including the condition of territorial exchange, this could not mean an automatic acceptance; Bolivia stated in due course that this condition was subject to the clarification of other elements introduced by Chile in its reply of 19 December 1975.

399. As has already been described in the Memorial[597], Bolivia submitted a proposal to Chile on 26 August 1975 which was consistent with the agreements, commitments and prior conduct to negotiate a sovereign access. In that document, Bolivia did not propose territorial compensations because they were never provided for in the agreements or commitments on sovereign access. However, given the mutually convenient nature of finding a solution for Bolivia's landlocked condition, Bolivia informed Chile that:

> "The Government of Bolivia will be willing to consider, as a fundamental affair of the negotiation, the contributions that may correspond, as an integral part of an understanding that consults mutual interests."[598]

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[596] CCM, para 7.20.

[597] BM, para. 144-146.

[598] BM, Annex 174.

400. Chile's response to Bolivia's proposal was not immediate. Before giving it, Chile used the press to introduce to the negotiating table and public opinion the condition of territorial exchange. Thus, due to an editorial published in the Chilean newspaper *El Mercurio*, which referred to territorial compensation in exchange for Bolivia's sovereign access to the sea, the Ambassador of Bolivia was forced to clarify, on 18 November 1975, to the Bolivian Ministry of Foreign Affairs, that "at no time, since I started discharging my functions, have I referred to territorial compensations; what's more, I am totally against that form of compensation".[599] That editorial was not an isolated event.

401. Chile began to introduce the question of territorial exchange into the bilateral negotiation in November 1975. The Bolivian Ambassador informed his Foreign Ministry once again that in the two meetings with the Chilean Foreign Minister, Patricio Carvajal, on 13 November and 9 December 1975, the latter introduced the requirement of territorial exchange as a condition to solve the problem of Bolivia's landlocked condition. The terms of the report of 9 December 1975 are as follows:

> "3 .- In regard to the formula of compensation via barter, or exchange of territories, I told the Chilean Foreign Minister that the mere mention of this condition had caused a strong negative reaction and a feeling of frustration and discouragement in the Government and that it might give place to strong opposition. I stated that we believed we had already made way too many sacrifices in the past, not only in 1879 but also in 1904 and that to the Bolivian Government, this proposal was sudden and even unjust and contrary to equity. 'To the Government of my motherland', I stated 'it is too much of a high price and too hard to explain to our people'"[600]

402. However, far from definitively ruling out the Chilean condition, the Bolivian Ambassador told the Chilean Foreign Minister:

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[599] Note from the Bolivian Ambassador to Chile, Guillermo Gutiérrez Vea Murguia, to the Minister of Foreign Affairs and Worship of Bolivia, Alberto Guzman Soriano, N° 625/244/75, 18 November 1975, **BR, Annex 304**. See also Note from the Bolivian Ambassador to Chile, Guillermo Gutiérrez Vea Murguia, to the Minister of Foreign Affairs and Worship of Bolivia, Alberto Guzman Soriano, N° 674/259/75, 9 December 1975, **BR, Annex 305**.

[600] Note from the Bolivian Ambassador to Chile, Guillermo Gutiérrez Vea Murguia, to the Minister of Foreign Affairs and Worship of Bolivia, Alberto Guzman Soriano, N° 674/259/75, 9 December 1975, **BR, Annex 305**.

> "[I]n Bolivia, the possibility of a territorial exchange has found strong opposition and Chile's proposal is not regarded as a *generous solution*, but, in any case, within *very fast-paced* negotiations and the general context of an agreement between the two countries, it is not Bolivia's intention to prematurely close any path to a possible understanding."[601]

403. Shortly thereafter, on 12 December 1975, the Chilean Foreign Minister, Patricio Carvajal, verbally explained his country's response to the Bolivian Ambassador, including the condition of territorial exchange. The representative of Bolivia replied on 16 December 1975, stating that he accepted:

> "[T]he general terms of the Chilean Government's response to the proposal presented by means of the Aide Memoire of 26 August of this year, regarding the framework for the negotiation that enables reaching an adequate solution to Bolivia's landlocked situation".[602]

404. Therefore, Bolivia's acceptance was based on the points of agreement that emerged from both proposals, the common denominator of which was the negotiation related to sovereign access. This fact was evidenced by the concrete and specific gratitude of the Bolivian government to that of Chile's for its decision to "grant to Bolivia a sovereign maritime coastline, linked to Bolivian territory by an equally sovereign strip of territory"[603]; it was further reported that:

> "the other proposals set forth in the Aide Memoire of 26 August, and those expressed by Your Excellency, will be subject to negotiations that contemplate the satisfaction of mutual interests"[604].

405. Three days later, on 19 December 1975, at the request of Bolivia, Chile reiterated its oral reply of 12 December 1975 in writing. Chile has referred to statements by Bolivian authorities, contending that Bolivia had accepted the exchange of territories without

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[601] Note from the Bolivian Ambassador to Chile, Guillermo Gutiérrez Vea Murguia, to the Minister of Foreign Affairs and Worship of Bolivia, Alberto Guzman Soriano, N° 674/259/75, 9 December 1975, **BR, Annex 305**. (emphasis in the original).

[602] Note Nº 681/108/75 of 16 December 1975, BM Annex 71, CCM, Annex 178.

[603] Note Nº 681/108/75 of 16 December 1975, BM Annex 71, CCM, Annex 178.

[604] Note Nº 681/108/75 of 16 December 1975, BM Annex 71, CCM, Annex 178.

conditions.[605] However, these statements only confirm Bolivia's position on the condition of the territorial exchange in the terms laid down in the note of 16 December 1975.

406. On 21 December 1975, the President of Bolivia, Hugo Banzer, stated that "the Government of Chile accepted to grant Bolivia a maritime coastline to the north of Arica with a connecting territory, with a transfer of sovereignty. Such acceptance, which addresses a vital issue raised in the Bolivian proposal, has been agreed to by the National Government". Regarding the question of territorial exchange, he pointed out that his Government "is responsibly considering this proposal, and procuring that whichever the outcome, it does not limit the development of our country". [606] The President of Bolivia, confirmed this understanding stating that:

> "Global acceptance means that we accept the Chilean proposition of granting us an outlet to the sea, by means of a strip of land that has territorial continuity from our border to the coast, and where we can fully exercise sovereignty. Everything else is subject to negotiation"[607].

407. The Bolivian Foreign Minister also detailed in an interview published on 1 January 1976 that:

> "The Bolivian proposal, itself having many points, has been responded by Chile in great detail, but it must be said that both countries are relying on the assumption that none of these items predetermine any solution of our vital problem. These are subject to negotiation, and I repeat, they are not required conditions in order for obtaining our outlet to the sea.
>
> There has been a lot of talk in the Chilean press, lately, about the matter of demilitarization. In any matter of this nature, these would be proposals to be negotiated. What is essential here is that Chile has already made the commitment to cede territory.

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[605] CCM, para. 7.20-7.21.

[606] "Government 'globally accepts Chilean response'", *Los Tiempos* (Bolivia), 22 December 1975, CCM, Annex 183. A few days later, President Banzer stated that "it would not be him or his cabinet who decide on Chile's response to the proposal for an exchange of territory as a solution to Bolivia's geographical confinement. "Banzer: It will be the people who decide on the agreement with Chile", *Presencia* (Bolivia), 30 December 1975, CCM, Annex 185.

[607] *Que Pasa* Magazine (Chile), Nº 257, 15 January 1976, extract quoted in, R. Prudencio Lizon, *History of the Charaña Negotiation* (2011), pp 143-144, **BR, Annex 366**.

> Bolivia has accepted everything that is consistent with its proposal but has left the rest to negotiations. Evidently, there is no expectation that everything has been so coordinated and so closely meshed that the Chilean response will match our proposal"[608].

408. Consistent with that position, the Bolivian Foreign Ministry published a communiqué on 5 January 1976 stating that acceptance of territorial exchange was subject to "clarification" regarding the maritime area:

> "3. The acceptance of simultaneous exchange of territories is subject to a clarification regarding the maritime area, in view of the fact that the extent of jurisdictional waters, territorial sea and patrimonial sea has not yet been defined by the International Community"[609].

409. On 17 February 1976, the Bolivian Ambassador held a meeting with Chile's Chancellor, informing him that it was unacceptable for Bolivia to give compensations for jurisdictional and patrimonial waters, because there was no legal precedent on the Chilean demand for compensation for two hundred miles[610].

410. In this regard, on 10 March 1976, Foreign Minister Guzman Soriano told the press:

> "We have categorically declared that we accept global bases of negotiation that take into account the reciprocal interests of our two countries, particularly as regards those matters on which there is common ground between us. All other matters contained in the documents forming the background to the negotiations, i.e. Bolivia's proposal and the Government of Chile's response, would be addressed at a later stage of the negotiations. [...]"[611].

411. Against this background, the course of the negotiations in 1976 was devoted to the prior solution of questions in which there was no agreement between the parties (known as

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[608] "Foreign Minister Guzman Soriano: We will give compensation that does not compromise our development", *Presencia* (Bolivia), 1 January 1976, CCM, Annex 187.

[609] "Basic documents that substantiate the Bolivian-Chilean agreement in regard to the maritime issue", El Diario (Bolivia), 6 January 1976, **BR, Annex 306**.

[610] Note from the Bolivian Ambassador to Chile, Guillermo Gutiérrez Vea Murguía, to the Minister of Foreign Affairs and Worship of Bolivia, Alberto Guzmán Soriano, No 130/85/76, 19 February 1976, **BR, Annex 307**.

[611] "Bolivia has not assumed definitive commitments with the Chilean Government", El Diario (Bolivia), 11 March 1976, CCM, Annex 195.

the "edges", *aristas*). Thus, on 15 March 1976, the Bolivian Ambassador to Santiago, Guillermo Gutiérrez Vea Murguía, declared:

> "It has been categorically stated [-he said–] that the global negotiation bases that take into account both countries' reciprocal interests have been accepted, especially in regard to the issues on which there are points of agreement, and that all other aspects have been left for a future stage in the negotiation"[612].

412. On 19 March 1976, Bolivian Ambassador Gutiérrez Vea Murguía informed the Bolivian Foreign Ministry that, upon receiving a proposal from the Chilean Chancellor to reactivate the Mixed Boundary Commission, he had made clear that Bolivia:

> "[B]efore entering into negotiations on the technical aspects of the cession of territory that Chile would make and the resulting Bolivian compensation, wished to clarify the three points that are regarded as unacceptable. I referred again to the territorial compensation for patrimonial sea, to the use of the total flow of Lauca River and to the demilitarization of the 'corridor'".[613]

413. In this context, in order to clarify the question of territorial exchange, the Bolivian Foreign Ministry issued a public clarification on 19 April 1976, stating:

> "3. The process of a prompt sovereign return to the Pacific Ocean is currently at a time in which both the Bolivian proposal and the response of the Government of Chile are in force and constitute the global basis for future negotiations. All aspects related to the proposed solution are at the negotiating table. Consequently, no definitive or irreversible agreements have yet been made".[614]

414. The progress of the negotiation on the points of disagreement was conditioned to the Peruvian response to the consultation made by Chile. It was not possible to proceed with the negotiations on the exchange of territories while Bolivia and Chile were not informed of Peru's position. The new Bolivian Ambassador, Adalberto Violand, was instructed to pace the

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[612] *La Tercera* (Chile). 15 March 1976, reproduced in R. Prudencio Lizon, *History of the Charaña negotiation*, La Paz, Plural editorial, 2011 p. 192, **BR, Annex 366**.

[613] Note from the Bolivian Ambassador to Chile, Guillermo Gutiérrez Vea Murguia, to the Minister of Foreign Affairs and Worship of Bolivia, Alberto Guzmán Soriano, N° 204/136/76, 19 March 1976, **BR, Annex 308**.

[614] Clarification of the Bolivian Ministry of Foreign Affairs, 19 April 1976, **BR, Annex 309**.

negotiations with Chile on the progress of the Chilean Peruvian talks.[615] The Peruvian reply occurred only on 19 November 1976 and its implications are explained in the following section.

2. Chile's lack of diligence to negotiate with Peru

415. Chile consulted Peru on 19 December 1975 according to Article 1 of the Additional Protocol to the 1929 Treaty of Lima.[616] Eleven months later, on 19 November 1976, Peru expressed its assent to the fundamental basis of negotiations between Bolivia and Chile: "sovereign cession to Bolivia of a corridor through the north of the province of Arica".[617] Although Chile submits that Peru's response was fundamentally different from the negotiating guidelines adopted by Bolivia and Chile[618], and that its acceptance was a non-negotiable condition to give its consent[619], it fails to mention that, in its reply, Peru expressed a sufficiently ample flexibility for negotiating it:

> "[T]he proposal that the Peruvian Government formulates to the Chilean Government shall serve as a basis for arriving, at the appropriate time, to the prior agreement, set forth in Article 1 of the Supplementary Protocol to the Treaty of 1929".[620]

The Peruvian Government added that its proposal:

> "also takes into account the spirit of understanding that has motivated our country in relation to Bolivia's landlocked situation, as expressed both in the Declaration of Ayacucho, adopted on 9 December 1974, and in reiterated official declarations".[621]

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[615] Note from the Minister of Foreign Affairs and Worship of Bolivia, Oscar Adriazola Valda, to the Bolivian Ambassador to Chile, Adalberto Violand, 3 May 1976, **BR, Annex 310**.

[616] Note sent by the Minister of Foreign Affairs of Chile on 19 December 1975, BM Annex 72, CCM, Annex 179.

[617] BM Annex 155

[618] BM Annex 155.

[619] CCM, para 7.30

[620] CCM, Annex 207.

[621] CCM, Annex 207.

Adding further that its proposal

> "has been presented with the firm intention of finding a definitive solution to Bolivia's landlocked situation".[622]

416. Under that understanding, the Minister of Foreign Affairs of Peru, Jose de la Puente, confirmed the negotiability of the proposal to the Peruvian press:

> "there must always be a dialogue in face of a Peruvian proposal. The difference is that the rounds of discussions are already complete. If dialogue occurs, it will take place at the level of the Foreign Ministers, and we Foreign Ministers can discuss it. This is the basis for the agreement with Chile that I mentioned a few minutes ago. In other words, by giving our answer, we have provided the basis for reaching that prior agreement, which we must have for Chile to be able to negotiate with Bolivia".[623]

417. Despite Peru's flexibility, on 26 November 1976 Chile simply rejected the Peruvian proposal without even considering it, expressing its position in the following terms:

> "In the opinion of the Government of Chile, such proposal affects matters within its exclusive national sovereignty, and bears no relationship to the general terms of the negotiation between Chile and Bolivia that were approved by both countries. This proposal also entails a clear and manifest modification of the clauses of the 1929 Treaty which definitively established Chilean sovereignty over Arica. For these fundamental reasons, the Government, faithful to the Chilean tradition of respecting Treaties and safeguarding national sovereignty, declines to consider the referred proposal".[624]

418. The Chilean note was replied to by a Memorandum of 26 November 1976. In that document, Peru emphasized that:

> "In view of the Supplementary Protocol to the Treaty of 1929 between Peru and Chile, and the fact that a consultation was made to obtain the bases for the prior agreement referred to in article one of the Supplementary Protocol, which gave the broadest powers to the Government of Peru, including for exercising a Right of Veto, it is hard for the Foreign Affairs Ministry of Peru to understand and accept that Chile does not accept to consider, without prior dialogue at the level of

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[622] CCM, Annex 207.

[623] "Complete version of the Explanations by the Peruvian Minister of Foreign Affairs Jose de la Puente", *El Mercurio* (Chile), 26 November 1976, CCM, Annex 213.

[624] Memorandum of the Ministry of Foreign Affairs of Chile, 26 November 1976, CCM, Annex 212.

> Foreign Ministers, Peru's response consisting of a proposal that protects the high interests of the Peruvian nation".[625]

419. In the same communication, Peru clarified that its proposal was not a rejection of the Chilean consultation; it constituted a different formula accepting Bolivia's sovereign access to the sea, establishing the following:

> "6. […] Added to this is Peru's will to constructively perform the faculty granted to it by article one of the Supplementary Protocol to the Treaty of 1929, not to veto the possible cession but to agree to the cession of the corridor through the establishment of an area under shared sovereignty among Peru, Bolivia and Chile".[626]

420. Finally, consistent with the agreements and commitments to negotiate a sovereign access between Bolivia and Chile, Peru added that "it will continue to make all necessary efforts to assist in achieving the aspiration of its sister Republic of Bolivia to access the Pacific Ocean"[627]. Peru did not change its position in the months that followed. The Peruvian Chancellor De la Puente declared before the General Assembly of the United Nations that Peru's proposal was "a proposal which ensured Bolivia's access to the sea". He added that the Peruvian proposal was not "a final and definitive formula, but rather as a basis for negotiations" that "should be inspired by a determination to achieve an over-all solution of the problems".[628]

421. Paradoxically, while Chile did not engage in any effort to have Peru modify its position, it simultaneously recognized the negotiable nature of the latter. As Chilean President Augusto Pinochet himself acknowledged in a letter to his Bolivian counterpart, Hugo Banzer, dated 18 January 1978:

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[625] "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.

[626] "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.

[627] "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.

[628] Verbatim Record of the Thirteenth Plenary Meeting of the Thirty-Second Session of the United Nations General Assembly, UN Doc. A/32/PV.13, 29 September 1977, CCM, Annex 230.

> "The view of my Government is that the bases of the Chilean proposal and accepted in general terms by Bolivia, are the only viable and realistic way to satisfy the longing of the brother country. I could not, therefore, propose a different alternative. But I am confident that on these bases it would be possible to achieve an agreement capable of being accepted by Peru. I rely on the statements of the Foreign Minister of such brother and friend country, who has declared twice that the November 1975 proposals 'are not necessarily a final solution formula but an alternative, an element of dialogue'".[629]

422. It is worth recalling that Peru's position has not changed and has been made known to the Court by Peru itself in a letter of 26 July 2016[630]. The negotiation of the Parties within the framework provided by the 1929 treaty and its additional protocol concerning the Peruvian memorandum of 19 November 1976 was a logic course of action, especially considering that Peru had not received a text previously agreed by Bolivia and Chile, but the bases of negotiation proposed by them. On the other hand, Chile had offered a territory whose cession was subjected to the prior consent of Peru; it was Chile that, as 'offeror', should have made an effort to obtain Peru's agreement.

423. The responsibility for acquiring Peru's consent, in order to comply with the obligation to negotiate sovereign access to the ocean, rested exclusively with Chile. Bolivia is not part of the 1929 agreements, and the obligation to negotiate sovereign access implies that Chile makes the necessary efforts to obtain Peru's consent when, as it was the case, Chile is offering a territory whose cession implied the agreement of Peru.

3) Bolivia's efforts to negotiate during the Charaña process

424. The engagement of Bolivia to foster the negotiation with both Chile and Peru is undeniable, in particular following the message forwarded by the Bolivian President, Hugo Banzer, on 24 December 1976[631] —and renewed on various occasions in 1977 through direct exchanges with his Chilean counter-part, Augusto Pinochet.[632] The sterility of these efforts to change Chile's new condition on the territorial exchange, on the one hand, and Chile's

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[629] Letter from the President of Chile to the President of Bolivia, 18 January 1978, CCM, Annex 236.

[630] Note from the Ambassador of Peru to the Kingdom of the Netherlands, Carlos Herrera, to the Registrar of the International Court of Justice, Philippe Couvreur, 26 July 2016, **BR, Annex 370**.

[631] BM, Annex 173.

[632] BM, Annexes, 74-78. See also, the Joint Communiqué of 3 September 1977 (*ibid.*, Annex 129).

rejection to discuss the Memorandum submitted by Peru on 19 November 1976, on the other, led Bolivia to consider that under these circumstances, maintaining diplomatic relations — resumed with this specific purpose, and with the spirit of Charaña in mind—, was pointless. However, it did not mean that Bolivia closed the door to a new round of negotiations. The President of Bolivia expressed indeed hope that Chile could reconsider its position in the future and the Ministry of Foreign Affairs of Bolivia made statements to the same effect.[633]

425. The record of the Charaña process shows that Bolivia has been actively pursuing negotiations in good faith during the said process and that, even though it is not bound by the 1929 Treaty between Chile and Peru, Bolivia helped Chile in framing possible solutions acceptable to Peru and adopted a constructive approach. These efforts date back to 1975. While the Bolivian Ambassador in Santiago, Guillermo Gutiérrez Vea Murguía, delivered the Bolivian proposal to the Chilean Chancellor in Santiago on 26 August 1975, Under-secretary of Foreign Affairs of Bolivia, Javier Murillo, travelled to Lima to give the Peruvian Chancellor, Miguel Angel de la Flor Valle, President Banzer's message hoping a positive response from Peru to the Chilean consultation[634].

426. Despite its position in the present proceedings, during the Charaña negotiation Chile informed Bolivia that the question of Peru's consent was a bilateral matter between Peru and

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[633] See Letter from the President of Bolivia to the President of Chile, 17 March 1978, para. 5, **CCM, Annex 239**. See also the official Statement by the Bolivian Foreign Minister, made on the same date, **BM, Annex 147**, **CCM, Annex 241**. Chile proposed in the VI Plenary Meeting of the Extraordinary Period of Sessions of the UN General Assembly, held on 26 March 1978, to resume bilateral dialogue under the same circumstances that preceded the rupture of diplomatic relations. For his part, the Bolivian Foreign Minister stated that: "we shall not lose faith the possibilities of a dialogue, when new and more favorable circumstances open the way", leaving open the possibility of resuming dialogue in the future (Verbatim Record of the Fifth Plenary Meeting of the Tenth Special Session of the United Nations General Assembly, UN Doc. A/S-10/PV.5, 26 May 1978, paras. 33-35, **CCM, Annex 243**. Verbatim Record of the Sixth Plenary Meeting of the Tenth Special Session of the United Nations General Assembly, UN Doc. A/S-10/PV.6, 26 May 1978, para. 328, **CCM, Annex 244**; Verbatim Record of the Ninth Plenary Meeting of the Tenth Special Session of the United Nations General Assembly, UN Doc. A/S-10/PV.9, 30 May 1978, paras. 275-287, **CCM, Annex 245**).

[634] L. Maira and J. Murillo, *The Long-standing Conflict between Chile and Bolivia. Two Perspectives*, Taurus editions, Santiago, 2004, pp. 138-139, **BR, Annex 353.**

Chile. During a meeting held on 7 December 1976, following the presentation of the Peruvian response, the Bolivian Ambassador in Santiago, Adalberto Violand, told the Chilean Foreign Minister, Patricio Carvajal, that Bolivia had repeatedly been told that "the Santiago-Lima talks were bilateral and that, on basis of this premise, we await a Chilean explanation on the fate of our maritime negotiation, for it is also bilateral".[635]

427. Notwithstanding the bilateral character of the negotiations between Peru and Chile, Bolivia proposed alternative solutions to the stagnation of the negotiation. In a public message of 24 December 1976, President Hugo Banzer sought to reconcile the positions of Chile and Peru, asking Chile to withdraw its condition for territorial exchange and Peru to abandon its shared sovereignty proposal in order to find a new understanding formula.[636] In addition, Bolivia proposed to make "contributions that are necessary, in equitable terms, for the establishment of a great pole of tri-party development on the coastal zones which will be transferred to Bolivian sovereignty, from which reciprocal benefits for Bolivia, Chile and Peru derive."[637]

428. Given the stagnation of the negotiations in 1977 and the evident lack of diligence on the part of Chile, Bolivia began to analyse a sovereign access alternative, other than those proposed in August and in December 1975. During a meeting held on 1 April 1977 between the Chilean Foreign Minister, Patricio Carvajal, and the Bolivian Ambassador, Adalberto Violand, the latter informed that there were two alternatives: "either Chile obtains the agreement with Peru to continue negotiating the proposed territory or, solutions will have to be sought in a perimeter exogenous to the one delimited by the Treaty of 1929. In the first case, the negotiation must be Chilean-Peruvian, since Bolivia was not a Party in 1929."[638]

429. Although Chile remained inflexible in its position, Bolivia continued to promote exchanges in order to achieve the object of the agreement to negotiate sovereign access to the

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[635] Note from Bolivia's Ambassador to Chile, Adalberto Violand, to the Minister of Foreign Affairs and Worship of Bolivia, Oscar Adriazola, N° 1093/481/79, 7 December 1976, **BR, Annex 312**.

[636] BM, Annex 173.

[637] BM, Annex 173.

[638] Note from the Bolivian Ambassador to Chile, Adalberto Violand, to the Minister of Foreign Affairs and Worship of Bolivia, Oscar Adriazola, N° 281/140/77, 7 April 1977, **BR, Annex 314**.

sea. Thus, the Bolivian Foreign Minister, Oscar Adriazola, signed a Joint Declaration with the Peruvian Foreign Minister, Jose de la Puente, in June 1977, with the aim of redirecting the negotiations. In this instrument, these authorities:

> "Within the framework of the traditional friendship that unites the two countries, both Foreign Ministers constructively analysed the problem of Bolivia's landlocked condition, in respect to its solution Peru reiterated its broadest understanding. In that sense, they agree on the desirability that, in the form and opportunity required, the best efforts should be made, taking into account the respective national interests, in order to concretize an effective and permanent solution for that problem."[639]

430. Bolivia also promoted the meeting of the Presidents of the three countries held in Washington in September 1977 to analyse the progress of negotiations, which resulted in a Joint Declaration wherein the three countries agreed to continue making efforts to solve Bolivia's landlocked condition.[640] This initiative also led to the meeting of the Chancellors held by the end of that month[641].

431. Considering Bolivia's genuine will to push forward the negotiation and Peru's sufficient openness to negotiate its proposal, the President of Bolivia recalled to the President of Chile, in a letter dated 23 November 1977, that Chile rejected the Peruvian proposal without taking further steps. The text in question indicated:

> "Your Government, Mr. President, limited itself to decline to consider the Peruvian proposal, arguing that it impacted on matters within the exclusive sovereignty of Chile. However, Bolivia was expecting Chile to make subsequent efforts to establish such situation; clarification which is critical, as demonstrated, for the Government of Chile to be able to give Bolivia a territory which is the specific and legal subject of the negotiation"[642].

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[639] Joint Declaration by the Ministers of Foreign Affairs of Bolivia and Peru, 7 June 1977, **BR, Annex 315**.

[640] BM, Annex 129, CCM, Annex 224.

[641] CCM, Annex 229.

[642] BM, Annex 77, CCM, Annex 235.

432. In the same note, the Bolivian President referred to the appointment of special representatives and their possible impracticability, given the circumstances.[643] President Banzer asserted:

> "I repeat, it is necessary that new factors are included into our dialogue to overcome the current stage, factors that must necessarily embody a spirit of widening of the conditions required for the settlement under which the unanimous decision of my Country can be reached.
>
> The establishment of new conditions to overcome the current stage and lead us to the aims we set at the meeting of Charaña is not in the hands of Bolivia. Only under these new circumstances would the meeting of Special Representatives make sense, and such circumstances will determine the rhythm and intensification of the negotiations".[644]

433. Bolivia adjusted its position to the terms of the agreement by suggesting studying alternative formulas. However, Chile rejected that possibility because it continued to maintain the condition of territorial exchange with respect to Bolivia and did not make the necessary efforts to obtain Peru's consent and in fact even refused to consider Peru's proposals.

434. In this context, in order to explore Chile's willingness to negotiate sovereign access and the possibility of studying alternative approaches to tackle the problem of Bolivia's landlocked condition, Bolivia carried out a diplomatic *démarche* by sending a special representative to Chile. The Bolivian delegate Willy Vargas, held a meeting with Chile's Foreign Minister, Patricio Carvajal, in early March 1978. During the meeting, the Bolivian representative proposed a transitory solution to Chile in order to pursue the negotiation, which was considered positive by the Chilean Minister.[645] When the talks between Vargas and Carvajal were resumed, the latter said that the only proposals that could be materialized quickly would be the transfer of the Chilean section of the railway.

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[643] On 29 September the Chancellors of Bolivia, Chile and Peru held a meeting in New York and agreed to appoint special representatives to push forward negotiations, CCM, Annex 229. See also A. Violand Alcazar, *Sovereign return to the sea. A frustrated negotiation* (2004), p. 286, **BR, Annex 354**.

[644] BM, Annex 77, CCM, Annex 235.

[645] BM, Annex 177, CCM Annex 237.

435. In the face of Chile's new position, the confidential emissary pointed out that in the three years of negotiations only the question of the three points of disagreement[646] (edges) had been solved, upon which Chancellor Carvajal replied that they were not completely overcome and that all matters were still under negotiation, given that no document had been signed.[647] These 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.

436. As a result of the meeting between the Bolivian delegate and the Chilean Minister, the former presented an official report[648], in which he informed that the questions concerning the territorial exchange and Peru's counterproposal were the factors that froze the negotiation and that they had no prospect of being resolved at that time. Consequently, Bolivia issued a press release on 17 March 1978, stating that:

> "In fact, far from finding the required receptivity for identifying new factors that would provide an effective projection to the Special Representatives level, the confidential enterprise confirmed highly disappointing positions and concepts, such as that Chile, in addition to maintaining all their demands contained in the December 19, 1975 document without any modification, had not exerted any efforts aimed at obtaining a previous agreement with Peru, neither did it consider it should exert any efforts for that purpose, within the framework of the 1929 Protocol".[649]

437. The stagnation of the negotiation resulting from Chile's rigid position forced Bolivia to suspend diplomatic relations. In the same communiqué, Bolivia reproached Chile for its failure to comply with the agreement to negotiate in the following terms:

> "5.- Recent endeavors carried out at the initiative of Bolivia, by means of sending an Ambassador on Special Mission to Santiago, provide additional evidence that the Government of Chile has abandoned the essential commitment that provides a historical explanation for resuming dialogue that was justified by the decision to

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[646] The three points of disagreement interposed by Chile in the negotiation were the following: a) demilitarization of the corridor, b) territorial compensation for the maritime area, c) Use by Chile of the waters of Lauca River. See BM, para. 151 and 425.

[647] R. Prudencio Lizón, *History of the Charaña negotiation* (2011), p. 347, **BR, Annex 366**.

[648] BM, Annex 177, CCM Annex 237.

[649] BM, Annex 147, CCM, Annex 241.

> place it at the fundamental service of our sovereign return to the sea, thus leaving it totally devoid of a raison d'être."[650]

438. The Charaña process thus shows that the failure of the rounds of negotiations which took place between 1975 and 1978 is eventually attributable to Chile. In spite of Bolivia's continuous manifestations to continue negotiating the points of divergence and of Peru's openness to negotiate its proposition, Chile chose to stay inflexible in its position with respect to its condition for territorial exchange and its rejection to try to obtain Peru's consent.

C. Chile's commitment to negotiate in the aftermath of the Charaña process

439. Independently of the responsibility for this failure, the commitment of Chile to negotiate with Bolivia a sovereign access to the Pacific Ocean did not terminate this obligation. The conduct of the parties after 1979 reflects their consistent willingness and efforts to have negotiations on sovereign access to the sea.

1. The "Fresh Approach" ("enfoque fresco") (1986-1987)

440. On 22 February 1986, President Paz Estenssoro announced that Bolivia would seek to resolve its landlocked situation by means of a "fresh approach"[651]. Two days later, the Bolivian Minister of Foreign Affairs, Guillermo Bedregal, stated that Bolivia had shown a "conciliating attitude vis-à-vis Chile: which is suitable to hold dialogue and is firmly based on the interests of the country, without relinquishing the fundamental objective of our foreign policy, i.e. to have our sovereignty over the Pacific Ocean restituted."[652] It is clear that the so-called "fresh approach" mentioned by the Bolivian President referred to the willingness to facilitate a rapprochement between the two States in order to pave the road for a negotiation on the sovereign access to the sea.[653]

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[650] BM, Annex 147, CCM Annex 241.

[651] CCM, Annex 283.

[652] "G. Bedregal. *Conciliatory attitude with Chile does not mean renouncing the sea*", *Presencia* (Bolivia), 25 February 1986, **BR, Annex 328**.

[653] Ministry of Foreign Affairs of the Republic of Bolivia, *Tricolor. History and Projections of Peace, Development and Integration of the Bolivian – Chilean dispute* (1998), pp. 50 y 52, **BR, Annex 335**.

441. Bolivia's Consul General in Chile, Jorge Siles Salinas, held talks with Chilean Chancellor, Jaime del Valle, from April 1986 onwards with regard to what was denominated as "the substantial matter", the sovereign access.[654] During the XVI OAS General Assembly of the same year, Del Valle and Bolivia's representative, Jorge Gumucio Granier, held a meeting to formalize negotiations on the "substantial matter".[655]

442. As a consequence of the agreement reached in Guatemala, the Chancellors of Bolivia and Chile issued separate communiqués. Bolivia's communiqué indicated that: "The aspects related to the maritime issue of Bolivia, which is regarded as a matter of substance, and those related to it, shall be formally considered at a forthcoming meeting to be held in April 1987 in the Oriental Republic of Uruguay".[656] Chile, for its part, recorded: "We have agreed with the Minister of Foreign Affairs of Bolivia that, without prejudice to the important and fruitful talks and tasks that the Rapprochement Binational Commission will continue to carry out, both Foreign Ministers will meet in Montevideo at the end of April, in order *to discuss matters of substance* that are of interest to both Governments."[657]

443. The communiqués were formulated in different terms, however, there can be little doubt that both recorded the existence of an agreement to start formal negotiations with regard to "matters of substance". The Bolivian communiqué indisputably identifies "the maritime issue of Bolivia" as the substantial matter to be treated. Chile did not reject this. It must be noted that the expression "matters of substance" corresponds to the "vital matters" referred to earlier in the Joint Declaration of Charaña of 1975.

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[654] Note from the Consul General of Bolivia to Chile, Jorge Siles Salinas, to the Minister of Foreign Affairs of Bolivia, Valentin Abecia, CGB N° 190–066/86, 30 April 1986, **BR, Annex 329**. Note from the Consul General of Bolivia in Chile, Jorge Siles Salinas, to the Minister of Foreign Affairs of Bolivia, Guillermo Bedregal, 13 June 1986, **BR, Annex 330**.

[655] Note from the Permanent Representative of Bolivia to the United Nations, Jorge Gumucio Granier, to the Minister of Foreign Affairs of Bolivia, Guillermo Bedregal, 20 November 1986, **BR, Annex 334**. See also, Note from the Consul General in Chile, Jorge Siles Salinas, to the Minister of Foreign Affairs of Bolivia, Guillermo Bedregal, CGB N° 586/240/86, 2 November 1986, **BR, Annex 331**.

[656] Communiqué of the Minister of Foreign Affairs of Bolivia, Guillermo Bedregal, 13 November 1986, **BR, Annex 332**.

[657] Communiqué of the Minister of Foreign Affairs of Chile, Jaime del Valle, 13 November 1986, **BR, Annex 333**. (emphasis added)

444. The events that followed, which have been submitted in the Memorial,[658] and particularly, the declaration by the Chilean Minister of Foreign Affairs, Jaime del Valle, at the beginning of the meeting in Montevideo, are revealing not only for the purposes of a *tacit* agreement[659]; they constitute an *informal* undertaking:

> "[…] The commitment of Your Excellency the President of the Republic to American interests led you to carry out the negotiations that commenced in the Act of Charaña of February 1975. As shall be remembered, in the act signed at that time, the Presidents of Chile and Bolivia expressly stated the commitment to continue the dialogue, at different levels, to seek solutions to key issues faced by both countries, such as the landlocked status that affects Bolivia, within the framework of reciprocal convenience and taking into consideration the aspirations of the Bolivian and Chilean nations. […] We have gone through the subsequent stages together, establishing a friendly and fraternal contact in different scenarios that made it possible to arrive precisely at this meeting, which is aimed at initiating what could be – and that is our desire – a mature and sincere dialogue which, if adequately conducted, may lead us to more decisive stages than the ones we could reach in previous negotiations […]."[660]

445. Chile was well aware that Bolivia conceived the negotiations with a specific purpose, namely to obtain sovereign access to the Pacific Ocean, the substantial issue (*el asunto de fondo*). This explains that the proposals, previously announced, were submitted to the Chilean Minister, Del Valle, in Montevideo, making it impossible to present them as a *surprise*.[661] It is in this precise context that the declarations by Del Valle must be interpreted. The Minister himself did not reject the treatment of the issue; on the contrary, the Minister posed questions that were duly answered by Bolivia, and Chile recognized that the dossier was being

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[658] BM paras.183-188 and Annexes 130, 170, 169, 27 and 28.

[659] It has been suggested the existence of a 'tacit' agreement, a formula examined in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (ICJ Reports 2007 (II), p. 735, para. 25.3), and applied by the Court in the *Maritime Dispute* between Peru and Chile in favor of Chile (I.C.J. Reports 2014, p. 38, para. 91), despite that the latter sought to avoid referring to a "tacit agreement" as fundament of its position.

[660] See CCM, Annex 291.

[661] During the 41st session of the UN General Assembly (1986), the Bolivian Minister handed out to his Chilean counterpart a letter which recorded possible solutions to address Bolivia's landlocked condition problem and certain guidelines to discuss the issue in subsequent meetings. Ministry of Foreign of the Republic of Bolivia, *Tricolor. History and Projections of Peace, Development and Integration of the Bolivian–Chilean maritime Dispute* (1988), p. 52, **BR, Annex 335**. See also BM Annex 131.

examined. It is therefore surprising that Chile decided to shelve abruptly the question, and revert to its old strategy based on the 1904 Treaty[662].

446. To mention the "inflexible insistence" of Bolivia submitting proposals that involved a transfer of territorial sovereignty[663] as justification is to ignore the historical record. Bolivia had engaged in the negotiations with the legitimate trust that the Chilean regime, the same that formulated the proposals in Charaña, would be consistent with its previous position. The Montevideo negotiation entailed continuity with the line agreed upon in 1950, confirmed in 1961 and applied, not yet successfully, in 1975. It was about looking for "formulas for solving" the landlocked status of Bolivia. As noted by Chilean diplomat, Pinochet de la Barra, Minister Del Valle: "with the same tranquillity with which he explained the Government plans to "calmly and seriously" study the corridor proposal, he revealed the reasons for his abrupt rejection".[664]

447. As is well known, the OAS General Assembly adopted the resolution 873, on 14 November 1987, regretting that the talks have broken off, and urged Chile and Bolivia to resume negotiations to find a means of solving the maritime problem of Bolivia[665].

2) The maritime issue and the Agenda without exclusions (Algarve Declaration, 2000)[666]

448. In June 1990, Chile's Chancellor, Enrique Silva Cimma, told the Bolivian President, Jaime Paz Zamora, within the framework of the OAS General Assembly held in Paraguay that he was willing to cede to Bolivia an *enclave* in Pisagua. This access to the sea would be located in the Chilean port, where Bolivia would be able to exert sovereignty. Bolivia, he

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[662] See the allocution made by the Chilean Representative, Mr. Illanes, before the OAS Permanent Council on 17 June 1987 (BM, Annex 211).

[663] CMC, I, para. 1.24 *d.*

[664] Ministry of Foreign of the Republic of Bolivia, *Tricolor. History and Projections of Peace, Development and Integration of the Bolivian–Chilean maritime Dispute* (1988), p. 193, **BR, Annex 335.**

[665] See BM, Annex 199.

[666] BM, I, paras. 198-219, 441-442 y 450-477; II, Annexes 80-86, 117-124, 132-139, 141, 145, 146, 150, 151, 159, 164, 166, 186, 231, 232.

added, would be directly connected with this port by sea, air, and land. This position was ratified by Chilean President Patricio Aylwin.[667]

449. The Chilean-Bolivian rapprochement amounted to the Agreement on Economic Complementation (ACE Nº 22), signed on 6 April 1993.[668] On that occasion, Chile's Chancellor, Enrique Silva Cimma, declared that: "there are no issues that cannot be addressed between the two Governments and the case of [Bolivia's] landlocked condition is one of them".[669]

450. Months later, the Chancellors of Bolivia and Chile signed a Joint Communiqué on 16 July 1993, in which the progress made in the rapprochement process was reproduced, underscoring the improvement of bilateral relations and communications between the two Governments.[670] Bolivian Chancellor, Ronald MacLean, referred to this communiqué stressing that "we talk about pending issues", noting that Chile had acknowledged "the existence of pending issues that must be addressed and tackled", adding that "all the points on the bilateral agenda, of course, include the maritime issue, and I think this is a substantial step forward that must be highlighted".[671]

451. The intention not to exclude the issue of the sovereign access from the bilateral agenda was further corroborated the following year. Chile's President, Eduardo Frei Ruíz Tagle, stated on 10 March 1994 that he was "open to addressing" all "the issues with Bolivia, including that of its landlocked condition", and added that "this pending problem must be addressed in the light of the current international treaties".[672]

452. Between 1996 and 1997, special delegates from Bolivia and Chile started contacts to grant Bolivia a port with all the customs facilities and legal provisions necessary to enable it

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[667] "Silva Cimma discloses information regarding Aylwin, Pinochet and boundary issues", *El Mercurio* (Chile), 21 July 2012, **BR, Annex 367.**

[668] CPO, Annex 45 (B).

[669] O. Pinochet de la Barra, *Chile and Bolivia: how much longer!* (2004), p. 95, **BR, Annex 352.**

[670] CCM, Annex 309.

[671] "Chile is willing to solve pending problems with Bolivia", *La Razón* (Bolivia), 20 July 1993. **BR, Annex 339.**

[672] J. Escobari Cusicanqui, *Diplomatic History of Bolivia*, Vol. II, (1999), p. 174, **BR, Annex 344.**

to connect with the Pacific Ocean. These negotiations were carried out, confidentially, by non-governmental representatives designated by the chancelleries of both countries. For Chile Enrique Correa, former Minister Secretary General in the Government of Patricio Aylwin, and for Bolivia, Horst Grebe. The meetings of both emissaries were held in La Paz, Iquique, Santiago, and Buenos Aires. These negotiations reached a draft agreement, but were left in an impasse when Bolivia attempted to address the issue of sovereign access.[673]

453. In 1999 Bolivia's Minister of Foreign Affairs, Javier Murillo de la Rocha, invoked Chile's commitments to negotiate before the OAS General Assembly: "[in] at least ten opportunities […] we carried out negotiations on basis of the cession to Bolivia of an own access to the sea, and that commitment was formalized in eight solemn occasions" referring in particular to "the commitment of 1950, ratified ten years thereafter, the content of the proposal of 1975 and the conversations held in 1984 and 1986."[674] Chile's assertion that "in more than 20 years of engagement following the restoration of democracy in Chile in 1990… Bolivia never once alleged that Chile was under an obligation to negotiate with Bolivia over sovereign access to the Pacific Ocean"[675] is plainly false.

454. Bolivia formulated a new approach to deal with the issue of the obligation of sovereign access. A first meeting was held between the Chancellors of Bolivia and Chile in Rio de Janeiro in 1999, where it was agreed that it was necessary to resolve pending bilateral

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[673] Joint Notes issued by Enrique Correa and Horts Grebe, 28 May 1996, **BR, Annex 341**.

[674] Minutes of the 4th Plenary Meeting, 29th Regular Session of the OAS General Assembly, 8 June 1999, **BR, Annex 345**. Previously, Bolivia had invoked the 1950 notes before the OAS General Assemblies of 1992 and 1993: Minutes of the 2nd Plenary Meeting, 22nd Regular Session of the OAS General Assembly, 19 May 1992, p. 301, **BR, Annex 336**; and, Minutes of the 3rd Meeting of the General Commission, 23rd Regular Session of the OAS General Assembly, 9 June 1993, p. 345, **BR, Annex 338**. See also the statements of the Minister of Foreign Affairs of Bolivia, before the 1998 and 1999 UN General Assembly. See Verbatim Record of the 21st Plenary Meeting, 50th Session of the United Nations General Assembly, UN Doc. A/53/PV.21, 30 September 1998, p. 17, **BR, Annex 343**, and Verbatim Record of the 20th Plenary Meeting, 54th Session of the United Nations General Assembly, UN Doc. A/54/PV.20, 1 October 1999, p. 10, **BR, Annex 346**.

[675] CCM, para. 1.5.

issues without exclusions.[676] The substance of that meeting was reiterated in the IX Ibero-American Summit of Heads of State held in Havana in 1999, where the Chancellors of Bolivia and Chile, Javier Murillo and Juan Gabriel Valdés, respectively, "agreed to resume *an open and unconditional dialogue* between the two countries, which –among other issues– would include the access of Bolivia to the sea."[677]

455. With this background, the parties issued the Joint Communiqué of Algarve on 22 February 2000, and later, the Joint Communiqué of Brasilia, on 1 September 2000, formalizing the Agenda "with no exclusions".[678] The common understanding was to conduct relations in an "all-inclusive" framework. It was clear for both Chile and Bolivia that this process could not exclude the question of sovereign access to the Pacific Ocean.[679]

456. In September 2000, the Chilean Under Secretary of Foreign Affairs, Heraldo Muñoz himself, referred to the process of bilateral dialogue emphasizing the will of the Chilean Government to develop an "open dialogue that includes all issues and seeks to create

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[676] L. Maira, and J. Murillo de la Rocha, *The long-standing conflict between Chile and Bolivia. Two Perspectives* (2004), pp. 151-152, **BM, Annex 353**.

[677] R. Orías Arredondo, *International Law and the Maritime Negotiations with Chile* (2000), **BR, Annex 347**. (emphasis added)

[678] BM paras. 199-200, Annexes 150 and 159.

[679] The Minister of Foreign Affairs of Bolivia, Javier Murillo de la Rocha, noted before the OAS General Assembly held in 2000 that: "With the same clarity and frankness with which it has always submitted its view, my country noted that this program had to always be seen as a path and not as a replacement for the effective solution to the proposal for restoration of Bolivia's condition as a coastal State. We have received positive signs from the new Government of President Lagos on his willingness to continue and project the important progress made in Algarve". Minutes of the 4th Plenary Meeting, 30th Regular Session of the OAS General Assembly, 6 June 2000, p. 168, **BR, Annex 348**. See also, the statement made by the Bolivian representative, Fernando Messmer Trigo, before the UN General Assembly in 2000. Verbatim record of the 25th Plenary Meeting, 55th Session of the United Nations General Assembly, UN Doc A/55/PV.25, 20 September 2000, p. 12, **BR, Annex 349**.

favorable conditions for an understanding". Likewise, he noted that the most immediate topics would first be addressed to "eventually, facing the most complex issues".[680]

457. In Bolivia's Memorial[681] and Chile's Counter-Memorial,[682] detailed information was given on the facts related to the negotiations, between 2001 and 2004, on a possible concession for a special economic zone, which was ultimately not concluded. During this period the parties did not exclude sovereign access to the Pacific Ocean from the bilateral agenda, and its distinctive character was manifestly evident at the XIV Political Consultations Mechanism (PCM) held in 2005, during the mandates of Presidents Eduardo Rodríguez Veltzé and Ricardo Lagos. In the corresponding minutes, the representatives of Bolivia and Chile made a clear distinction between the item labelled "free transit" and the one concerning the "maritime issue".[683]

3. The 13-Point Agenda (2006)

458. The "maritime issue" was discussed in the meetings of the Working Group of Bilateral Matters[684] and then, within the framework of the PCM. The Counter-Memorial itself recognizes that "[t]he maritime issue was also discussed at XV meeting on 25 November 2006 and subsequently"[685]. Also the minutes of the PCM meetings —eight between 2006 and 2010 (XV to XXII), refer "to progress being made on the 'maritime issue'"[686]. It was

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[680] Version of Chile's Ministry of Foreign Affair's Press Direction on the interview to the Deputy Minister in *Telenoche* TV show on Chanel 13, of 6 September 2000, reproduced in C. Bustos, Chile and Bolivia. *A long road from Independence to Monterrey* (2004), pp. 295-296, **BR, Annex 351**.

[681] BM para. 201.

[682] CCM, paras. 9.10-9.12.

[683] Minutes of the XIV Meeting of the Political Consultations Mechanism, 6 October 2005, **BR, Annex 356**.

[684] Minutes of the I Working Group Meeting regarding the Bolivian-Chilean Bilateral Issues of 9 August 2005 (**BR, Annex 355**); Minutes of the III Meeting of the Chile-Bolivia Working Group on Bilateral Affairs, 31 October 2006 (**BR, Annex 359**); Minutes of the XV Meeting of the Political Consultations Mechanism Bolivia-Chile, 25 November 2006 (BM, Annex 118).

[685] CMC, I, para. 9.17.

[686] CMC, I, para. 9.18. In the XVIIIth meeting of the Mechanism (17 June 2008) ideas and criteria were exchanged on specific ways to negotiate and reach concrete solutions to the problem. Chile recognized that it had analyzed different options and deepened those viable in the short term with Bolivia. The Minutes read: "The Vice-Chancellors reiterated their conviction that through this dialogue process, with a realistic and

therefore well assumed by both Parties that this new terminology – (*Plan de Acción* and 13-point Agenda) referred to the long-standing problem of the sovereign access. Point 6 ("Maritime Issue") is clearly different from Point 3 ("Free Transit").[687]

459. Consistent with the spirit of the Algarve Declaration, in February 2006, before the mandate of Chilean President Ricardo Lagos ended, Chilean Chancellor, Ignacio Walker, expressed, after a meeting held with his Bolivian counterpart, "the desire of the Government of Chile to build a future agenda to face past issues which are a result of the last five meetings, [he also] noted the necessity of dialogue continuity using an agenda without exclusions".[688]

460. In March, the new Chilean Chancellor Alejandro Foxley stated that there was "a very sincere spirit on both sides to establish an open agenda, without exclusions, starting with simple and concrete goals –especially in economic terms– to make gradual progress. Once trust has been generated between the two Governments on a firm basis, we can set more ambitious objectives for ourselves".[689]

461. As a result, the understanding concerning the binding and comprehensive character of the "agenda without exclusions" established in 2000 was not unintended. At the OAS General Assembly held in June 2006, it was recorded that Chile's Chancellor, Alejandro Foxley, reaffirmed the "agreement of our Governments to seek a permanent substantial understanding under this broad agenda, without exclusions".[690]

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future approach the necessary agreements will be reached. The Vice-Chancellors agreed to give continuity to the dialogue, to which end the considered appealing to their respective teams of technicians" (See BM, Annex 120, CCM, Annex 341). Minutes of the meetings that followed are found in BM, Annexes, 121-124.

[687] The terminology used on the agenda of the OAS General Assembly from 1979 to present has included 'the Maritime Problem of Bolivia'. See OAS Resolutions on the "Maritime Problem" between 1979 to 1989 (BM, Annexes 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201).

[688] BM Annex 151.

[689] "President clarifies that she did not address the maritime issue with Evo Morales", *La Nación* (Chile), 14 March 2006, **BR, Annex 357.**

[690] Minutes of the 4th Plenary Meeting, 36th Regular Session of the OAS General Assembly, 6 June 2006, **BR, Annex 358**.

462. At the OAS General Assembly held in 2007, Bolivian Chancellor, David Choquehuanca, confirmed the binding nature of the "agenda of thirteen points" in a framework "without exclusions", by declaring that: "This agreement was reflected in the bilateral meeting held on 17 and 18 July 2006. Since then, both countries have been committed to building an environment of mutual trust with the objective and firm commitment to arrive at a final solution to Bolivia's landlocked condition".[691] Chile's Chancellor, Alejandro Foxley, far from rejecting the position held by his Bolivian counterpart, confirmed it, acknowledging that "an agenda was defined without exclusions with thirteen points"[692], and that these topics had made different degrees of progress.

463. In its Memorial, Bolivia stated that by 2009 both countries were discussing the possibility of creating a Bolivian enclave on the Chilean coast.[693] The Counter Memorial minimizes this process by stating that "[t]he Vice-Ministers of both States *exchanged ideas* concerning the establishment of a non-sovereign coastal area for Bolivia in the zone of Tiviliche, north of the town of Pisagua and south of the Quebrada de Camarones, with a special status to be negotiated between both States"[694]. Nonetheless, it was more than a simple *exchange of ideas*. The talks concerning the *enclave* had begun in 2007 and, as Chile itself recognizes, together, they made a visit to the potential site in a Chilean helicopter[695].

464. Chile's claim that "Bolivia did not then assert that there was any obligation underlying this diplomatic dialogue"[696], is not correct. The conversations regarding the *enclave* in Tiviliche were being developed within the "13-point Agenda", which included the "maritime issue" (Point VI). During the negotiations both Parties considered that a definitive solution to the "maritime issue" that would include sovereignty should not be discussed at an early stage. Nonetheless, Bolivia manifested that, in the meantime, it would enjoy sovereign rights,

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[691] Minutes of the 4th Plenary Meeting, 37th Regular Session of the OAS General Assembly, 5 June 2007, **BR, Annex 361**.

[692] Minutes of the 4th Plenary Meeting, 37th Regular Session of the OAS General Assembly, 5 June 2007, **BR, Annex 361**.

[693] BM para. 213.

[694] CCM, para. 9.19 (emphasis added).

[695] Content of talks between the Delegations of Chile and Bolivia regarding Point 6 of the Agenda of the 13 - points: The Maritime Issue, **BR, Annex 362.**

[696] CCM, para. 9.19.

including legislative and judicial attributions, and administration and executive power in the area of the enclave.[697] There was every reason to believe that, at the end of the Presidency of Michelle Bachelet in late 2009, it would be possible to reach an agreement.

465. As agreed by both States, Bolivia sent Chile a reserved minute in December 2009 in which the negotiations carried out were placed on record. However, the Government of President Bachelet decided not to sign this document, and left the decision for the coming government. Sebastián Piñera, new President of Chile, rejected the formula that had been previously negotiated between the Governments of Presidents Morales and Bachelet.[698]

4. The agreement to propose and reach "concrete, feasible and useful" solutions (2010)

466. Chile submits that "Bolivia's statement in its Memorial that Chile 'suddenly cancelled' the PCM meeting planned to take place in November 2010 and 'pulled out of further negotiations' is […] misleading".[699] Chile adds that "[a]s the discussions between the two States were elevated to the ministerial level, the meeting of the PCM […] were suspended", and this is how it was explained by the Minister of Foreign Affairs before the OAS in June 2011.[700] This is not an accurate description of the facts. The meeting of Presidents Piñera and Morales on 17 December 2010, and the joint press release dated 17 January 2011, were the consequence of the sudden cancellation by Chile of the PCM meeting of November 2010.

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[697] Content of the talks between the Delegations of Chile and Bolivia regarding point 6 of the 13 Points: The Maritime Issue, **BR, Annex 362**. See also "Moreno and the enclave: 'Alternatives that divide the country are not beneficial'", La Tercera (Chile), 5 December 2010, **BR, Annex 364**.

[698] "The Bolivian enclave that was frustrated by Piñera", *La Tercera* (Chile), 5 December 2010, **BR, Annex 363**.

[699] CMC, I, para. 9.21.

[700] However, before the OAS (XIL General Assembly) the Chilean Foreign Minister Alfredo Moreno assured that "Chile has indicated very clearly that it is not in a position to grant Bolivia sovereign access to the Pacific Ocean, much less without any [territorial] compensation" which meant that the discussion concerned sovereign access and the acceptance of the future negotiation would be subject to the condition of territorial exchange. Minutes of the Fourth Plenary Meeting of the Organization of American States General Assembly, 7 June 2011. CCM, Annex 359, p. 166.

467. The Presidents of Bolivia and Chile, Evo Morales and Sebastian Piñera, decided to create a High Level Bi-national Commission to generate and exchange concrete, useful and feasible proposals that could be negotiated. Morales and Piñera agreed to design a framework for the negotiations, and the Chancellors would lead a Commission to progress in every issue, especially in the maritime negotiations[701].

468. This Joint Declaration of 17 January 2011 reported that the Ministers of Foreign Affairs agreed to seek to "achieve concrete, feasible and useful solutions, for the benefit of both countries and their peoples". Similar terms were used in the Joint Communiqué of 7 February 2011.[702] All of them were virtually identical to those used in the minutes of the XXII Meeting of the PCM of 14 July 2010.

469. Although the so-called "concrete, feasible and useful solutions" for resolving Bolivian maritime landlocked condition were not submitted under the PCM, 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[703].

470. In view of Chile's failure to submit a written proposal, Bolivian President, Evo Morales, respectfully requested Chile to submit a concrete proposal before 23 March (Bolivian Day of the Sea).[704] Chile limited itself to recall that Chilean frontiers with Bolivia were already settled by the 1904 Treaty.[705] It was under these circumstances that, on 7 June 2011, the Bolivian Minister of Foreign Affairs asked his Chilean counterpart, before the OAS General Assembly, "for immediate establishment, today, of a process of bilateral and formal negotiations on the basis of a written proposal, specific, feasible and useful, with all Member States of the Organization of American States as witnesses".[706]

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[701] Ibid.

[702] BM, Annex 166.

[703] See CCM, Annex 360 and "The unknown offer from Pinera to Bolivia", *La Tercera* (Chile), 11 January 2015, **BR, Annex 369.**

[704] BM, Annex 145.

[705] BM, Annex 164.

[706] BM, Annex 231.

471. Bolivia interpreted that elevating the "maritime issue" to a ministerial level would provide the opportunity for Chile to reconsider its new position. However, becoming aware of the rigidity shown by President Piñera and his Minister of Foreign Affairs, Bolivia concluded that it was virtually impossible to make any progress with that Administration, decided to dilute, or directly bury, the "maritime issue". The matter of sovereignty was not absent, on the contrary, controversial manifestations were made[707].

472. To conclude, the factual record of the case demonstrates that it was Chile that in 2011, arbitrarily, decided to modify its position and to reject to negotiate a sovereign access of Bolivia to the Pacific Ocean,[708] referred Chile's decision to deny the existence of the commitment to negotiate forced Bolivia to resort to the Court to obtain a judgment that acknowledges the existence of the obligation, its breach by Chile and to compel Chile to resume negotiations.

D. Final Remarks

473. It is well-established that, once an obligation to negotiate arises, there exists a requirement not only to enter into negotiations, but also to pursue them as far as possible[709]. And it would not be the first time that States have been ordered to return to the negotiating table, demonstrating that failure in the negotiation process does not have any effect nor does it undermine the obligation, which remains alive and opposable[710].

474. The meaning of the expression "pursue them as far as possible" 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[711]. In international law this

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[707] See. El Dia (Bolivia) 28 January 2013 **BR, Annex 368.**

[708] BM, Annexes 218, 226 and 228.

[709] Railway Traffic between Lithuania and Poland, P.C.I.J., Series A/B, No. 42, 1931, at p. 116. See also Chapter 2 (Sections A and B) and Chapter 7 (B) of the Reply.

[710] North Sea continental Shelf (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 47, para. 87.

[711] For this theory developed in civil law see, for instance, J. Carbonnier, Droit civil, Tome 4, Les obligations, Paris, Presses universitaires de France, p. 119.

relation between the obligation to negotiate and its cause has been authoritatively captured in the following terms:

> "Lorsqu'une obligation à laquelle des États s'étaient obligés se solde par un échec, l'obligation est-elle éteinte ? se maintient-elle ? subsiste-t-elle d'une manière permanente ?....On pourrait répondre….qu'à défaut d'autres indications tirées des circonstances, 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…"[712]

475. The cause of today's Chilean obligation to negotiate a sovereign access to the Pacific Ocean arose more than a century ago from a common interest between the Parties. Bolivia's interest has always been inextricably linked with the urgent necessity to overcome the obstacles resulting from its landlocked condition and the serious consequences that this situation entails in socio-economic or regional development terms. Chile's reasons are not different, as it has recognized since the beginning of this now too long of a journey. The words of President Domingo Santa María could not be more revealing when, as early as 1884, he declared that:

> "Bolivia cannot remain as it is, as it cannot either hand over its trading only to our customs. No people can live and develop in such conditions. We, as to support Bolivia, on one hand, so we cannot share it among the neighbours, and so we can take over its wealth and unite our interests, on the other hand, we must grant it an access of its own to the Pacific, where our influence would be always efficient, and take the territory to the south, where borates and mines among others can be found, which remunerate our work and would give the occasion to the consumption of our products. There is a problem that needs a solution here… I repeat, we cannot and we must not kill Bolivia that is not our interest"[713].

476. The same motivation led Chile, shortly after the end of the Pacific War, to negotiate with Bolivia and to conclude the 1895 Treaty on Territory Transfer[714]. Half a century later, similar reasons guided the visit of Chilean President, González Videla, to the United States in April 1950. Chile and Bolivia resumed negotiations in 1975, again in 1986, and again

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[712] P. Reuter, « De l'obligation de négocier », in Il processso internazionale, Studi in onore di Gaetano Morelli, Milano: Giuffré, 1975, p. 727 (emphasis added).

[713] BM, Annex 36 (emphasis added).

[714] BM, Annex 98.

between 2000 and 2011 for the exact same reasons. These negotiations persisted during all these decades because the desired objective resulted from the mutual interest of both parties and it was firmly believed that a solution was always attainable and feasible.

477. It was in the full exercise of its sovereignty that Chile committed itself to negotiate a sovereign access to the sea for Bolivia. How can Chile now reasonably explain to this Court that its interests are no longer compatible with the negotiation of a sovereign access to the Pacific Ocean, (as Chile did in 1895, in 1920, in 1950, in 1961, in 1975 etc., all dates corresponding to very clear statements declaring its "willingness" to negotiate)? How do these intentions suddenly become fatally irreconcilable with the promised solution to Bolivia's landlocked condition? The answer is simple: Chile cannot.

SUBMISSIONS AND PRAYER FOR RELIEF

For the reasons given above, Bolivia requests 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.

21 March 2017

Eduardo RODRÍGUEZ VELTZÉ

Agent of the Plurinational State of Bolivia

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CERTIFICATION

I certify that the 373 annexes filed with this Reply are true copies of the documents reproduced and that the translations provided are accurate.

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