

**INTERNATIONAL COURT OF JUSTICE**

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

**MEMORIAL OF THE GOVERNMENT OF THE PLURINATIONAL  
STATE OF BOLIVIA**

**VOLUME I**

**17 APRIL 2014**



## TABLE OF CONTENTS

<b>INTRODUCTION.....</b>	<b>1</b>
SECTION I: OVERVIEW OF THE DISPUTE.....	1
A. <i>The key Episodes</i> .....	2
B. <i>The Chile's Obligation to Negotiate</i> .....	7
C. <i>Subject matter of this dispute</i> .....	8
SECTION II: JURISDICTION.....	8
SECTION III. RELIEF SOUGHT .....	10
SECTION IV: OUTLINE OF THE MEMORIAL .....	10
 <b>CHAPTER I .....</b>	<b>13</b>
 <b>THE FACTS.....</b>	<b>13</b>
I. INTRODUCTION .....	13
II. BOLIVIA'S COASTAL TERRITORY ON INDEPENDENCE (1825).....	14
 <b>FIGURE I: BOLIVIA'S LOCATION IN SOUTH AMERICA.....</b>	<b>15</b>
 <b>FIGURE II: OFFICIAL MAP OF BOLIVIA (1859) .....</b>	<b>17</b>
III. CHILE'S EXPANSIONIST POLICY .....	19
IV. THE TERRITORIAL LIMITS TREATIES .....	20
V. THE INVASION OF BOLIVIA'S COASTAL TERRITORY IN 1879 .....	23
VI. THE 1884 TRUCE PACT AND 1895 TRANSFER TREATY.....	26
VII. THE 1904 TREATY.....	39
VIII. 1920 ACT AND OTHER EXPRESSIONS OF CHILE'S AGREEMENT TO GRANT BOLIVIA SOVEREIGN ACCESS TO THE SEA .....	41
A. <i>The 1920 Act</i> .....	41
B. <i>Events following the 1920 Act</i> .....	44
C. <i>The 1926 Kellogg proposal</i> .....	47
D. <i>The 1926 Matte Memorandum</i> .....	49
E. <i>The secret Supplementary Protocol of 1929 between Chile and Peru</i> .....	50
IX. THE 1950 EXCHANGE OF NOTES .....	51
X. THE 1961 TRUCCO MEMORANDUM .....	57
XI. THE 1975 JOINT DECLARATION OF CHARAÑA .....	59
A. <i>The Ayacucho Declaration of 1974</i> .....	59
B. <i>The Joint Declaration of 1975</i> .....	60
C. <i>OAS Resolution of August 1975</i> .....	61
D. <i>Proposals in August 1975</i> .....	62
E. <i>Proposals in December 1975</i> .....	63
F. <i>Events in 1977, including the Joint Declaration of June 1977</i> .....	68
XII. CHILE'S COMMITMENTS BEFORE THE OAS (1979-85).....	72
A. <i>Events of 1979</i> .....	73
B. <i>Events of 1980 – 1983</i> .....	75
C. <i>Events of 1984</i> .....	77
D. <i>Events of 1985</i> .....	78
XIII. THE "FRESH APPROACH" TO NEGOTIATIONS ( <i>ENFOQUE FRESCO</i> ) (1986-1987) .....	79
A. <i>The new bilateral approach</i> .....	79
B. <i>Meeting in April 1987</i> .....	80

C. Bolivia's two memoranda .....	81
D. Chile's Rejection of Further Negotiations in 1987 .....	83
XIV. NEGOTIATIONS ATTEMPTS: 1995-2011 .....	87
A. 1995: Bolivian-Chilean mechanism of Political Consultation .....	87
B. Events From 2000 to 2005 .....	87
C. 2006: the 13-Point Agenda .....	89
D. 2011: Chile's rejection of any further negotiations .....	93
<b>CHAPTER II.....</b>	<b>97</b>
<b>THE CHILEAN OBLIGATION .....</b>	<b>97</b>
I. INTRODUCTION .....	97
II. THE NATURE OF THE OBLIGATION TO NEGOTIATE.....	97
A. <i>The Specific Nature of the Obligation to Negotiate Agreed upon by Chile</i> .....	97
B. <i>Content of the Obligation to Negotiate</i> .....	100
a. Negotiations must be conducted in Good Faith .....	100
b. <i>Negotiations must be Meaningful</i> .....	103
C. <i>Specific Aspects of the Obligation to Negotiate</i> .....	104
a. Obligation to Make Proposals in Good Faith .....	104
i. <i>Reasonable proposal</i> .....	106
ii. Take into account the other party's interests .....	107
iii. Address the subject matter that the parties agreed to negotiate .....	108
b. Obligation to Receive and Consider Proposals in Good Faith.....	108
c. Obligation to be willing to negotiate over any and all legal modalities which might be proposed .....	113
d. <i>No Unreasonable Delay</i> .....	114
e. The Continuing Obligation to Negotiate .....	116
D. <i>Conclusion</i> .....	119
III. THE PROCESS OF FORMATION OF THE CHILEAN OBLIGATION.....	120
A. <i>Formation of Obligations in International Law</i> .....	120
a. <i>Obligation Created by Agreements</i> .....	120
b. Obligation Created by Conduct and Unilateral Declarations .....	125
B. <i>The Key Episodes in the Process in this Case</i> .....	135
a. The antecedent: the 1895 Transfer Treaty .....	136
b. The 1920 Act and the 1926 Matte Memorandum .....	138
c. <i>The 1950 Exchange of Notes</i> .....	142
d. The Nature and Content of the Notes Exchanged .....	143
e. The Circumstances that Preceded the exchange of Notes .....	144
f. The Circumstances that Followed the 1950 Exchange of Notes (The 1961 Trucco Memorandum) .....	146
g. The 1975 Joint Declaration of Charaña .....	148
h. The Subsequent Confirmation by Chile of its Agreement within the Framework of the OAS .....	150
I. THE BINDING NATURE OF CHILE'S COMMITMENT .....	151
A. <i>The Binding Nature of Agreements Entered into by Chile</i> .....	151
B. <i>The Binding Nature of Unilateral Promises Made by Chile</i> .....	153
IV. CONCLUSION .....	154
<b>CHAPTER III .....</b>	<b>157</b>
<b>CHILE'S BREACH OF ITS OBLIGATION .....</b>	<b>157</b>
I. INTRODUCTION .....	157
SECTION I: DEGRADATION OF THE NEGOTIATIONS TERMS.....	157
A. <i>Introduction</i> .....	157

<i>B. The failure to negotiate in good faith .....</i>	160
<i>C. Chile's Progressive Withdrawal from its Commitments.....</i>	160
a. Chile's reversals concerning the 1895 Transfer Treaty .....	160
b. Chile's Conduct in the Period of the 1950 Exchange of Notes .....	164
c. <i>Chile's Conduct in 1975.....</i>	165
d. Conclusion Concerning the Key Episodes.....	167
<i>D. Conclusion Concerning the Overall Pattern of Chile's Conduct.....</i>	168
<b>SECTION II: THE REFUSAL OF CHILE TO NEGOTIATE A SOVEREIGN ACCESS TO THE SEA AND ITS CONSEQUENCES.....</b>	<b>170</b>
<i>A. The Refusal of Chile to Negotiate the Sovereign Access.....</i>	170
<i>B. Consequences of the Breach by Chile of its Obligation to Negotiate.....</i>	189
<b>CONCLUSIONS.....</b>	<b>193</b>
<b>SUBMISSIONS AND PRAYER FOR RELIEF .....</b>	<b>195</b>



# **VOLUME I**



## **INTRODUCTION**

1. The Plurinational State of Bolivia (“Bolivia”) initiated these proceedings against the Republic of Chile (“Chile”) by its Application dated 24 April 2013. By its Order dated 18 June 2013, the Court fixed 17 April 2014 as the date for the filing Bolivia’s written pleadings. The present Memorial is submitted in accordance with that Order.
2. This Introduction is divided into four sections. Section I provides an overview of the dispute before the Court and summarizes Bolivia’s position. Section II explains the basis of the Court’s jurisdiction. Section III sets out the relief sought. Section IV provides an outline of the structure of this Memorial.

### **Section I: Overview of the dispute**

3. The present dispute 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. Bolivia was deprived of its coastal territories when they were occupied by Chile in the War of the Pacific in 1879. In agreements with Bolivia, as well as in its own unilateral declarations, Chile expressly recognized that Bolivia should not become perpetually landlocked, and bound itself to negotiate a sovereign access that would allow Bolivia to maintain its connection to the sea. But after more than a century Chile has not fulfilled that obligation. Indeed, after decades of prevarication, during which there was a steady degradation of the terms on which Chile had agreed to negotiate, Chile shifted its position and has now completely repudiated its obligation. Bolivia asks the Court to order the Parties to resume negotiations in good faith on such access, as they have agreed to do on many occasions since the nineteenth century. The two States themselves will negotiate the exact terms of that sovereign access.

4. Bolivia's case is focused upon the continuing failure of Chile to fulfil its obligation to negotiate a sovereign access and upon its recent repudiation of that obligation. Chapter I of this Memorial sets out a detailed account of the historical evolution of the dispute from the occupation of Bolivia's coastal territory up to the present. The following is an overview of the key episodes.

#### *A. THE KEY EPISODES*

5. In 6 August 1825 the independent State of Bolivia emerged from the administrative province of *Audiencia de Charcas* established in 1559 under the Spanish dominion. Bolivia inherited the coastal territory of this province in accordance with the *uti possidetis* principle; and no objection was raised to its territorial boundaries by Chile or by any other State<sup>1</sup>.

6. In the 1840s, Chile began making claims to Bolivia's coastal area – the Department of Littoral ("Departamento Litoral"), aware of its rich natural resources<sup>2</sup>. After long negotiations, a decision was reached finally between Bolivia and Chile by a treaty dated 10 August 1866. By this treaty, Chile recognized that "the line of demarcation of boundaries between Chile and Bolivia in the desert... shall henceforth be the parallel of latitude 24 degrees south". And a subsequent treaty, signed at Sucre in 6 August 1874, confirmed the 24 parallel as the boundary between the two States. Another treaty, "respecting boundaries", was signed at Sucre in 6 August 1874<sup>3</sup>.

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<sup>1</sup> Chap. I paras. 37-41.

<sup>2</sup> Chap. I paras. 47-48.

<sup>3</sup> See MB Vol. II, Annex 96.

7. In 1877 an earthquake devastated the area and Bolivia ordained a tax to fund the relief effort. Chilean investors disputed that tax; and in 1879, despite Bolivia's proposal to submit the controversy to arbitration, and the cancellation of the tax, Chile used the dispute to justify its invasion of Bolivia's coastal territory<sup>4</sup>.

8. In the face of Chile's threats of a further invasion, Bolivia signed at Valparaiso on 4 April, 1884 a Truce Pact<sup>5</sup> providing that Chile would continue to govern the occupied coastal area of Bolivia<sup>6</sup>. The parties agreed, however, that the Truce Pact be complemented by another peace agreement providing for Bolivia's sovereign access to the sea.

9. Accordingly, on 18 May 1895, Bolivia and Chile concluded a Treaty of Peace and Friendship, which confirmed the loss for Bolivia of its extensive and resource-rich Department of Littoral for the benefit of Chile, together with a Treaty on Transfer of Territory (the "1895 Transfer Treaty"), providing for the grant to Bolivia of an outlet to the Pacific Ocean<sup>7</sup>. These instruments, and the accompanying explanatory and additional protocols, provided that Chile's right to govern the occupied coastal territories would be subject to Bolivia's "free and natural access to the sea."<sup>8</sup> In particular, Chile expressly committed itself "to acquire the port and territories of Tacna and Arica", then in dispute with Peru, "with the unavoidable purpose of ceding them to Bolivia."<sup>9</sup> Chile further undertook that if it did not succeed in obtaining this territory, it would give Bolivia an alternative sovereign access to the Pacific through "Vítor or another equivalent inlet" and recognized that its obligation "will not be regarded as fulfilled, until it cedes a port

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<sup>4</sup> Chap. I paras. 53-57.

<sup>5</sup> Chap. I paras. 60-64.

<sup>6</sup> See BM Vol. II, Annex 108, Article II.

<sup>7</sup> See BM Vol. II, Annexes 99 and 98, Chap. I paras. 71-88.

<sup>8</sup> See BM Vol. II, Annex 98. Preamble.

<sup>9</sup> See BM Vol. II, Annex 105. Art. III.

and area that fully satisfies the current and future needs of Bolivian trade and industry.”<sup>10</sup>

10. The so-called relations of peace and friendship were re-established between Bolivia and Chile by the 20 October 1904 Treaty of Peace and Friendship,<sup>11</sup> bringing an end to the regime established by the Truce Pact (Article I). Chile’s dominion over the occupied territories was recognised and a new boundary was established (Article II). Chile recognised that Bolivia had a right of free commercial transit through Chile’s territories and ports on the Pacific (Article VI) and provided for financial compensations (Article IV) and the building of a railroad from Arica to La Paz (Article III). Sovereign access to the sea was not addressed in the 1904 Treaty.

11. Chile affirmed its will to negotiate a sovereign access to the Pacific in declarations before the League of Nations and, in the Officially Approved Act of 10 January 1920 (“1920 Act”) pursuant to which it confirmed its willingness “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.”<sup>12</sup> A proposal to similar effect was made by American Secretary of State Frank B. Kellogg in 1926<sup>13</sup> and Bolivia subsequently accepted Chile’s offer (set out by the Chilean Minister of Foreign Affairs, Mr. Jorge Matte) to negotiate transfer of a strip of territory and a port to Bolivia. Nonetheless, in 1929 Chile concluded a boundary Treaty and a Complementary Protocol with Peru pursuant to which Chile acquired Arica while committing itself not to transfer this territory without Peru’s consent.<sup>14</sup>

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<sup>10</sup> *Ibid.*, Art. IV.

<sup>11</sup> See BM Vol. II, Annex 100.

<sup>12</sup> See BM Vol. II, Annex 101.

<sup>13</sup> See BM Vol. II, Annex 21.

<sup>14</sup> See BM Vol. II, Annex 107.

12. In an exchange of notes in 1950, Chile once again reaffirmed its commitment to negotiate a sovereign access to the sea for Bolivia. In response to the Bolivian Note of 1 June 1950 which referred *inter alia* to the 1895 Transfer Treaty pursuant to which “the Republic of Chile … accepted the transfer to my country of an own access to the Pacific Ocean”,<sup>15</sup> the Chilean Note of 20 June 1950 confirmed that it “is willing to formally enter into direct negotiations aimed at finding a formula that will make it possible to give to Bolivia a sovereign access to the Pacific Ocean of its own, and for Chile to receive compensation of a non-territorial character that effectively takes into account its interests.”<sup>16</sup>

13. In a 1961 memorandum, the Chilean Ambassador to Bolivia, Mr. Manuel Trucco, reassured Bolivia that Chile’s Note of 1950 was “clear evidence” of Chile’s “full consent to initiate as soon as possible, direct negotiations aimed at satisfying the fundamental national need of [Bolivia’s] own sovereign access to the Pacific Ocean, in return for compensation that, without being territorial in character, takes into account the reciprocal benefits and effective interests of both countries.”<sup>17</sup>

14. In 1975 the Bolivian and Chilean Presidents, Hugo Banzer Suárez and Augusto Pinochet Ugarte, signed a Joint Declaration at the border town of Charaña undertaking to address “the landlocked situation that affects Bolivia”<sup>18</sup>. A Note from Chile dated 19 December 1975 confirmed that, notwithstanding the 1904 Treaty, Chile “would be willing to negotiate with Bolivia the cession of a strip of territory north of Arica to the *Línea de la Concordia*.”<sup>19</sup>

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<sup>15</sup> See BM Vol. II, Annex 109 A.

<sup>16</sup> See BM Vol. II, Annex 109 B.

<sup>17</sup> See BM Vol. II, Annex 24.

<sup>18</sup> See BM Vol. II, Annex 111.

<sup>19</sup> See BM Vol. II, Annex 73.

15. Beginning in 1975, the Organization of American States (“OAS”) adopted a series of unanimous resolutions supporting Bolivia’s sovereign access to the sea. Resolution N° 157 of August 1975 called for an end to Bolivia’s “landlocked situation ... in accordance with the principles of international law”. In 1979 and 1983 the General Assembly adopted Resolutions N°s 426 (IX-O/79) and 686 (IX-O/83) that stated: “it is of continuing hemispheric interest that an equitable solution be found whereby Bolivia will obtain appropriate sovereign access to the Pacific Ocean.”<sup>20</sup>

16. Negotiations stagnated when, contrary to its earlier agreements, Chile demanded that Bolivia cede further territory to Chile as a pre-condition to an agreement on sovereign access to the sea. In 1978, Bolivia suspended diplomatic relations because of Chile’s “uncompromising stance”,<sup>21</sup> and Chile laid landmines in the areas that would have been transferred to Bolivia<sup>22</sup>.

17. On 9 June 1987, despite repeated affirmation of its commitment and several attempts at negotiation, Chile abruptly changed its position and declared that any solution based on sovereign access for Bolivia was “unacceptable”.

18. In the years that followed, despite the efforts of the OAS and of Bolivia, no progress was made on concluding an agreement. On 17 February 2011, following many months of unsuccessful attempts at finding a solution, the President of Bolivia, Evo Morales Ayma, made a final plea for Chile to put forward a meaningful proposal for negotiation. Chile failed to respond. In June 2011, Chile’s Foreign Minister, Alfredo Moreno, declared that “Chile has clearly stated that it is

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<sup>20</sup> See BM Vol. II, Annexes 191 and 195.

<sup>21</sup> Chap. I para. 163.

<sup>22</sup> *Ibid.*

not in a position to grant Bolivia a sovereign access to the Pacific Ocean”<sup>23</sup>. Subsequent declarations of the President of Chile, his Minister of Foreign Affairs and other Chilean representatives have confirmed this position.

*B.* THE CHILE’S OBLIGATION TO NEGOTIATE

19. Thus, for decades Chile has on the one hand repeatedly recognized its obligation to negotiate a sovereign access to the sea, while on the other hand, it has repeatedly failed to engage in meaningful negotiations, progressively degraded the negotiation terms agreed upon by the parties, and, ultimately, repudiated entirely its obligation to negotiate.

20. The prolonged and continuing denial of such access has had far-reaching adverse consequences on Bolivia’s progress and development and remains a matter of utmost national importance for its people. The fulfilment of the obligation to negotiate is an urgent need, driven both by international law and fundamental principles of justice. Bolivia is in a unique and unprecedented position: it has been landlocked for more than a century while retaining a right of sovereign access to the sea that it has not been allowed to exercise. Accordingly, it comes before the Court to vindicate its rights and to resolve peacefully a dispute that has distressed the Bolivian people, significantly undermined their economic progress and social development,<sup>24</sup> and impaired neighbourly and mutually advantageous relations with Chile.

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<sup>23</sup> See BM Vol. II, Annex 154.

<sup>24</sup> See BM Vol. II, Annex 180.

### C. SUBJECT MATTER OF THIS DISPUTE

21. For decades, the Parties have agreed to negotiate the particular expression and elements of a sovereign access to the Pacific Ocean for Bolivia. But, although the negotiations commenced from time to time, they have not led anywhere. For more than a century Bolivia has put its trust in Chile's repeated acknowledgements of the duty to negotiate a sovereign access to the Pacific through Chilean territory for Bolivia. In these proceedings, Bolivia seeks the reopening of the door that Chile closed and has refused to reopen. It seeks a decision from the Court that Chile is obliged to negotiate on a sovereign access to the sea for Bolivia. Bolivia indeed has the right to get back to the negotiating table with its neighbour and to find an agreed solution of this protracted and unjust situation.

### Section II: Jurisdiction

22. The Court has jurisdiction over this dispute by reason of Article XXXI, b), c) and d) of the American Treaty on Pacific Settlement adopted at Bogota, Colombia, on 30 April 1948 (the "Pact of Bogota")<sup>25</sup>.

23. Article XXXI of the Pact of Bogota provides:

"In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning: a) The interpretation of a treaty; b) Any question of international law; c) The existence of

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<sup>25</sup> Organization of American States (OAS), *American Treaty on Pacific Settlement ("Pact of Bogotá")*, 30 Apr. 1948, United Nations, *Treaties Series (UNTS)*, Vol. 30, N° 449.

any fact which, if established, would constitute the breach of an international obligation; d) The nature or extent of the reparation to be made for the breach of an international obligation.”<sup>26</sup>

24. As observed by the Court, the importance of peaceful dispute settlement within the inter-American system is reflected in Article 2 (c) of the OAS Charter, which declares that one of the essential purposes of the Organization is “to ensure the pacific settlement of disputes that may arise among the Member States.”<sup>27</sup>

25. Bolivia ratified the Pact of Bogota on 14 April 2011<sup>28</sup> and deposited its instrument of ratification on 9 June of the same year. Chile ratified the Pact on 21 August 1967 and deposited its instrument of ratification on 15 April 1974<sup>29</sup>. As at the date these proceedings were initiated by Bolivia, neither party had any reservation in force precluding the jurisdiction of the Court<sup>30</sup>.

26. Bolivia and Chile are Parties to the Statute of the Court *ipso jure* by virtue of their membership of the United Nations Organization.

27. The Court thus has jurisdiction over this dispute.

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<sup>26</sup> 30 UNTS N° 449, pp. 84-116.

<sup>27</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832, para. 54.

<sup>28</sup> See BM Vol. II, Annex 113.

<sup>29</sup> See BM Vol. II, Annex 114.

<sup>30</sup> At the time of signature, the Delegation of Bolivia made a reservation with regard to Art. VI. On 10 Apr. 2013; that reservation was withdrawn (Instrument of Withdrawal of Reservation to the Pact of Bogota, dated 10 April 2013, See BM Vol. II, Annex 115). At the time of ratification, Chile made the following reservation: Art. LV of the Pact, in the part that refers to the possibility that some of the Contracting States would make reservations, must be interpreted in the light of paragraph N° 2 of Res. XXIX adopted at the Eighth International Conference of American States. This is not a pertinent reservation.

### **Section III. Relief Sought**

28. Bolivia accordingly asks the Court to adjudge and declare that:

- a)* Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean;
- b)* Chile has breached the said obligation; and
- c)* Chile must perform the said obligation in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean.

### **Section IV: Outline of the Memorial**

29. Chapter I of the *Memorial* sets out the facts in this case. After a brief overview of the geographical context, this chapter sets out in some detail the historical evolution of the dispute. This historical account is necessary in order to understand the context and circumstances of the relations between Bolivia and Chile, and of the negotiations during the entire period between the 1879 invasion and occupation of Bolivia's coastal area and the present.

30. Chapter II explains that the duty to negotiate at issue in this case is not simply an instance of a general duty under international law to negotiate on differences between States. It is a specific duty, which arises from the specific circumstances in the case and the nature and extent of the commitments made by Chile. The first section of Chapter II explains the components that make up this specific duty to negotiate; and the second section explains how this duty acquired its legal force, which has been recognized and maintained through a succession of

bilateral agreements, statements in international fora, and unilateral statements, made over the course of decades, so as to rise to a legally-binding obligation on Chile to negotiate over a sovereign access to the sea.

31. Chapter III, drawing on the facts set out in Chapter I, explains how the factual record demonstrates that Chile has failed to fulfil its obligation to negotiate in good faith a sovereign access to the sea for Bolivia and is required to comply with this obligation.

32. The Memorial ends with a summary of its main conclusions, followed by the formal submissions of Bolivia and its prayer for relief.

33. In accordance with Article 50 of the Rules of the Court, Bolivia's Memorial also contains documentary Annexes which are set out in separates volumes that accompany this *Memorial*.



## CHAPTER I

### THE FACTS

#### I. Introduction

34. Bolivia has a population of 10,027,254 inhabitants<sup>31</sup> and has an area of 1, 098,581 square kilometres<sup>32</sup>. It is situated in the centre of South America, bordering the Republic of Chile on the southwest, the Republic of Peru on the west, the Federative Republic of Brazil on the north and east, the Republic of Paraguay on the southeast, and the Argentine Republic on the south. (See Figure I).

35. Bolivia's connection with the sea dates back to the Pre-Colonial Andean civilizations and the Spanish dominion. The Royal Audience of Charcas administered an extensive coastal territory on the Pacific Ocean. In accordance with the *uti possidetis* principle, upon gaining independence in 1825, Bolivia inherited and exercised full sovereignty over this territory. It was administered as the Department of Littoral. In 1866 and 1874, Bolivia and Chile concluded agreements fixing the boundary at parallel 24° latitude south. In 1878 however, a dispute arose over taxation of Chilean and foreign investors exploiting Bolivia's rich saltpetre resources. In 1879, Chile invaded and occupied Bolivia's coastal territories.

36. When Chile threatened further invasions, Bolivia concluded the 1884 Truce Pact, followed by the 1895 Peace Treaty and the Treaty on Transfer of Territory and its Protocols. The essential *quid pro quo* of these agreements was the cession to Chile of Bolivia's occupied Department of Littoral in exchange for coastal territories further north. Thus, the Parties agreed that Bolivia's *enclosure* was

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<sup>31</sup> See [www.censosbolivia.bo](http://www.censosbolivia.bo) census 2012.

<sup>32</sup> See [http://www.ine.gob.bo/html/visualizadorHtml.aspx?ah=Aspectos\\_Politicos.htm](http://www.ine.gob.bo/html/visualizadorHtml.aspx?ah=Aspectos_Politicos.htm)

temporary and that it retained a right of sovereign access to the sea. The parties continued to conclude successive agreements, including the 1920 Act, the 1926 Matte Memorandum, the 1950 Exchange of Notes, the 1961 Trucco Memorandum, and the 1975 Joint Declaration of Charaña, and Chile made several declarations, including before the League of Nations and in later years before the OAS, acknowledging Bolivia's claim over sovereign access to the sea. It was in the 1980s, when Chile began to openly evade its obligations in an abrupt *volte face*.

## **II. Bolivia's coastal territory on independence (1825)**

37. Under the Spanish dominion, the territory that was to become Bolivia was administered by the Royal Audience of Charcas, under the authority of the Viceroyalty of Peru<sup>33</sup>. This Audience included the province of Atacama which bordered the Pacific Ocean to the west, the Audience of Lima to the north at the Loa River, and the Captaincy-General of Chile to the south at the Salado River<sup>34</sup>.

38. When the Viceroyalty of Río de La Plata was created in 1776, the Royal Audience of Charcas, including the Atacama and its coast, was transferred to its jurisdiction<sup>35</sup>. This territory was often referred to as "Alto Peru"<sup>36</sup>.

39. In 1782, the Viceroyalty was divided into eight intendancies, including the Intendancy of Potosí, encompassing the Atacama coastal territory on the Pacific

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<sup>33</sup> See BM Vol. II, Annex 3.

<sup>34</sup> P.V. Cañete and Domínguez, *Guía histórica, geográfica, física, política, civil y legal del Gobierno e Intendencia de la Provincia de Potosí*, 1787, Ed. Potosí, 1952, p. 263.

<sup>35</sup> J. Mendoza, *El mar del sur*, Sucre, 1926, p. 27.

<sup>36</sup> E. Aillón, "De Charcas/Alto Perú a la República de Bolívar/Bolivia. Trayectorias de la identidad boliviana", en *Crear la Nación. Los nombres de los países de América Latina*, Buenos Aires, Sudamericana, 2008, p. 132.

Ocean<sup>37</sup>. This remained part of the Royal Audience of Charcas or Alto Peru until Bolivia's independence in 1825.

**FIGURE I: BOLIVIA'S LOCATION IN SOUTH AMERICA**



<sup>37</sup> J. Escobari Cusicanqui, *Historia Diplomática de Bolivia*, Urquiza, Vol. I, 5<sup>th</sup> Ed., 1999, pp. 122.

40. Upon attaining independence from the Spanish dominion, the new Republics of Hispanic America agreed to define their international borders based on the boundaries of the colonial administrative units they inherited. This practice gave rise to the now generally applied principle of *uti possidetis juris*<sup>38</sup>.

41. The Provinces of Alto Peru declared their independence on 6 August 1825, as an independent State subsequently renamed “Bolívar Republic” and, finally, “Republic of Bolivia”. This new State had a coastline of more than 400 kilometres along the Pacific Ocean<sup>39</sup>, corresponding to the Province of Atacama, which was part of the Department of Potosí. That Department was defined by the Loa River at its northern limit and at its southern limit the Salado River beyond parallel 25° latitude south, which formed a natural boundary between Bolivia and Chile<sup>40</sup> (See Figure II).

42. The Port of Cobija – also called La Mar – was situated in this area and recognized as a major port<sup>41</sup>. In 1829, the Bolivian President, Marshal Andrés de Santa Cruz, decreed the establishment of the Littoral Province (Atacama)<sup>42</sup>, independent of the Department of Potosí.

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<sup>38</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, I.C.J. Reports 1992*, p. 380, para. 28, and *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, pp. 706-707, paras. 151-154.

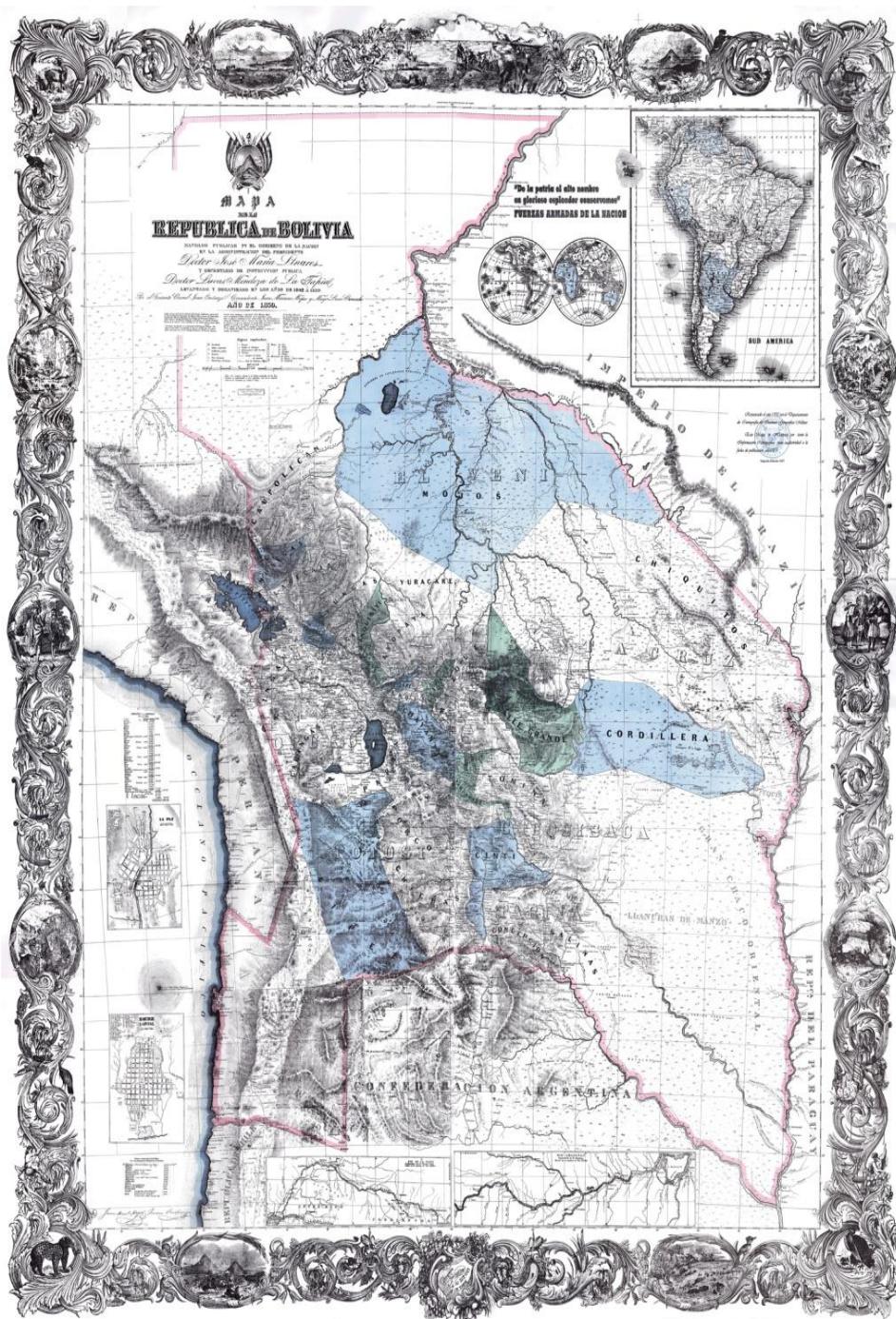
<sup>39</sup> A. Bresson, *Una visión francesa del Litoral boliviano* (1886), La Paz, 1997, p. 152.

<sup>40</sup> R. Botelho Gozálvez, *Breve Historia del Litoral Boliviano*, La Paz - Bolivia, 1979, p. 18.

<sup>41</sup> See BM Vol. II, Annex 9.

<sup>42</sup> See BM Vol. II, Annex 11.

## FIGURE II: OFFICIAL MAP OF BOLIVIA (1859)



43. The Bolivian Constitutions of 1831<sup>43</sup> and 1834<sup>44</sup> declared that the Littoral Province constituted an integral part of Bolivia's territory. Subsequently, the Department of Littoral was created on this Province, and declared by the Bolivian Constitutions of 1839 and 1843<sup>45</sup> to be part of Bolivia's territory.

44. Bolivia exercised full sovereignty over the territory of the Department of Littoral and its respective maritime coast through various legislative and administrative acts<sup>46</sup>. Neither Chile nor any other State objected to Bolivia's peaceful and sovereign possession of these territories.

45. In 1833, Chile concluded the Treaty of Friendship, Commerce and Navigation with Bolivia. Article 6 of that Treaty recognized the maritime status of Bolivia, providing that: "Bolivian or Chilean vessels belonging to citizens of either of the two Republics, shall be able to enter all those ports, rivers, and other places of the territory of the other securely and freely..."<sup>47</sup>

46. The maritime status of Bolivia was also accepted by other States, as evidenced by the conclusion of several navigation and commerce treaties.<sup>48</sup>

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<sup>43</sup> See BM Vol. II, Annex 1 A.

<sup>44</sup> See BM Vol. II, Annex 1 B.

<sup>45</sup> See BM Vol. II, Annex 1 C and D.

<sup>46</sup> See for example, *inter alia*: concession of exemptions to those establishing residence in the said territory, "Decree of 10 September 1827", "Order of 15 October 1840"; Creation of mail services, "Order of 26 November 1832"; regulation of taxes "Law of 5 November 1832"; creation of customs offices, "Law of 17 July 1839"; transportation arrangements "Law of 4 November 1844" in BM Vol. II Annexes 10, 13, 12, 4, 5 and 7. See also F. Cajás, *La Provincia de Atacama 1825-1842*, 2<sup>nd</sup> Ed., 2012, La Paz.

<sup>47</sup> See BM Vol. II, Annex 87.

<sup>48</sup> For example: "Treaty of Friendship, Commerce, and Navigation between Bolivia and France of 9 December 1834" (Annex 88); "Treaty of Friendship, Commerce, and Navigation between Bolivia and the United Kingdom of Great Britain of 29 September 1840" (Annex 89); "Treaty of Peace and Friendship between Bolivia and the Kingdom of Spain of 21 July 1847", (Annex 90); "Treaty of Friendship, Commerce and Navigation between Bolivia and the United States of America on 13

Likewise, Bolivia's sovereignty over its coastal territory was recognized in official maps of neighbouring countries<sup>49</sup>.

### **III. Chile's expansionist policy**

47. Beginning in the 1840s, Chile embarked on an expansionist policy that threatened Bolivia's coastal territory. The Atacama Desert had rich natural resources. The growing demand for guano as a fertilizer made this a valuable commodity. During this period, Chile dispatched various expeditions to guano-rich regions in Bolivia's Department of Littoral<sup>50</sup>. Subsequently, Chile passed the Law of 31 October 1842 by which it declared that: "Guano deposits existing on the coast of the province of Coquimbo, on the coastal territory of the Desert of Atacama and in its adjacent islands and islets are declared national property."<sup>51</sup>

48. A year later, on 31 October 1843, Chile created a new province, naming it Province of Atacama, deliberately creating confusion with the Bolivian territory of Atacama. Chilean subjects began to exploit guano on Bolivian territory up to the parallel 23° latitude south without authorization<sup>52</sup>. Bolivia formally protested these incursions and unlawful exploitation of resources and called for revocation of the

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May 1858" (Annex 91); "Treaty of Friendship, Commerce and Navigation between Bolivia and Belgium of 19 August 1860" (Annex 92), "Treaty of Commerce and Customs between Bolivia and Peru of 5 September 1864" (Annex 93); "Treaty of Commerce and Navigation Treaty among Bolivia, United States of Colombia, Ecuador, Guatemala, Peru, El Salvador, and the United States of Venezuela of 10 March 1865" (Annex 94).

<sup>49</sup> See *Maritime Dispute (Peru v. Chile)*, I.C.J. *Memorial of the Government of Peru of 20 March 2009*, Vol. I, p. 29, Figure 1.2.

<sup>50</sup> V. Abecia, *Las Relaciones Internacionales en la Historia de Bolivia*, Los Amigos del Libro Editorial 1979, pp. 524-527.

<sup>51</sup> See BM Vol. II, Annex 6.

<sup>52</sup> See A. Bresson, *Una visión francesa del Litoral boliviano* (1886), La Paz, 1997, p. 13.

1842 Law<sup>53</sup>. In the years that followed, Chile made manifest its expansionist intentions over the Bolivian territory up to parallel 23° latitude south<sup>54</sup>.

#### IV. The Territorial Limits Treaties

49. On 10 August 1866, the parties concluded the Treaty of Territorial Limits in which Bolivia ceded some of its territory to Chile in order to establish the new boundary at parallel 24° latitude south. This treaty also established a special regime of joint ownership between parallels 23° and 25° latitude south for the exploitation of guano and other minerals. It provided that Chile and Bolivia:

“shall divide equally the produce of the guano deposits discovered in Mejillones, and any other deposits of the same kind which may be discovered in the territory comprehended within between parallels 23° and 25° degrees of south latitude, as also the export duties upon minerals extracted from this designated territory.”<sup>55</sup> (See Figure III)

50. Because of the difficulty of subjecting diverse minerals to the 1866 joint ownership regime, Bolivia and Chile agreed that only the exploitation of guano found between parallels 23° to 24° latitude south would be included<sup>56</sup>. They concluded a new Treaty of Territorial Limits of 6 August 1874 which confirmed the boundary at parallel 24° south<sup>57</sup>. (See Figure IV)

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<sup>53</sup> V. Abecia, *Las Relaciones Internacionales en la Historia de Bolivia*, Ed. Los Amigos del Libro, 1979, pp. 527-581. See also Memoria Rafael Bustillos (1863) pp. 1-2. To this end Bolivia sent several diplomatic missions: Casimiro Olañeta (1842), Joaquín Aguirre (1847), José Ballivián (1848), Juan de la Cruz Benavente (1854), Manuel Macedonio Salinas (1858), José María Santibáñez (1860), Rafael Bustillos (1863) y Tomás Frías (1864).

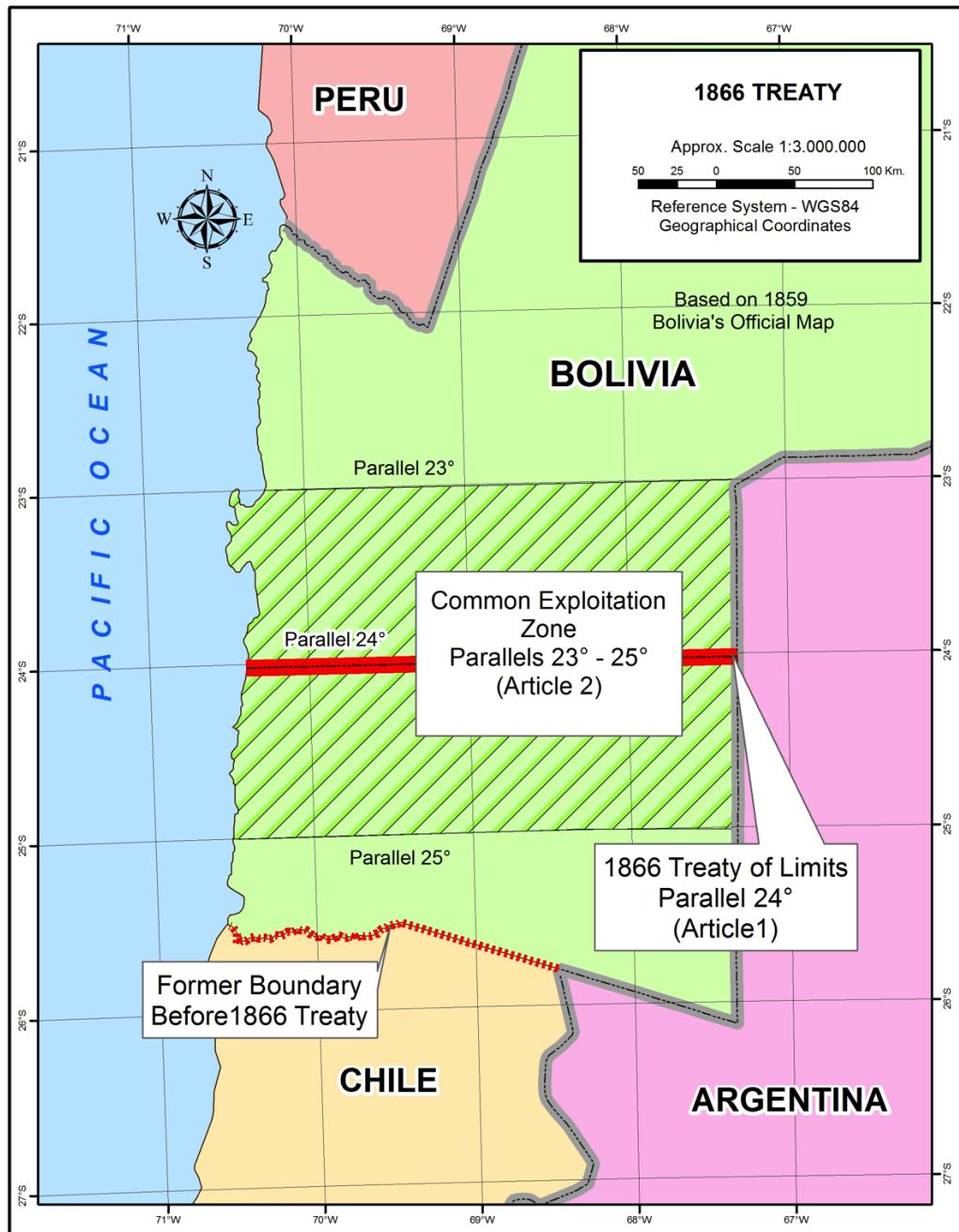
<sup>54</sup> V. Abecia, *Las Relaciones Internacionales en la Historia de Bolivia*, Ed. Los Amigos del Libro, 1979, p. 571.

<sup>55</sup> See BM Vol. II, Annex 95, Art. II.

<sup>56</sup> See BM Vol. II, Annex 96. Art. 3.

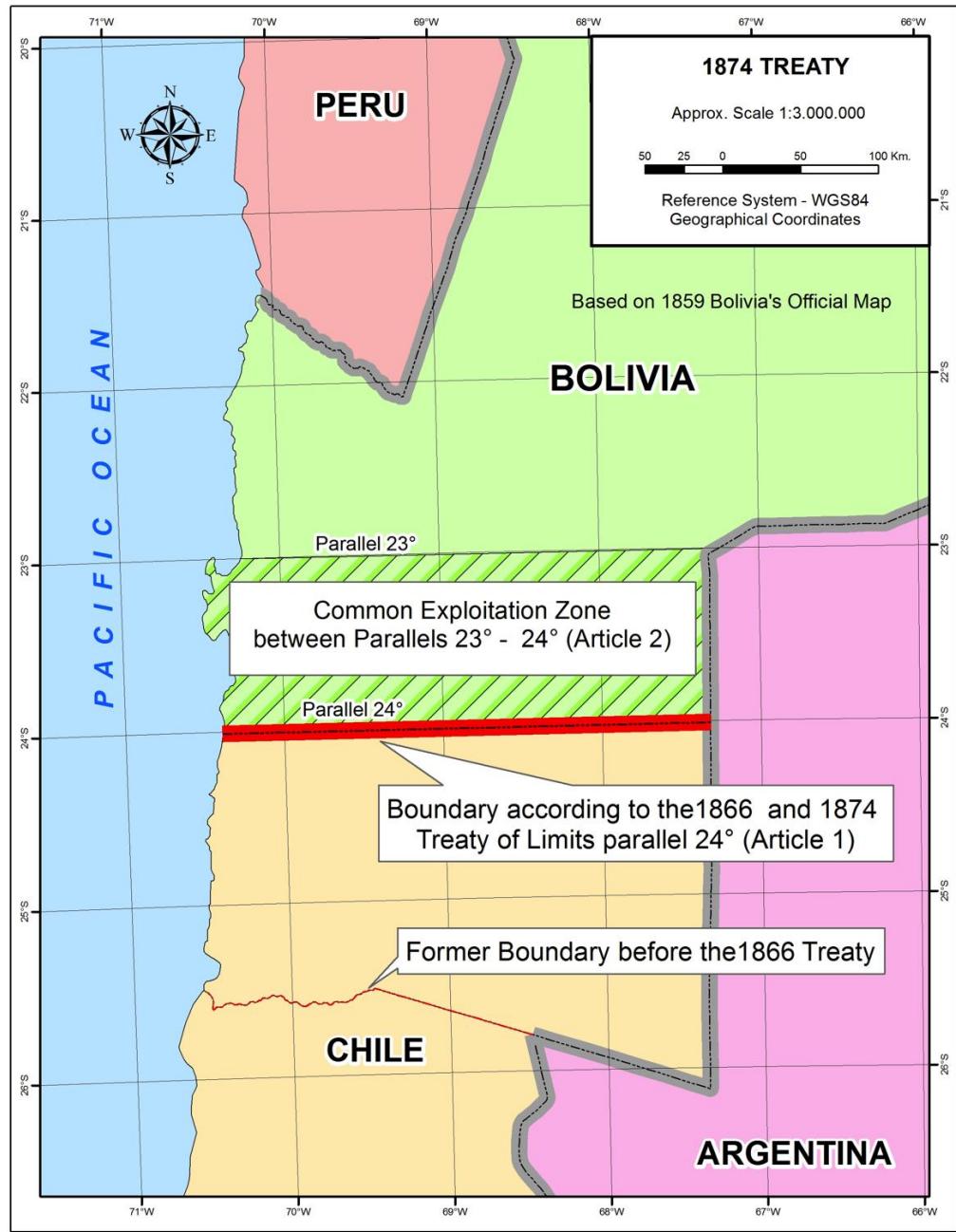
<sup>57</sup> *Ibid.*

**FIGURE III: TREATY OF TERRITORIAL LIMITS BETWEEN BOLIVIA AND CHILE OF 10 AUGUST 1866**



This sketch-map has been prepared for illustrative purposes only.

**FIGURE IV: TREATY OF TERRITORIAL LIMITS BETWEEN BOLIVIA AND CHILE, 6 AUGUST 1874**



This sketch-map has been prepared for illustrative purposes only.

51. On 21 July 1875, an Additional Protocol to the Treaty of Territorial Limits of 1874 was concluded which provided in Article 1 that the joint ownership regime over the exploitation of guano would also cover the territory between 24° and 25° parallels of latitude south. Article 2 further provided that: “All questions resulting from the interpretation and application of the Treaty of Territorial Limits of August 6, 1874 shall be submitted to arbitration.”<sup>58</sup>

52. This special regime of joint ownership of minerals would, however, be short-lived. Chile’s expansionist policy was soon transformed from commercial domination to military occupation. Chile’s pretext for invasion would be a dispute between Bolivia and the Chilean and foreign company that was exploiting natural resources on Bolivia’s coastal territories.

## **V. The invasion of Bolivia’s coastal territory in 1879**

53. The Bolivian Government of General Mariano Melgarejo (1864-1871) had granted concessions in favour of Chilean nationals to exploit the coastal territory’s vast nitrate resources. These investors established the “Nitrate and Railway Company of Antofagasta”, which also attracted capital from other countries<sup>59</sup>. In 1877, a massive earthquake devastated the Bolivian coast line and destroyed the Bolivian port of Cobija<sup>60</sup>. The following year, 1878, in order to raise funds for reconstruction and repair of this extensive damage, and following the initiative of Congress Representatives from Antofagasta and Mejillones<sup>61</sup>, Bolivia adopted a

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<sup>58</sup> See BM Vol. II, Annex 102.

<sup>59</sup> M. Frontaura Argandoña, *El Litoral de Bolivia*, p. 192. H. Municipality of La Paz, pp. 191-192.

<sup>60</sup> R. Querejazu Calvo, *Guano, Salitre, Sangre: Historia de la Guerra del Pacífico (La Participación de Bolivia)*, Ed. G.U.M., La Paz, 2009, pp. 139-142.

<sup>61</sup> R. Querejazu Calvo, *Aclaraciones Históricas sobre la Guerra del Pacífico*, Ed. G.U.M., La Paz, 2009, p. 88.

law requiring a tax of ten cents per quintal of exported nitrate<sup>62</sup>. The “Nitrate and Railway Company of Antofagasta” refused to pay.

54. Instead of first exhausting domestic remedies, the Company approached Chile to espouse its claim on the grounds that the 1878 Bolivian law violated the Treaty of Territorial Limits of 6 August 1874<sup>63</sup>. In response, Bolivia invoked the Additional Protocol of 21 July 1875 proposing arbitration to resolve the dispute<sup>64</sup>. On 20 January 1879, Chile declared that it would accept arbitration on the condition that Bolivia suspend enforcement of the law<sup>65</sup>. On 1 February 1879, pending arbitration of the dispute, Bolivia cancelled the concession of the “Nitrate and Railway Company of Antofagasta” and suspended enforcement of the Law of 14 February 1878<sup>66</sup>.

55. Just a few days later, on 14 February 1879, without any declaration of war, Chile invaded the Bolivian port of Antofagasta. In the days that followed, Chilean troops advanced throughout the Bolivian coastal territory, taking the ports of Mejillones, Cobija and Tocopilla as well as the mining centre of Caracoles<sup>67</sup>.

56. On 3 March 1879, the Chilean Foreign Ministry issued a memorandum to persuade the international community that its military occupation of Antofagasta was limited to the assertion of its purported rights to the territory between parallels

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<sup>62</sup> See BM Vol. II, Annex 8.

<sup>63</sup> See BM Vol. II, Annex 29.

<sup>64</sup> Through Note of 26 December 1878 in, pp. 20-21. See BM Vol. II, Annex 30.

<sup>65</sup> See BM Vol. II, Annex 31.

<sup>66</sup> See BM Vol. II, Annex 14.

<sup>67</sup> R. Querejazu Calvo, *Guano, Salitre, Sangre: Historia de la Guerra del Pacífico (La Participación de Bolivia)*, Ed. G.U.M., La Paz, 2009, pp. 220-221.

23° and 24° south<sup>68</sup>. However, Chilean troops invaded well beyond this area and eventually occupied all of Bolivia's Department of Littoral.

57. Against the onslaught of the invasion, an improvised group of lightly-armed Bolivian citizens made a heroic stand under the leadership of Ladislao Cabrera and Eduardo Abaroa against the vastly more powerful Chilean forces<sup>69</sup>. By 31 March 1879, as the extent of Chile's military ambitions became clear, and the distress and suffering of the Bolivian people intensified, Bolivia dispatched a memorandum to the international community denouncing the invasion and occupation of its territory<sup>70</sup>. It was only on 5 April 1879, that Chile finally declared war, having already seized the entire Department of Littoral.

58. Chile's military ambitions did not end in Bolivia. Soon after, it went on to invade the Peruvian coastal territory of Tarapacá. By 18 January 1881, Chile had occupied the city of Lima. In the period that followed, Chile gradually concluded armistices and negotiated withdrawals from or cession of occupied territories, in pursuit of a permanent peace settlement that would define its new boundaries. Following the Treaty of Peace with Peru on 20 October 1883 – known as the Treaty of Ancón – Chile began to withdraw from Lima. Pursuant to Article 2 of that Treaty, Peru transferred its southernmost Province of Tarapacá to Chile. In contrast, Article 3 provided that to the north, the territory of the Provinces of Tacna and Arica:

“shall continue in the possession of Chile and subject to Chilean authorities and laws for a period of ten years from the date of the ratification of the present peace Treaty.

After the expiration of that term, a plebiscite will decide by popular vote whether the territories of the above-mentioned provinces shall

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<sup>68</sup> See BM Vol. II, Annex 15.

<sup>69</sup> “Informe de Ladislao Cabrera Jefe de las Fuerzas de Caracoles y Calama al Ministro de Guerra de 27 de marzo de 1879”, *El Industrial*, N° 80, Sucre, abril, 1879.

<sup>70</sup> See BM Vol. II, Annex 16.

remain definitively under the dominion and sovereignty of Chile or continue to form part of Peru.”<sup>71</sup>

59. Thus, during this period, Bolivia’s coastal territory was surrounded by Chile from both north and south. Furthermore, despite the Treaty of Ancón, Chile did not completely withdraw its armed forces from the Peruvian Departments of Arequipa and Puno, keeping them close to the Bolivian border in order to threaten and persuade Bolivia to conclude a Truce Pact on Chile’s terms<sup>72</sup>. It was under these circumstances that Bolivia was forced to sign the 1884 Truce Pact to recognize Chilean control of its coastal territories.

## **VI. The 1884 Truce Pact and 1895 Transfer Treaty**

60. By late 1883, following the Treaty of Ancón between Peru and Chile, Bolivia authorized two Plenipotentiary Ministers in Santiago to negotiate the conclusion of a similar peace agreement with Chile, based on the transfer of Tacna and Arica to Bolivia<sup>73</sup>. Bolivia’s most pressing demand was to maintain sovereign access to the sea. Chile initially rejected this proposal, arguing that it could not transfer Tacna and Arica to Bolivia until their status was first clarified with Peru in the plebiscite contemplated in the Treaty of Ancón<sup>74</sup>. It maintained instead that Chile and Bolivia should first conclude a truce pact; and it threatened a further invasion if Bolivia failed to agree. However, in pursuit of its own strategic interests, Chile eventually accepted, and even encouraged, Bolivia’s demands.

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<sup>71</sup> See BM Vol. II, Annex 97.

<sup>72</sup> R. Querejazu Calvo, *Guano, Salitre, Sangre: Historia de la Guerra del Pacífico (La Participación de Bolivia)*, Ed. G.U.M., La Paz, 2009, p. 500.

<sup>73</sup> *Ibid.*, p. 502.

<sup>74</sup> *Ibid.*

61. Initially, Bolivia was placed under considerable pressure by Chile to conclude an unconditional truce agreement. In a Note of 27 February 1884, Bolivian officials advised the Bolivian Foreign Minister that:

“We are placed, Mister Minister, in a position either to sign the conditions imposed upon us or to be forced to declare at once that the negotiations have broken down, and return to Bolivia without any success and as precursors of an invasion that may well begin presently.”<sup>75</sup>

62. Similarly, in a Note of 2 April 1884, the Plenipotentiary Ministers informed the Bolivian Ministry of Foreign Affairs that “the invasion of Bolivia is imminent, it is known that the Chilean government has put measures in place to ensure that its army is ready to move on our borders at the first order.”<sup>76</sup>

63. In view of the distress and suffering of the Bolivian people resulting from Chile’s invasion and occupation, the note emphasized that:

“The calamities of war, the ravages of a violent occupation of our cities and villages, and the shame of a defeat, overwhelmingly press on our conscience. Being in a position to avert these dangers, and on the basis of having no conclusive response from our Government, we have decided to conclude the truce.”<sup>77</sup>

64. It was under those circumstances that Bolivia signed the Truce Pact in Valparaiso, on 4 April 1884<sup>78</sup>. According to that agreement: “The Republic of Chile, during the period that this treaty is in force, shall continue to govern

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<sup>75</sup> See BM Vol. II, Annex 37.

<sup>76</sup> See BM Vol. II, Annex 38.

<sup>77</sup> *Ibid.*

<sup>78</sup> See BM Vol. II, Annex 108.

according to Chilean law, the territories situated between the parallel 23° S and the mouth of the Loa River.”<sup>79</sup>

65. Nonetheless, Bolivia expressly stipulated that its acceptance of the Truce would be subject to maintaining Bolivia’s sovereign access to the sea. It was formally recorded in a Protocol of 13 February 1884 that: “Bolivia cannot resign itself to a total lack of an outlet to the Pacific, without the risk of condemning itself to perpetual isolation and a painful existence, even in the midst of its great elements of wealth.”<sup>80</sup>

66. Although at first Chile subjected Bolivia to threats of further military action in order to impose terms to its own advantage, it soon came to accept Bolivia’s demands for sovereign access to the sea. Chile had a strategic interest in breaking the alliance between Bolivia and Peru. It sought to achieve this by offering Bolivia coastal territory on the northern territories administrated by Chile in exchange for an alliance. Thus, Chile agreed to, and even encouraged, Bolivia’s demand that it maintain its sovereign access to the sea. Such a transfer of territory would have situated Bolivia as a buffer zone between Chile and Peru. Indeed, from the early stages of the war in 1879, in exchange for an alliance against Peru, Chile had conveyed a proposal through a Bolivian national, Gabriel René Moreno, offering to transfer the Peruvian coastal territories of Tacna and Arica to Bolivia<sup>81</sup>. Chile’s offer was that:

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<sup>79</sup> *Ibid.* Art. II, Truce Pact 1884.

<sup>80</sup> See BM Vol. II, Annex 103.

<sup>81</sup> G. R. Moreno, *Daza y las bases chilenas*, 1879. Library Presencia, Notebook N° 84, 1979, p. 8. The letter of accreditation of Gabriel René Moreno dated 29 May 1879 stated: “the Government of Chile would be pleased if you approach His Excellence, the President of Bolivia, and expressed to him our feelings on that regard. My government hopes that the Government of Bolivia will listen benevolently when you talk to it this end and complying with what you have expressed in our verbal conferences. Your word will be supported by your personal antecedents and this note.” See BM Vol. II, Annex 33.

“Since the Republic of Bolivia is in need of a piece of Peruvian territory in order to regularize its own and provide it with an easy link to the Pacific which it currently lacks, without subjecting it to the constraints that the Peruvian Government has always imposed, Chile shall not interfere with the acquisition of that territory or object to the final occupation thereof by Bolivia, but rather on the contrary shall provide effective assistance.”<sup>82</sup>

67. Because of these conditions, Chile’s offer was rejected by Bolivian President Hilarión Daza, reaffirming his alliance with Peruvian President Mariano Ignacio Prado<sup>83</sup>. Nonetheless, Chile insisted that Bolivia should accept a strip of coastal territory to the north of its Department of Littoral, adjacent to the yet undetermined frontier with Peru. On 26 November 1879, in a note addressed to the Minister of War [in Campaign], Rafael Sotomayor, the Chilean Foreign Minister Domingo Santa María persisted in the view that:

“the only means to avoid this serious issue, the prolonged fighting in Tarapacá, would be to position Bolivia between Peru and us, by transferring Moquegua and Tacna to Bolivia. Thus, there would be a wall defending us against Peru and leaving us peacefully in Tarapacá.”<sup>84</sup>

68. The note emphasized Chile’s strategic interest in proposing and agreeing to grant Bolivia its own sovereign access to the sea. It also recognized that denying Bolivia an access to the sea was unfair:

“Let us not forget, even for a moment, that we cannot suffocate Bolivia. Deprived of Antofagasta and all its coastal territory which it previously held up to the Loa [river], we must somehow provide it with its own

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<sup>82</sup> See BM Vol. II, Annex 32.

<sup>83</sup> J. Escobari Cusicanqui, *Historia Diplomática de Bolivia*, Urquiza, Vol. I, 5<sup>th</sup> Ed., 1999, p. 155.

<sup>84</sup> See BM Vol. II, Annex 34. J. M. Concha, *Iniciativas chilenas para una alianza estratégica con Bolivia (1879-1899)*, Plural Editores, 2008, p. 55.

port, a front door so it can enter inland with security, without asking for permission. We cannot and should not kill Bolivia.”<sup>85</sup>

69. In a Note dated 24 July 1880, this view was confirmed by Chilean President, Aníbal Pinto, wherein he contended that “by taking ownership of the Bolivian Littoral, it became necessary to grant Bolivia an access to the Pacific. That was the reason for us going to Ilo and Tacna.”<sup>86</sup> In December 1881, a meeting was held in Tacna between the Bolivian Foreign Minister Mariano Baptista and the Governmental Delegate in the Army and Navy of Chile located in Tacna, Eusebio Lillo. On that occasion, in a “memorandum of terms for a definitive peace arrangement with Chile”, Chile made the following offer: “The transfer to Bolivia of the territories of Tacna, Arica and Moquegua, would be in compensation for the cession of the Bolivian coastline that extends south of the Loa [river] that Chile requires to continue its territory to Camarones.”<sup>87</sup>

70. It was within this context that on 4 April 1884, the Truce Pact was concluded between Bolivia and Chile. Although the Pact provided for Chile’s continuing occupation of Bolivia’s coastal territories pending conclusion of a peace agreement, it was subject to Chile’s recognition that the resolution of Bolivia’s landlocked situation (“*enclaustramiento*”) was the *condition sine qua non* for a final settlement. Chile’s own Minister of Foreign Affairs, Mr. Aniceto Vergara Albano, left little doubt as to the terms of the agreement. According to the Memorandum N° 38 of 22 June 1895 of the Legation of Bolivia in Chile, in his address to the National Congress in 1884, Mr. Vergara Albano referred to the position of Bolivia’s representatives about an “own port in the Pacific” as a “*non-negotiable condition*”<sup>88</sup>. Bolivia’s consent to the 1884 Truce Pact was thus fundamentally

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<sup>85</sup> *Ibid.*

<sup>86</sup> See BM Vol. II, Annex 35.

<sup>87</sup> See BM Vol. II, Annex 187.

<sup>88</sup> See BM Vol. II, Annex 17.

conditioned on what Chile itself described as the “non-negotiable condition” of sovereign access to the sea in a future agreement.

71. It thus came as no surprise that following the Truce Pact, Chile specifically agreed to a transfer of territory in the negotiations leading to the 1895 Peace and Friendship Treaty with Bolivia<sup>89</sup>. In the 1895 Annual Report of the Ministry of Foreign Affairs, the Chilean Foreign Minister, Luis Barros, made it expressly clear that consistent with Bolivia’s conditional acceptance of the Truce Pact:

“The negotiation entrusted to Mr. Salinas and to Mr. Boeto were principally aimed at finding a definitive solution, with its Plenipotentiaries expressing from the very beginning that ‘Bolivia cannot resign itself to the absolute lack of an outlet to the Pacific Ocean’”.<sup>90</sup>

72. With this understanding, on 18 May 1895, Bolivia and Chile concluded three treaties: 1) the Treaty of Peace and Friendship; 2) the Covenant on Transfer of Territory (“1895 Transfer Treaty”); and 3) the Treaty of Commerce. Article 1 of the Treaty of Peace provided that Chile: “shall continue to hold possession in absolute and perpetual dominion of the territory which it has governed to the present day in accordance with the Truce Pact of 4 April 1884.”<sup>91</sup>

73. In exchange for this cession of the Bolivian Department of Littoral, and consistent with prior declarations to ensure Bolivia’s sovereign access to the sea, the preamble to the Transfer Treaty provided that “a higher need and the future

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<sup>89</sup> On the background and negotiation of the 1895 Treaties, see H. Gutiérrez, *Memorándum relativo al desenvolvimiento de las gestiones encomendadas a la Legación de Bolivia en Santiago para llegar a un tratado definitivo de paz, amistad y comercio entre las Repúblicas de Bolivia y Chile*, Santiago, 22 June 1895. See BM Vol. II, Annex 17.

<sup>90</sup> Chile, *Memoria del Ministro de Relaciones Esteriores Presentada al Congreso en 1895*, Santiago, Imprenta Mejia, 1896, pp. 11-12. See BM Vol. II, Annex 188.

<sup>91</sup> See BM Vol. II, Annex 99.

development and commercial prosperity of Bolivia require its free and natural access to the sea”. It specified that in furtherance of this objective, “the Republic of Chile and the Republic of Bolivia... have decided to conclude a special Treaty on the transfer of territory”. Pursuant to Article I of that agreement, Chile assumed the following obligations in favour of Bolivia:

“I. If, as a consequence of the plebiscite due to take place pursuant to the Treaty of Ancón or through direct negotiations, the Republic of Chile acquires dominion and permanent sovereignty over the territories of Tacna and Arica, it undertakes to transfer them to the Republic of Bolivia in the same way and covering the same area in which it acquires them, without prejudice to the stipulations of Article II.”<sup>92</sup>

74. In Article III, Chile further committed itself:

“So as to accomplish that set forth in the preceding Articles [i.e. the transfer of territory to ensure Bolivia’s access to the sea], the Government of Chile commits itself to engaging all its efforts, either jointly with Bolivia or on its own, to obtain the definitive title over the territories of Tacna and Arica.”<sup>93</sup>

75. Chile was fully committed to grant Bolivia a sovereign access to the sea. Chile, aware of the uncertain outcome of the plebiscite in Tacna and Arica, did not limit this obligation; sovereign access to the sea for Bolivia by tying it to terms of the Treaty of Ancón with Peru, rather it entered in Article IV fully recognizing that if the plebiscite did not achieve the stated objectives an alternative position was necessary:

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<sup>92</sup> See BM Vol. II, Annex 98. And also Art. II of the 1895 Transfer Treaty provided that “If the transfer stipulated in the above Article takes place, it is understood that the Republic of Chile shall extend its northern border from Camarones to the Vítor ravine, from the sea to the border which currently separates that region from the Republic of Bolivia”

<sup>93</sup> *Ibid.*

“If the Republic of Chile were not able to obtain, through the plebiscite or through direct negotiations, definitive sovereignty over the territory in which the cities of Tacna and Arica are found, it commits itself to cede to Bolivia from the Vítor inlet up to the Camarones ravine, or an equivalent territory.”<sup>94</sup> (See Figure V).

76. The Parties agreed in effect that Bolivia’s sovereign access to the sea would not be across the Bolivia’s Department of Littoral. Because of Chile’s occupation of Peruvian territories further north, a Bolivian corridor across its former territories would disrupt the territorial continuity of Chile. Thus, Tacna and Arica were specified in the 1895 Transfer Treaty because they were the northernmost Peruvian territories occupied by Chile. Since their status was subject to a plebiscite in which Peru might possibly prevail over Chile, as a fall-back the 1895 Transfer Treaty stipulated that in case Tacna and Arica did not go to Chile under the plebiscite (or otherwise), Bolivia’s sovereign access to the sea would lie through the Vítor Inlet or an analogous area that would constitute Chile’s northernmost frontier. The 1895 Transfer Treaty thus expressed the parties’ agreement that Bolivia should have a sovereign access to the sea.

77. A Protocol on the Scope of the 1895 Transfer Treaty was concluded on 28 May 1895 (“1895 Explanatory Protocol”) to clarify that the territories specified in Articles I to III were the primary objective of the agreement, “and that the solutions established under Article IV of the said Treaty are only supplementary and contingent in nature.”<sup>95</sup> The purpose of this latter Protocol was to leave no doubt that the Transfer Treaty’s objective was: “to secure for Bolivia a port on the Pacific, of proper and sufficient conditions to fulfil the needs of foreign trade of the

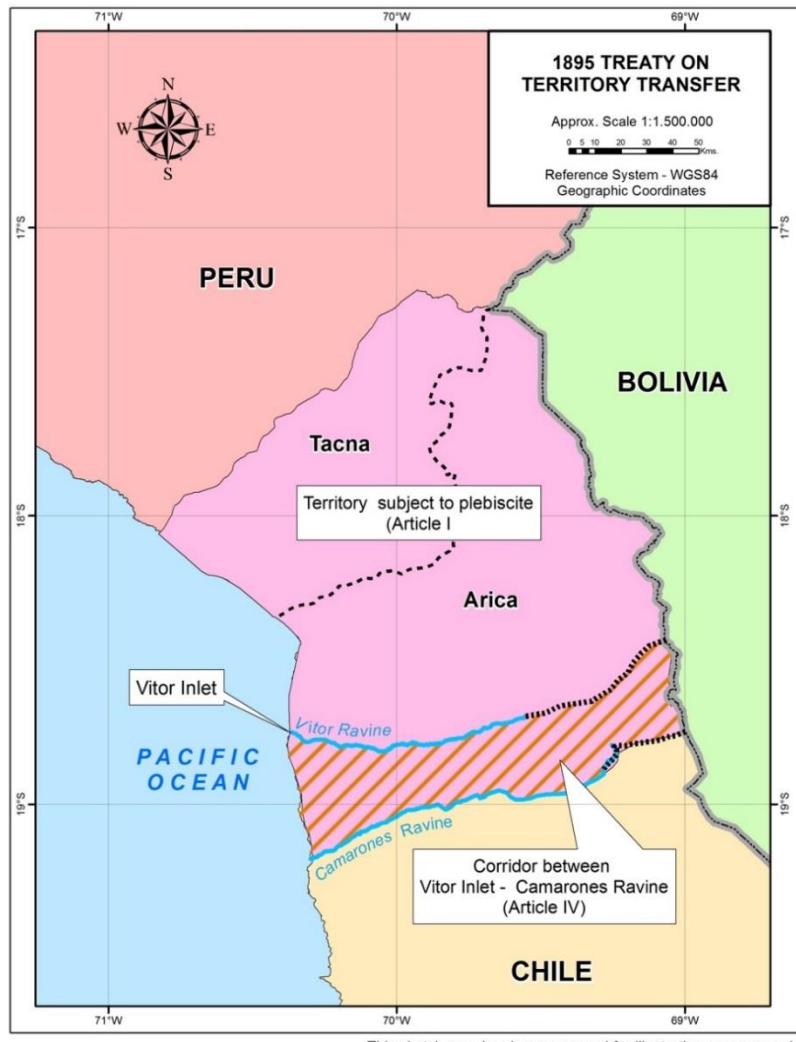
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<sup>94</sup> *Ibid.*

<sup>95</sup> See BM Vol. II, Annex 104. On the same day, a second protocol was also concluded relating to Art. II of the 1895 Treaty of Peace and Friendship (the Protocol on Credit Settlement).

Republic.”<sup>96</sup> Another Protocol on credit settlement was concluded on the same day (“1895 Credit Settlement Protocol”).

**FIGURE V: TERRITORIES CONTEMPLATED BY THE 1895 TRANSFER TREATY**



78. Another complementary protocol (the “Additional Explanatory Protocol on the Scope of the 1895 Transfer Treaty”) concluded on 9 December 1895, provided

<sup>96</sup> *Ibid.*

that Bolivia and Chile regarded the Treaty of Peace and Friendship and the 1895 Transfer Treaty as “an indivisible whole containing reciprocal obligations”<sup>97</sup>, so that the Treaty of Peace and Friendship would not enter into force until Chile fulfilled its obligation to transfer the territory contemplated under the Transfer Treaty. Consistent with the understanding that had been reached as early as the 1884 Truce Pact, it provided in Article 2:

“That the definitive cession of the Littoral of Bolivia, in favour of Chile, would have no effect, if Chile does not give Bolivia, within a period of two years, the port on the Pacific Coast to which the Treaty of Transfer makes reference.”<sup>98</sup>

79. Article 3 further provided:

“That the Government of Chile is bound to make use of all legal measures found in the Pact [Treaty] of Ancón, or by means of direct negotiations, so as to acquire the port and territories of Tacna and Arica, with the unavoidable purpose of ceding them to Bolivia in the area determined by the Pact [Treaty] of Transfer.”<sup>99</sup>

80. Article 4 clarified again:

“That if in spite of all of its determination, Chile could not obtain the said ports and territories and has to comply with the other provisions of the Pact, giving Vítor or an equivalent inlet, the said obligation undertaken by Chile will not be regarded as fulfilled, until it cedes a port and area that fully satisfies the current and future needs of Bolivian trade and industry.”<sup>100</sup>

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<sup>97</sup> See BM Vol. II, Annex 105.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.* Articles 2, 3 and 4 of Additional Explanatory Protocol on the Scope of the 1895 Transfer Treaty.

81. On the same day, the Bolivian Congress ratified all these agreements, with the exception of the 1895 Credit Settlement Protocol. Similarly, Chile ratified all agreements except the Additional Explanatory Protocol on the Scope of the 1895 Transfer Treaty<sup>101</sup>.

82. On 30 April 1896, Bolivia and Chile exchanged the instruments of ratification of the Treaties and Protocols of 1895, and noted that the 1895 Credit Settlement Protocol was pending on Bolivia's side and that the Additional Explanatory Protocol on the Scope of the 1895 Transfer Treaty was pending on Chile's side<sup>102</sup>.

83. On the same date, the Parties signed a new Protocol, further clarifying the scope of Article IV of the 9 December 1895 Additional Explanatory Protocol on the Scope of the 1895 Transfer Treaty, and agreed upon the steps to be taken regarding its pending ratification<sup>103</sup>. According to this new Protocol of 30 April 1896, the Chilean Government approved the 1895 Additional Explanatory Protocol on the Scope of the 1895 Transfer Treaty, and specified that in case Tacna and Arica fell under Peruvian sovereignty, it would transfer to Bolivia the Vítor Inlet or another analogous territory:

“with proper port conditions to fulfill the trade needs of Bolivia, namely, anchorage for merchant vessels, with an area where a dock and customs buildings can be built and with facilities to settle a population that by means of a railway to Bolivia may meet the fiscal and economic needs of the country.”<sup>104</sup>

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<sup>101</sup> See BM Vol. II, Annex 181. And also, Law N° 326 of Ratification of the agreements signed in 1895, enacted on 31 December 1895.

<sup>102</sup> See BM Vol. II, Annexes 112 and 181. See also, Publication on the Official Paper of the Republic of Chile, issue 5,397 of 2 May 1896.

<sup>103</sup> See BM Vol. II, Annex 106.

<sup>104</sup> *Ibid.* Art. 1 Protocol 30 April 1896.

84. It was also agreed that the Bolivian Government would seek approval of its Congress for the 1895 Credit Settlement Protocol and the Protocol of 30 April 1896<sup>105</sup>, and that the Chilean Government would seek the approval of its Congress for the Additional Explanatory Protocol as soon as Bolivia had acted in the prescribed way<sup>106</sup>. The exchange of instruments of the remaining protocols would then be made within sixty days after the Chilean Congress fulfilled its part of the agreement.

85. Bolivia fulfilled its obligations in this regard. The Bolivian Congress approved the protocols on 7 November 1896; and the President, Severo Fernández Alonso, ratified them seven days later and notified the Chilean Government on 25 February 1897, giving full powers to its representative in Santiago, Mr. Heriberto Gutiérrez, to proceed with the exchange of instruments of ratification<sup>107</sup>. This exchange however, did not take place.

86. In the deliberations before the Congress of Chile, the Foreign Minister, Carlos Morla, had urged ratification of the complementary protocols. He emphasized 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 independent existence, as it is not only the importation and exportation of goods that Bolivia seeks, but also to end

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<sup>105</sup> *Ibid.* Art. 2 Protocol 30 April 1896.

<sup>106</sup> *Ibid.* Art. 3 Protocol 30 April 1896.

<sup>107</sup> Barros Borgoño, L., *La Cuestión del Pacífico: Las Nuevas Orientaciones de Bolivia*. Santiago, University Printing, 1922, p. 137.

its landlocked condition and to be able to communicate with 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.”<sup>108</sup>

87. The Foreign Minister concluded that:

“With 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 will be, undoubtedly, the completion of the treaties exchanged already by approving the Additional and Explanatory Protocols submitted to the National Congress today.”<sup>109</sup>

88. Although the 1895 treaty regime was an “indivisible whole”, Chile published the Peace and Friendship and Commerce Treaties in its *Official Gazette*<sup>110</sup>, and published the Transfer Treaty in the official records of the Ministry of Foreign Affairs<sup>111</sup>. It is also recorded that Chile invoked the Peace and Friendship Treaty during Bolivian boundary negotiations with Argentina over the Puna of Atacama<sup>112</sup>.

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<sup>108</sup> See BM Vol. II, Annex 189.

<sup>109</sup> *Ibid.*

<sup>110</sup> See BM Vol. II, Annex 182.

<sup>111</sup> This agreement, named a *special treaty on the transfer of territory*, appears in the collection of the Ministerio de Relaciones Exteriores, Dirección de Documentación, Departamento de Tratados, *Tratados, Convenciones y Arreglos Internacionales de Chile 1810-1976, Tratados Bilaterales, Chile-Bolivia*, Tomo II, Santiago de Chile, 1977, cit., pp.79-80.

<sup>112</sup> J. L. Roca, “1904: Un tratado que restableció la paz pero no la amistad”, *A cien años del Tratado de Paz y Amistad de 1904 entre Bolivia y Chile*, Ed. Garza Azul, 2004, p. 29.

## VII. The 1904 Treaty

89. From 1900 to 1904 onwards, Chile sometimes appeared to try to impose a new policy of “peace without a port” on Bolivia. In a notorious Note of 13 August 1900, addressed to the Foreign Ministry of Bolivia, the Chilean Plenipotentiary Minister Abraham König<sup>113</sup> explained in blunt terms that: “We already knew that the Littoral is rich and worth many millions. We keep it because it is worth something, if something were worth nothing, there would be no interest in keeping it.”<sup>114</sup>

90. Plenipotentiary Minister König went on to denigrate the 1895 Treaties stating that “[t]hey were premature pacts, dead before being born” and that “Bolivia must not count on the transfer of the territories of Tacna and Arica even if the plebiscite is favourable for Chile”. He asserted that Chile’s title to Bolivia’s Department of Littoral was based on conquest:

“It is a misconception spread and repeated daily in the press and on the street that Bolivia has the right to demand a port in compensation for its coastal territory. There is no such thing. Chile has occupied the Bolivian coast and has taken it with the same rights as Germany annexed Alsace and Lorraine to its empire, with the same rights the United States of North America took Puerto Rico. Our rights are rooted in victory, the supreme law of nations... Bolivia was defeated, had nothing to pay with and gave the Littoral.”<sup>115</sup>

91. In light of prior agreements between the Parties, the Bolivian Foreign Minister, Mr. Eliodoro Villazón, rebutted Ambassador König’s contentions, but to little avail<sup>116</sup>. In effect, the Chilean Note of 13 August 1900 was an ultimatum.

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<sup>113</sup> See BM Vol. II, Annex 39.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> See BM Vol. II, Annex 40.

Chile had already unilaterally annexed the Bolivian Department of Littoral by a Law of 12 July 1888 whereby it created the province of Antofagasta. Furthermore, Peru had renounced its province of Tarapacá, north of the Bolivian Department of Littoral, under the 1883 Treaty of Ancón<sup>117</sup>. Further north, the status of Tacna and Arica remained subject to a plebiscite between Chile and Peru. In the meantime, Bolivia's landlocked situation ("enclaustramiento") had strangled its foreign trade and ravaged its economy.

92. It was in these circumstances that the Parties concluded the Treaty of Peace and Friendship of 20 October 1904<sup>118</sup>. That Treaty re-established relations of peace and friendship between Bolivia and Chile, bringing an end to the regime established by the Truce Pact (Article I), and recognized Chile's dominion over Bolivia's occupied territories (Article II). Chile also recognised that Bolivia had a right of free commercial transit through its territories and ports on the Pacific (Article VI) and provided for financial compensations (Article IV) and the building of a railroad from Arica to La Paz (Article III).

93. The 1904 Treaty addressed the cession of Bolivia's Department of Littoral but not Bolivia's sovereign access to the sea on occupied coastal territories further to the north. According to Chilean Foreign Minister, Emilio Bello Codesido, a confidential "supplementary agreement to the [1904] Peace Treaty"<sup>119</sup> was signed, but this document was not approved nor ratified by Bolivia.<sup>120</sup>

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<sup>117</sup> See BM Vol. II, Annex 97, Art. II.

<sup>118</sup> See BM Vol. II, Annex 100.

<sup>119</sup> See BM Vol. II, Annex 184.

<sup>120</sup> *Ibid.*

## **VIII. 1920 Act and other expressions of Chile's agreement to grant Bolivia sovereign access to the sea**

94. The subsequent conduct of the parties following 1904 further confirmed that Bolivia retained a right of sovereign access to the sea.

### *A. THE 1920 ACT*

95. On 22 April 1910, Bolivian Foreign Minister, Daniel Sánchez Bustamante, sent a memorandum to Chile and Peru once again raising the subject of the transfer of territory. He declared that notwithstanding the 1904 Treaty:

“Bolivia cannot live isolated from the sea. Now and always, to the extent of its abilities, it will do as much as possible to possess at least one port on the Pacific, and will never resign itself to inaction each time the Tacna and Arica question is raised, jeopardizing the very foundations of its existence.”<sup>121</sup>

96. Shortly after, in a meeting with Chilean legislators in 1913, Ismael Montes (who was President of Bolivia at the time the 1904 Treaty was concluded), on the eve of his second term as Head of State, reiterated Bolivia's right to have a port of its own on the Pacific Ocean<sup>122</sup>.

97. By 1919, Bolivia had become more assertive. It decided to raise the question of its sovereign access to the sea before the League of Nations<sup>123</sup>. In response, Chile once again reiterated its agreement to negotiate Bolivia's sovereign access to the

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<sup>121</sup> See BM Vol. II, Annex 18.

<sup>122</sup> See BM Vol. II, Annex 41.

<sup>123</sup> J. Gumucio Granier, *El enclaustramiento marítimo de Bolivia en los foros del mundo*, Academia Boliviana de la Historia, p. 20.

sea. In that year, Emilio Bello Codesido, Minister of Foreign Affairs of Chile at the time of the signature of the 1904 Treaty, said:

“Regardless of the situation created by the Treaty of Peace with Chile, why could that aspiration not be translated into future agreements based on sufficient and equitable compensation?”<sup>124</sup>

98. In May 1919, he 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<sup>125</sup>. On 9 September 1919, in his capacity as plenipotentiary of Chile in La Paz, Emilio Bello Codesido submitted a proposal<sup>126</sup> which was repeated again in a meeting held on November 1919<sup>127</sup>. The proposal was presented once again in the 1920 Act. By this instrument Chile reaffirmed its commitment to negotiate sovereign access to the sea.

99. Consistent with the terms of the 1895 Transfer Treaty, the 1920 Act confirms that: “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.”<sup>128</sup>

100. It clarifies that: “Independently from what has been established under the Treaty of Peace of 1904, Chile accepts opening new negotiations aimed at fulfilling

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<sup>124</sup> See BM Vol. II, Annex 184.

<sup>125</sup> See BM Vol. II, Annex 42.

<sup>126</sup> See BM Vol. II, Annex 19.

<sup>127</sup> See BM Vol. II, Annex 43.

<sup>128</sup> *Ibid.*

the aspiration of its friend and neighbour, subject to Chile's victory in the plebiscite.”<sup>129</sup>

101. It confirms that: “A prior agreement would determine the boundary line between the regions of Arica and Tacna which would fall under the ownership of Chile and Bolivia respectively, as well as all other commercial compensations or compensations of a different nature set out in that agreement.”<sup>130</sup>

102. And it provides that: “So as to achieve these aims, Bolivia would, of course, lend its diplomatic influence to that of Chile and would undertake to cooperate effectively to secure a favourable result for Chile in the plebiscite over Tacna and Arica.”<sup>131</sup>

103. In the 1920 Act, Bolivian Foreign Minister Carlos Gutiérrez emphasized that:

“Bolivia's aspiration for its own port on the Pacific Ocean has not been reduced at any time in history and has currently reached a greater intensity. The railway from Arica to El Alto of La Paz that has facilitated Bolivian trade, contributes to promoting the legitimate aspiration of securing a port that can be incorporated under Bolivian sovereignty.”<sup>132</sup>

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<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> Acta Protocolizada of 10 January 1920, Foreign Minister Carlos Gutiérrez expressed himself in similar terms in the Note on 16 March 1920 to the Minister of Foreign Affairs of Peru, Melitón F. Porras. See BM Vol. II, Annexes 44 and 101.

## B. EVENTS FOLLOWING THE 1920 ACT

104. Following the 1920 Act, the Chilean Chargé d’Affaires, Emilio Rodríguez Mendoza, gave further reassurances to the Bolivian Foreign Ministry that Chile would engage in direct negotiations to secure Bolivia’s sovereign access to the sea<sup>133</sup>.

105. In May 1920, Bolivia’s Ambassador in London, Adolfo Ballivian, held a meeting with his Chilean counterpart, Agustín Edwards, in which he confirmed the 1920 Act in the following terms:

“Chile expected a favourable and cooperative attitude from Bolivia in order to be able to win the plebiscite in Arica, whereupon Chile could give Bolivia a port to the north of Arica, and if possible, an independent area or enclave within the port of Arica itself for the transport of Bolivian cargo.”<sup>134</sup>

106. In the following year, Chile provided further reassurance to Bolivia that it would get a sovereign access to the sea, so long as Chile obtains sovereignty over in Tacna and Arica. On 28 September 1921, the same Agustín Edwards, this time in his capacity as Head of the Chilean Delegation to the League of Nations, confirmed before the League’s Assembly that:

“Bolivia can seek satisfaction through the medium of direct negotiations of our own arranging. Chile has never closed that door to Bolivia, and I am in position to state that nothing would please us better than to sit down with her and discuss the best means of facilitating her development.”<sup>135</sup>

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<sup>133</sup> C. Ríos Gallardo, *Después de la paz... Las relaciones chileno-bolivianas*, 1926, pp. 89, 216.

<sup>134</sup> See BM Vol. II, Annex 175.

<sup>135</sup> See BM Vol. II, Annex 160.

107. In a second intervention, consistent with the 1920 Act, Edwards confirmed that Chile was under an obligation to negotiate with Bolivia: “Bolivia has finally decided to exercise the only right it can assert: namely, the right of negotiations with Chile.”<sup>136</sup>

108. When closing the debate, the President of the Assembly, Herman Van Karnebeek commended Bolivia and Chile for their agreement to negotiate, stating that it: “contain[s] elements of promise which allow us to congratulate both delegations on the attitude they have to-day [sic] adopted towards the dispute which has divided them.”<sup>137</sup>

109. In the following year, on 19 September 1922, the Chilean delegate to the Third Assembly of the League Nations, Manuel Rivas Vicuña, submitted a note to the Secretary-General, once again confirming Chile’s commitment:

“in accordance with the declaration made by its delegation at the second Assembly, the Chilian [sic] Government has expressed the greatest willingness to enter into direct negotiations, which it would conduct in a spirit of frank conciliation, and in the ardent desire that the mutual interests of the two parties might be satisfied.”<sup>138</sup>

110. Earlier that year, in June 1922, the Chilean President Arturo Alessandri, confirmed before the Chilean Congress that:

“it will be necessary that Bolivia secures the conviction that, within the framework of an atmosphere of brotherhood and harmony, it will

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<sup>136</sup> See BM Vol. II, Annex 161.

<sup>137</sup> See BM Vol. II, Annex 162.

<sup>138</sup> See BM Vol. II, Annex 46.

find in our country but a friendly desire of seeking for formulas which consulting our legitimate rights, satisfy inasmuch as possible its aspirations.”<sup>139</sup>

111. The following year, Chile gave Bolivia yet more reassurances. In a Note of 6 February 1923, Chilean Minister of Foreign Affairs Luis Izquierdo, responding to the initiative of Bolivian Plenipotentiary Minister Ricardo Jaimes Freyre in Chile,<sup>140</sup> confirmed that Chile:

“maintains the purpose of listening, with the most elevated spirit of conciliation and equity, to the proposals that the Government of Your Excellency wishes to present to it in order to conclude a new Pact which responds to the situation of Bolivia, without modifying the Treaty of Peace and without interrupting the territorial continuity of the Chilean territory.”<sup>141</sup>

112. The Note added that:

“the Government of Chile will make the greatest effort to arrange with the Government of Your Excellency, on the basis of the specific and timely proposals that Bolivia submits, the grounds for a direct negotiation that, through mutual compensation and without undermining any inalienable rights, leads to the realization of that desire.”<sup>142</sup>

113. The following day, Foreign Affairs Minister Izquierdo stated unequivocally to the Bolivian Ambassador Freyre that: “When the situation of Tacna-Arica situation is resolved, we will be able to give Bolivia a port in return through compensations.”<sup>143</sup>

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<sup>139</sup> See BM Vol. II, Annex 45.

<sup>140</sup> See BM Vol. II, Annex 47.

<sup>141</sup> See BM Vol. II, Annex 48.

<sup>142</sup> *Ibid.* In declarations to Mr. William Will Davies published by the newspaper “El Mercurio” on 4 April 1923, the President of Chile, Arturo Alessandri, confirmed this commitment.

<sup>143</sup> See BM Vol. II, Annex 49.

114. In a second Note of 22 February 1923, the Chilean Foreign Minister once again repeated these commitments<sup>144</sup>. A few days later on 27 February 1923, at the conclusion of Ambassador Freyre's mission, Chilean President Alessandri expressed his wish: "to inform the Government of Bolivia that it 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."<sup>145</sup>

### C. THE 1926 KELLOGG PROPOSAL

115. These undertakings by Chile were of course subject to the outcome of the referendum between Chile and Peru over Tacna and Arica, which was still unresolved in 1923, and for which Chile sought Bolivia's diplomatic support. In 1922, Chile and Peru had concluded a Protocol of Arbitration, in order to submit their dispute to arbitration by the President of the United States. An arbitral award in 1925 set forth the terms of the plebiscite over Tacna and Arica<sup>146</sup>. The outcome of that plebiscite would have enabled Chile to honour its commitments towards Bolivia, corresponding in substance to the obligations to grant sovereign access to the sea across Tacna and Arica under the terms of the 1895 Transfer Treaty. In this regard, when asked in a press interview if Chile would agree to Bolivia's sovereign access to the sea, Chilean President Alessandri had confirmed that:

"In case the arbitral award...allows it, I am resolved to consider generously the aspirations of Bolivia, in the form and terms clearly and frequently posed in the Note of the Chilean Foreign Ministry of Chile, addressed to the Bolivian Minister in Chile, on 6 February [1923]."<sup>147</sup>

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<sup>144</sup> See BM Vol. II, Annex 50.

<sup>145</sup> See BM Vol. II, Annex 51.

<sup>146</sup> See *Tacna-Arica Question (Chile v. Peru)* 4 March 1925, RIAA Vol. II, pp. 921-958.

<sup>147</sup> See BM Vol. II, Annex 125.

116. In 1926, with Chile still seeking Bolivia's diplomatic support in the plebiscite, and given the United States' role as mediator in the dispute between Chile and Peru, the United States Ambassador in Chile, William Collier, proposed the transfer to Bolivia of a corridor parallel to the Arica-La Paz railway. Again in accordance with the general terms of the 1895 Transfer Treaty, Chilean Foreign Minister, Beltran Mathieu, replied that Chile would consider such territorial transfer if Arica remained in Chile<sup>148</sup>. In particular, on 23 June 1926, he submitted a Memorandum, agreeing to the “[t]ransfer of the territory to Bolivia, as proposed by the mediator, so long as it was settled by the inhabitants of Tacna and Arica by popular vote”, and stating that “we accept to sacrifice, in favour of Bolivia, a part of the Department of Arica.”<sup>149</sup> However, in view of the uncertain outcome of the plebiscite, an earlier Chilean proposal to the United States Secretary of State, Frank B. Kellogg, was to simply give Tacna to Peru and Arica to Chile, and to give Bolivia a four-kilometre wide sovereign corridor to the Pacific Ocean, parallel to the Tacna and Arica border. President Alessandri of Chile confirmed that:

“on 10 June, an offer arrived in Washington made by the Chilean Government concerning a transactional formula, in order to solve the problem by *leaving Tacna to Peru and Arica to Chile, and a strip for Bolivia that would end in an inlet whose name neither Samuel Claro nor myself could find in the map by Cruchaga.*”<sup>150</sup>

117. Based on Chile's initiative, on 30 November 1926, the United States of America Secretary of State Kellogg, submitted the following proposal to Chile and Peru (“the 1926 Kellogg Proposal”):

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<sup>148</sup> See BM Vol. II, Annex 34.

<sup>149</sup> See BM Vol. II, Annex 20.

<sup>150</sup> See BM Vol. II, Annex 183.

“The Republics of Chile and Peru, either by joint or by several instruments freely and voluntarily executed, to cede to the Republic of Bolivia, in perpetuity, all right, title and interest which either may have in the Provinces of Tacna and Arica; the cession to be made subject to appropriate guaranties for the protection and preservation, without discrimination, of the personal and property rights of all of the inhabitants of the provinces of whatever nationality.”<sup>151</sup>

118. Again, this proposal reflected the substance of the 1895 Transfer Treaty.

#### *D. THE 1926 MATTE MEMORANDUM*

119. Bolivia declared its acceptance of the 1926 Kellogg Proposal through a Note of 2 December 1926<sup>152</sup>. Chile accepted as well, however, did not wish to go as far as the 1926 Kellogg Proposal. On 4 December 1926, the Chilean Minister of Foreign Affairs, Mr. Jorge Matte, submitted a Memorandum (“the 1926 Matte Memorandum”) to the United States Secretary of State confirming Chile’s commitment to negotiate with Bolivia in order to grant it sovereign access to the sea: “in the course of the negotiations... and within the formula of territorial division, the Government of Chile has not rejected the idea of granting a strip of territory and a port to the Bolivian nation”<sup>153</sup>. It added that once the definitive possession of territories was clarified between Chile and Peru, “the Chilean Government would honour its declarations in regard to consideration of Bolivian aspirations”.<sup>154</sup>

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<sup>151</sup> See BM Vol. II, Annex 21.

<sup>152</sup> See BM Vol. II, Annex 52.

<sup>153</sup> See BM Vol. II, Annex 22.

<sup>154</sup> *Ibid.*

120. The following day, on 5 December 1926, by means of a diplomatic note signed by the Chilean Agent in La Paz, Manuel Barros Castañón, Chile transmitted the 1926 Matte Memorandum to the Bolivian Ministry of Foreign Affairs. Just two days later, on 7 December 1926, Bolivia accepted the Chilean offer to proceed in the discussion and examination of the details of the transfer of territory and a port referred to in the 1926 Matte Memorandum<sup>155</sup>.

**E. THE SECRET SUPPLEMENTARY PROTOCOL OF 1929 BETWEEN CHILE AND PERU**

121. On 3 June 1929, Chile and Peru, having agreed to divide Tacna and Arica between them instead of holding a plebiscite, concluded the Treaty of Lima. In light of its repeated agreements, declarations, and assurances, Chile was now in a position to negotiate with Bolivia the concrete terms of the cession of territory in Arica's area, so as finally to grant its neighbour sovereign access to the sea. In stark contrast to these obligations however, Chile concluded a secret Supplementary Protocol with Peru, subjecting the transfer of Arica or other relevant territories to Peruvian consent<sup>156</sup>.

122. Once the secret Supplementary Protocol became known to Bolivia, its Ambassador in Washington submitted a Memorandum to the American Secretary of State stating that Chile had acted in violation of its obligation to grant Bolivia sovereign access to the sea on the Arica territory<sup>157</sup>. Bolivia did not succeed in reversing the secret Protocol, but registered its position in Memorandum N° 327 dated 1 August 1929, affirming that "at no point has it renounced her right to have

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<sup>155</sup> See BM Vol. II, Annex 53.

<sup>156</sup> See BM Vol. II, Annex 107.

<sup>157</sup> See BM Vol. II, Annex 54.

her maritime sovereignty restored”<sup>158</sup> and that “we are persisting and shall persist in the policy of reintegration of our maritime sovereignty. We are not renouncing the repossession of our free communication with the world, by way of the Pacific Ocean.”<sup>159</sup> Notwithstanding the temporary frustration of Bolivia’s rights and expectations, Chile’s commitment to a sovereign access to the Pacific would once again emerge in the years that followed.

## IX. The 1950 Exchange of Notes

123. After the Chaco War against Paraguay (1932-35), the question of sovereign access soon re-emerged in diplomatic relations with Chile. On 26 December 1944, shortly before the conclusion of the Second World War, the President of Chile, Juan Antonio Ríos, told the Bolivian Ambassador in Santiago, Mr. Fernando Campero Alvarez, that his Government was willing to consider any direct proposal that could resolve Bolivia’s landlocked situation. When President Ríos died, his commitment to negotiations was immediately endorsed by his successor, Mr. Gabriel González Videla. In an interview on the occasion of his investiture in November 1946, the new President confirmed to the Bolivian Minister of Foreign Affairs, Mr. Aniceto Solares, in the presence of the Bolivian Ambassador in Santiago, Mr. Ostria Gutiérrez, his willingness to “gradually” reach a solution to the problem<sup>160</sup>.

124. After the election in 1947 of Bolivian President Enrique Hertzog, Bolivia made a concerted effort to negotiate with Chile on sovereign access to the sea, largely through the efforts of Bolivia’s Ambassador to Chile, Alberto Ostria Gutiérrez. Between 1947 and 1950, Ambassador Ostria Gutiérrez proposed a number of possible solutions, including cession by Chile to Bolivia of the port of

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<sup>158</sup> See BM Vol. II, Annex 23.

<sup>159</sup> *Ibid.*

<sup>160</sup> See BM Vol. II, Annex 56.

Arica. In meetings with Ambassador Ostriá Gutiérrez on 8 November 1946<sup>161</sup> and again on 6 January 1948<sup>162</sup>, the Chilean President expressed Chile's willingness to negotiate sovereign access to the sea<sup>163</sup> and gave a commitment to "reaching an agreement that gradually pleased the Bolivian aspirations."<sup>164</sup> At a following meeting on 17 June 1948, the Chilean President reassured the Bolivian Ambassador that he would give instructions for the conclusion of an agreement through an exchange of notes<sup>165</sup>. On 23 December 1949, after meetings with President González and Chilean Foreign Minister German Riesco, Bolivian Ambassadors Enrique Hertzog (former President of Bolivia) and Alberto Ostriá reported the Chilean President's statement that "by satisfying Bolivia's longing for a port, granting it a free and sovereign outlet to the Pacific Ocean, would make an historical reparation."<sup>166</sup> It was also recorded that President González emphasized his "determined aim to provide a solution for Bolivia's port issue during his administration", stating that "Chile will not demand any territory from Bolivia in exchange for the zone it will cede Bolivia and that the compensation considered will be of a different nature."<sup>167</sup>

125. The correspondence between Ambassador Ostriá Gutiérrez and the Foreign Ministry and President of Bolivia continued to record Chile's commitment to negotiate sovereign access to the sea. These include records of meetings between Ambassador Ostriá and President González Videla in March and July 1947<sup>168</sup>, January 1948<sup>169</sup>, and in particular on 1 June 1948, when President González Videla

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<sup>161</sup> See BM Vol. II, Annex 126.

<sup>162</sup> See BM Vol. II, Annex 59.

<sup>163</sup> See BM Vol. II, Annex 56.

<sup>164</sup> See BM Vol. II, Annex 59.

<sup>165</sup> See BM Vol. II, Annex 62.

<sup>166</sup> See BM Vol. II, Annex 64. See also Annex 127.

<sup>167</sup> See BM Vol. II, Annex 64.

<sup>168</sup> See BM Vol. II, Annexes 57 and 58.

<sup>169</sup> See BM Vol. II, Annex 59.

proposed the transfer of territory to the north of Arica for the construction of a port, remarking that this would be a just act in the interest of both countries, and expressing his willingness to formalize negotiations in writing<sup>170</sup>. On 17 June 1948, President González Videla reaffirmed his proposal for the transfer of territory, making an oral agreement for the formalization of negotiations, and gave the relevant instructions to the Minister of Foreign Affairs, Germán Vergara Donoso. After meeting with Ambassador Ostriá, it was agreed to exchange notes in two stages: one to agree in principle to grant Bolivia a sovereign access to the sea, and another to specify the terms including compensation from Bolivia. For this purpose, Ambassador Ostriá submitted a draft note to Foreign Affairs Minister Vergara<sup>171</sup>. Because of the domestic political situation in Chile, President González Videla delayed negotiations until parliamentary elections were held in March 1949. The President told Ambassador Alberto Ostriá Gutiérrez in an interview held on 23 July 1948 “I keep my word with regard to what I have told you on former occasions”, and said that “[w]hat has been verbally agreed is as if it were already written.”<sup>172</sup> Some months later, the President of Chile expressed the view that giving Bolivia a free and sovereign access to the Pacific would constitute a form of “historical reparation.”<sup>173</sup> Negotiations were resumed in March 1949, following his instructions. A year later, referring to the proposed transfer of territory, the President declared to Ambassador Alberto Ostriá Gutiérrez that the agreement to negotiate on that basis was as good “as if they had been signed”, and that his determination to conclude an agreement was “unwavering.”<sup>174</sup>

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<sup>170</sup> See BM Vol. II, Annexes 60 and 61.

<sup>171</sup> See BM Vol. II, Annex 62.

<sup>172</sup> See BM Vol. II, Annex 63.

<sup>173</sup> See BM Vol. II, Annex 64.

<sup>174</sup> See BM Vol. II, Annex 65.

126. During this same period, in April 1950, Chilean President Gabriel González Videla, on a visit to the United States, had informed American President Harry Truman of a possible solution whereby Bolivia would agree to the use of the waters of Lake Titicaca, located in the Bolivian and Peruvian Andes, for Chilean hydroelectric development, in exchange for Bolivia receiving sovereign access to the sea, noting that the United States might fund this project. President Truman reportedly reacted favourably<sup>175</sup>. Nevertheless, Bolivia was never officially informed by Chile about this project.

127. It was against this backdrop that in June 1950, the Bolivian Ambassador Alberto Ostria Gutiérrez held a meeting with the Chilean Foreign Minister, Mr. Horacio Walker Larraín, during which he submitted diplomatic Note Nº 529/21 setting out Bolivia's legal position as follows:

“The Republic of Chile, on several occasions and specifically in the Treaty of 18 May 1895, and in the Act of 10 January 1920, entered into with Bolivia, although not ratified by the respective Legislative Powers, accepted the transfer to my country of an own access to the Pacific Ocean.”<sup>176</sup>

128. In addition to these agreements, the Note also invoked the undertakings of the President of Chile, Mr. Gabriel González Videla, from his investiture in 1946 until 1950. In this regard, it proposed that:

“The Governments of Bolivia and Chile formally enter into a direct negotiations to satisfy Bolivia’s fundamental need to obtain an own sovereign access to the Pacific Ocean, solving the problem of Bolivia’s landlocked situation on the terms that take into account the mutual benefits and genuine interests of both peoples.”<sup>177</sup>

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<sup>175</sup> See <http://www.trumanlibrary.org/publicpapers/index.php?pid=269&st=boliviast1>

<sup>176</sup> See BM Vol. II, Annex 109 A.

<sup>177</sup> *Ibid.*

129. In response, through a Note dated 20 June 1950, the Minister of Foreign Affairs of Chile, Walker Larraín, confirmed that:

“From the quotes contained in the note I reply to, it follows that the Government of Chile, along with safeguarding the legal situation established by the 1904 Peace Treaty, has been willing to study, in direct negotiations with Bolivia, the possibility of satisfying the aspirations of Your Excellency’s Government and the interests of Chile.”<sup>178</sup>

130. The Chilean Note further declared that: “my Government will act consistently with this position”<sup>179</sup> and

“in a spirit of fraternal friendship towards Bolivia, is willing to formally enter into direct negotiations aimed at finding a formula that will make it possible to give to Bolivia a sovereign access to the Pacific Ocean of its own, and for Chile to receive compensation of a non-territorial character that effectively takes into account its interests.”<sup>180</sup>

131. Chile’s Note did not disagree in any way with Bolivia’s Note or otherwise suggest that the substantive terms of the 1895 Transfer Treaty or 1920 Act were inapplicable. On the contrary, it committed Chile to negotiating sovereign access to the sea on substantially the same basis.

132. It was with this understanding that following the exchange of Notes, the Chilean Foreign Minister declared:

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<sup>178</sup> See BM Vol. II, Annex 109 B.”

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

“Chile has expressed in different occasions, and even during sessions at the League of Nations, its willingness to give an ear, in direct negotiations with Bolivia, to the propositions this latter may pose, aiming at fulfilling its aspiration of having a sovereign access to the Pacific Ocean. That customary policy of our Ministry does not diminish the right that the treaties in force bestow upon Chile. The current Government is consequent with diplomatic antecedents recalled and, thus, it is willing to engage in conversations with Bolivia on the issue referred to.”<sup>181</sup>

133. Similarly, on 19 July 1950, the Chilean President declared that:

“consistent with the custom of the Ministry of Foreign Affairs of Chile... I have never rejected discussing Bolivia’s aspiration for a port. That is how I expressed it in San Francisco on behalf of the Chilean Government, when I was governmental delegate to that Conference. On assuming my mandate, in 1946 President Hertzog, from Bolivia, reminded me about the promise, and I, in accordance with a rule never denied by the Ministry of Foreign Affairs of the Republic, replied to the Bolivian Head of State that I was in agreement with opening talks on the proposed issue.”<sup>182</sup>

134. In August 1950, the Chilean Foreign Minister repeated that: “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.”<sup>183</sup>

135. To this end, on 31 August 1950, both Parties agreed to publish the content of the previously confidential diplomatic notes. Public reactions were mixed however. The intention of President González Videla to conclude an agreement on the transfer of territory with Bolivia in exchange for use of the waters of Lake Titicaca and the Bolivian Highlands had “exploded like a bomb in the circles of the

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<sup>181</sup> See BM Vol. II, Annex 66.

<sup>182</sup> See BM Vol. II, Annex 67.

<sup>183</sup> See BM Vol. II, Annex 68.

opposition, both in Chile and Bolivia, and in the spheres of the Government of Peru.”<sup>184</sup> After Chilean President Gabriel González Videla’s term ended in 1952, and in spite of the agreement formally entered into in 1950, no further progress was made in the negotiations.

## **X. The 1961 Trucco Memorandum**

136. On 10 July 1961, when it became apparent that Bolivia would raise the issue of sovereign access to the sea in multilateral fora, the Chilean Ambassador in La Paz, Mr. Manuel Trucco, reassured the Bolivian Foreign Affairs Minister, Mr. Eduardo Arze Quiroga, in a memorandum that:

“Chile has always been willing, along with preserving the legal situation established by the Treaty of Peace of 1904, to examine directly with Bolivia the possibility of satisfying the aspirations of the latter and the interests of Chile.”<sup>185</sup>

137. The Memorandum invoked Chile’s Note N° 9 of 20 June 1950 as “clear evidence” of these intentions. Based on this reassurance, the Bolivian Foreign Affairs Ministry expressed its acceptance to:

“formally enter into a direct negotiation to satisfy the essential need of Bolivia to obtain its own sovereign access to the Pacific Ocean, thus resolving the problem of Bolivia’s landlocked status on the basis of conditions that meet the mutual benefit and genuine interests of both countries.”<sup>186</sup>

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<sup>184</sup> See BM Vol. II, Annex 185.

<sup>185</sup> See BM Vol. II, Annex 24.

<sup>186</sup> See BM Vol. II, Annex 25.

138. In the 1950s and 60s however, Chile had moved towards its plans to divert water from the Lauca River<sup>187</sup>. In April 1962, as Chile moved forward with its plans for the Lauca River, Bolivia broke diplomatic relations on the grounds that Chile's diversion of waters violated Bolivia's rights. Amidst efforts by the President of the OAS Council, Gonzalo J. Facio Segreda to mediate the dispute between the Parties, Bolivia conditioned resumption of diplomatic relations upon Chile's compliance of its promise to negotiate sovereign access to the sea. Chile however rejected this condition, claiming that it was not under an obligation to resume such negotiations.<sup>188</sup> In order to justify its position, Chile began to deny its commitments to solving what it described as the "port problem", and suddenly began an unwarranted attempt to equate Bolivia's proposals with a revision of the 1904 Treaty. In a speech made on 28 March 1963, the Chilean Minister of Foreign Affairs, Carlos Martínez Sotomayor, attempted to disavow the 1961 Trucco Memorandum, on the grounds that it was not an official note and was not signed. Implicitly conceding that the Memorandum would otherwise create an obligation for Chile, the Foreign Minister went to great lengths to argue that memorandum is merely "a document widely used in Foreign Ministries"<sup>189</sup> that "serves to record something, so much so that in diplomatic jargon they are called *Aide-Mémoire*."<sup>190</sup> In this manner, Chile attempted to renounce its prior commitments and repeated reassurances to Bolivia. However Bolivia kept claiming the fulfilment of Chile's commitments. One week after the Chilean Foreign Minister speech, Bolivian Foreign Minister José Fellman Velarde exposed his country's position in the following terms: "The exchange of letter of June 1 and 20, 1950, according to the rules of international law, constitutes a formal commitment between Bolivia and

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<sup>187</sup> See Chap. 3, Sec. I (C)(1) below.

<sup>188</sup> Tomasek, R. D. "The Chilean-Bolivian Lauca River Dispute and the O.A.S.", *Journal of Inter-American Studies* 351, 335 (1967).

<sup>189</sup> See BM Vol. II, Annex 171.

<sup>190</sup> *Ibid.*

Chile”<sup>191</sup> and also that “This commitment is an inseparable part of the legal regime that regulates the relations between Bolivia and Chile and it is guaranteed, as any other exchange of notes, by both states’ faith and their national honour”<sup>192</sup>. Circumstances would however change in the 1970s, and Chile would once again recognize its agreement to negotiate sovereign access with Bolivia.

## **XI. The 1975 Joint Declaration of Charaña**

### **A. THE AYACUCHO DECLARATION OF 1974**

139. Following the Lauca River controversy, on February 1974, at the Tlatelolco Mexico, conference of Ministers of Foreign Relations, the representatives of Bolivia and Chile agreed on a meeting of their presidents in Brasilia<sup>193</sup>. On 14 March 1974, a new round of negotiations was initiated. This coincided with the assumption of power in Chile by the Government of President Augusto Pinochet in 1973, and with multilateral support for finally granting Bolivia sovereign access to the sea. In a meeting between President Pinochet and his Bolivian counterpart President Hugo Banzer, at the investiture of President Ernesto Geisel of Brazil in Brasilia, there was agreement that Bolivia and Chile should conduct negotiations aimed at solving pending and fundamental issues for both countries<sup>194</sup>. A first confidential meeting of a joint commission made up of representatives of the Presidency, the Foreign Ministry and the Armed Forces was held in Santiago on 4 December 1974<sup>195</sup>. A few days later, on 9 December 1974, Bolivia and Chile, together with other American Heads of State, adopted the “Ayacucho Declaration”,

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<sup>191</sup> Bolivia, Ministerio de Relaciones Exteriores. *Rumbo al Mar. Documentos trascendentales*, Departamento de Prensa y Publicaciones, La Paz, 1963, p. 60.

<sup>192</sup> *Ibid.*

<sup>193</sup> M. Ostria Trigo, *Temas de mediterraneidad*, Editorial Garza Azul, 2004, pp. 95-102.

<sup>194</sup> See BM Vol. II, Annex 128.

<sup>195</sup> See BM Vol. II, Annex 176.

which made specific reference to Bolivia's sovereign access to the sea. In that Declaration, the American Heads of State expressed their view that:

"Upon reaffirming the historic commitment to strengthen the unity and solidarity between our peoples, we offer the greatest understanding to the landlocked condition affecting Bolivia, a situation that demands the most attentive consideration leading towards constructive understanding."<sup>196</sup>

#### *B. THE JOINT DECLARATION OF 1975*

140. Subsequently, on 8 February 1975, in the Bolivian border town of Charaña, Presidents Banzer and Pinochet signed a "Joint Declaration", in which Chile agreed to resume diplomatic relations and to negotiate a solution to Bolivia's confinement from the Pacific Ocean. This agreement, which refers to the Ayacucho Declaration, commits both Heads of State 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."<sup>197</sup>

141. The resumption of diplomatic relations was agreed upon on this basis. This Joint Declaration was published in the Treaty Series of the Ministry for Foreign Affairs of Chile<sup>198</sup>.

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<sup>196</sup> See BM Vol. II, Annex 110.

<sup>197</sup> See BM Vol. II, Annex 111.

<sup>198</sup> Under the name of the "Charaña Process". See Ministerio de Relaciones Exteriores, Dirección de Documentación, Departamento de Tratados, *Tratados, Convenciones y Arreglos Internacionales de Chile 1810-1976, Tratados Bilaterales, Chile-Bolivia*, T. I, Santiago de Chile, 1977, cit., p. 259.

### C. OAS RESOLUTION OF AUGUST 1975

142. Chile's commitment to negotiate sovereign access to the sea was further confirmed before the OAS. On 6 August 1975, the Permanent Council of the OAS adopted by consensus, Resolution N° 157 entitled "Declaration of the 150<sup>th</sup> Anniversary of Bolivia's Independence". This Declaration emphasized that:

"The landlocked situation which affects Bolivia is a matter of continental concern; therefore, all American States offer their cooperation in finding solutions which, in accordance with principles of International Law and in particular those contained within the Charter of the Organization of American States, support Bolivia to eliminate the difficulties that this landlocked condition has caused to its economic and social development, reconciling mutual interests and promoting constructive relations."<sup>199</sup>

143. It was therefore understood by the OAS, including Chile that Bolivia's right of sovereign access to the sea was "in accordance with the principles of international law." Chile's delegate to the OAS, left no doubt that the Declaration reaffirmed its earlier commitments to negotiate a solution to Bolivia's landlocked situation:

"The Chilean delegation agrees with the approval of the Declaration formulated by the Permanent Council on occasion of this Bolivian anniversary, and in doing so, reiterates the spirit of the Joint Declaration of Charaña, expressing, once more, its spirit of solidarity."<sup>200</sup>

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<sup>200</sup> See BM Vol. II, Annex 163.

#### D. PROPOSALS IN AUGUST 1975

144. Following these diplomatic initiatives and multilateral efforts, on 25 August 1975, Bolivia's Ambassador in Santiago, Guillermo Gutiérrez Vea-Murguía, submitted an *Aide-Mémoire* to the Chilean Foreign Minister Patricio Carvajal, proposing guidelines for negotiations. The core elements of the Bolivian proposal included the following:

“2. The cession to Bolivia of a sovereign maritime coast found between *Línea de la Concordia* and the limit of Arica’s Metropolitan Area. This coast is to extend along a sovereign strip of land from the said coast up to the Bolivian - Chilean border, and include the transfer of the Arica-La Paz railway.”<sup>201</sup>

145. It also proposed discussion on: “4. The cession to Bolivia of a piece of sovereign territory 50 kilometres along the coast and 15 kilometres wide in a suitable region to be determined, alternatively, close to Iquique, Antofagasta or Pisagua.”<sup>202</sup>

146. Consistent with earlier agreements, there was no suggestion of a territorial exchange, but rather, some other, non-territorial, form of compensation by Bolivia.

147. On the second anniversary of his assumption of power, in his message to the Chilean people, President Pinochet reaffirmed that: “Since the Charaña meeting... we have repeated our unchanging purpose to study together with that brother country, within a frank and friendly negotiation, the obstacles that limit Bolivia’s development on account of its landlocked condition.”<sup>203</sup>

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<sup>201</sup> See BM Vol. II, Annex 174.

<sup>202</sup> *Ibid.*

<sup>203</sup> See BM Vol. II, Annex 172.

148. Eager to expedite a Chilean reply so that negotiations could move forward, President Banzer of Bolivia sent a dispatch to President Pinochet on 19 September 1975, invoking the “spirit” of the Joint Declaration of Charaña, and the reliance of the Bolivian Government and people on Chile’s promises and commitments<sup>204</sup>. Once again, President Pinochet reassured his Bolivian counterpart: “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.”<sup>205</sup>

#### *E. PROPOSALS IN DECEMBER 1975*

149. Some months later, on 12 December 1975, the Chilean Foreign Minister Patricio Carvajal orally conveyed his Government’s response to the Bolivian Ambassador in Santiago, expressing Chile’s willingness to cede a sovereign corridor to Bolivia north of Arica, consistent with earlier agreements. Within a few days, on 16 December 1975, Bolivia accepted the “general terms” of the Chilean reply through Note N° 681/108/75, and requested that the 12 December 1975 oral offer be put in writing. Expressing appreciation for Chile’s decision to negotiate sovereign access to the sea in concrete terms, the Note set out Bolivia’s understanding that: “the other proposals put forward in the Aide Memoire of 26 August and those expressed by Your Excellency will be subject to negotiations that take into account the satisfaction of mutual interests.”<sup>206</sup>

150. Soon after, in a Note dated 19 December 1975, Chile set out its terms for negotiations as follows:

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<sup>204</sup> See BM Vol. II, Annex 69.

<sup>205</sup> See BM Vol. II, Annex 70.

<sup>206</sup> See BM Vol. II, Annex 71.

“b) On this basis, the Chilean response is based on a mutually convenient agreement that would take into account the interest of both countries’ interest without containing any innovation to the stipulations of the Treaty of Peace, Friendship, and Commerce signed between Chile and Bolivia on 20 October 1904.

c) As His Excellency President Banzer stated, the cession to Bolivia of a sovereign maritime coast linked to Bolivian territory through a territorial strip with the same type of sovereignty would be considered.

d) Chile would be willing to negotiate with Bolivia over the cession of a strip of territory in the north of Arica up to the *Línea de la Concordia* based on the following delimitations:

- North Boundary: the current Chilean boundary with Peru.

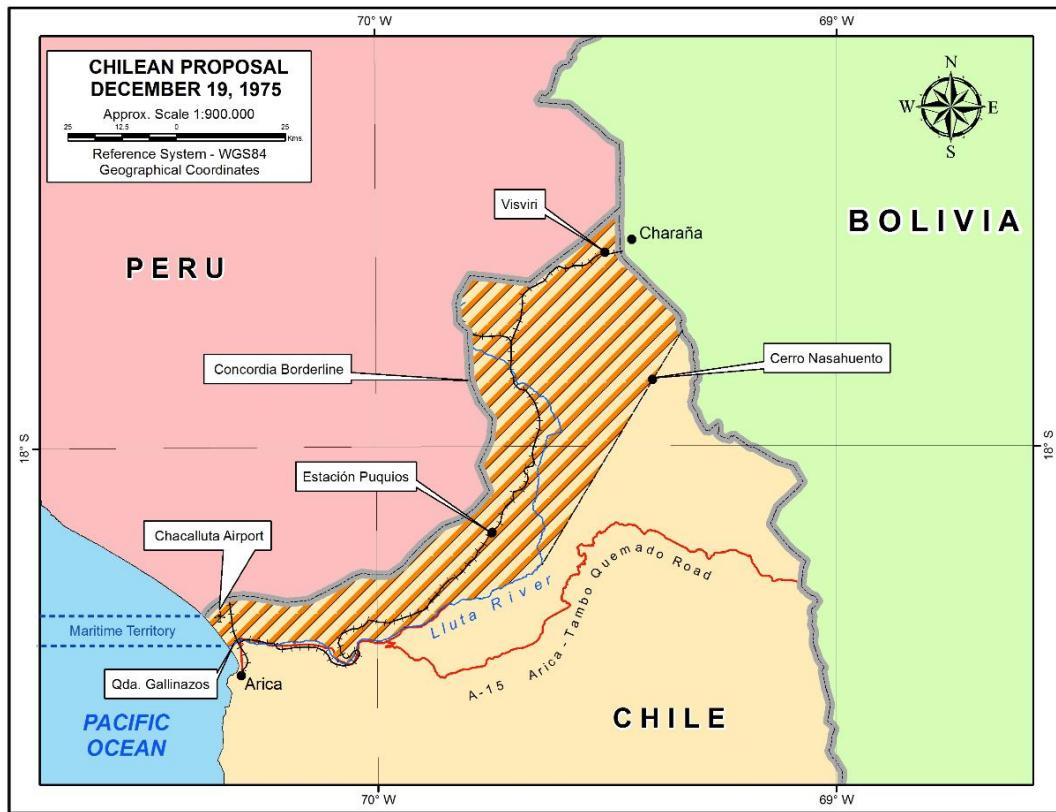
- South Boundary: Gallinazos ravine and the upper edge of the ravine north of the River Lluta, (so that the A-15 road from Arica to Tambo Quemado would totally be part of Chilean territory) up until a southern point of Puquios Station, and then a straight line passing through Cota 5370 of Mountain Nasahuento and continuing up until the current international boundary between Chile and Bolivia.

- Area: the cession would include a land territory described before and a maritime territory comprised between parallels of the end points of the coast that would be ceded (territorial sea, economical zone, and submarine shelf).<sup>207</sup> (See Figure VI)

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<sup>207</sup> See BM Vol. II, Annex 73.

**FIGURE VI: CHILEAN PROPOSAL OF 19 DECEMBER 1975**



This sketch-map has been prepared for illustrative purposes only.

151. Contrary to earlier agreements, the Chilean Diplomatic Note imposed certain conditions, including a territorial exchange:

“f) The cession to Bolivia described in section d) would be subject to a simultaneous exchange of territories, namely Chile would at the same time receive in exchange a compensatory area at least equal to the area of land and sea ceded to Bolivia.

(...)

- i) The Government of Bolivia authorizes the use by Chile of the waters of the Lauca River.
- j) The territory ceded by Chile would be declared a Demilitarized Zone.

(...)

l) Arriving to the final agreement, a solemn testimony will be left mentioning that the territorial cession that permits the sovereign access to the sea represents the full and definitive solution to the landlocked situation of Bolivia.”<sup>208</sup>

152. Furthermore, invoking the Complementary Protocol to the 1929 Treaty of Lima, Chile informed Peru through Diplomatic Note N° 685 about the content of the Bolivian proposal, inquiring whether Peru would consent to the cession of territory requested by Bolivia<sup>209</sup>. On 19 November 1976, Peru submitted a Memorandum to Chile in which it made its own proposal as follows:

“a) The eventual sovereign cession to Bolivia of a corridor through the north of the province of Arica, parallel to the *Línea de la Concordia*, which shall start on the Bolivian - Chilean boundary and ends when reaching the Pan-American highway in the said province which unites the port of Arica with the city of Tacna. This transfer is subject to the condition detailed as follows.

b) The establishment, in the Province of Arica, following the Corridor, of a territorial area under the shared sovereignty of the three States Peru, Bolivia, and Chile, located to the south of the Peruvian-Chilean boundary, between the *Línea de la Concordia*, the Pan-American highway, the northern area of the city of Arica and the coastal region of the Pacific Ocean.”<sup>210</sup>

153. There were yet other terms attached to this condition:

“a) Establishment of a tri-national port authority in the port of Arica;

b) Granting Bolivia the rights to build a port under its full sovereignty in accordance with the Peruvian interest to find a definitive, real, and effective solution to the Bolivian landlocked status, for which it is important that the mentioned country have its own port;

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<sup>208</sup> *Ibid.*

<sup>209</sup> See BM Vol. II, Annex 72.

<sup>210</sup> See BM Vol. II, Annex 155.

- c) Bolivian sovereignty over the sea adjacent to the coast under shared sovereignty;
- d) The establishment by the three countries of an economic development zone in the territory under shared sovereignty, in which multilateral credit organizations will be able to cooperate financially.”<sup>211</sup> (See Figure VII)

154. Chile rejected the Peruvian proposal, maintaining that it exceeded the terms of Note 685 of 19 December 1975<sup>212</sup>. Thus, the unprecedented Chilean requirement of a territorial exchange with Bolivia, and its rejection of the Peruvian proposal of an area under tripartite sovereignty, complicated the negotiations. However, the consultation by Chile and corresponding response by Peru made explicit the will of Chile to grant Bolivia a territory with an access to the sea. Furthermore, it complied with the terms of the Supplementary Protocol of 1929 by which a country willing to transfer territories to a third Power could not do so without previous agreement between them. A year later, on 24 December 1976, President Banzer of Bolivia publicly appealed to the Governments of Peru and Chile to amend their proposals so that the negotiations could resume<sup>213</sup>.

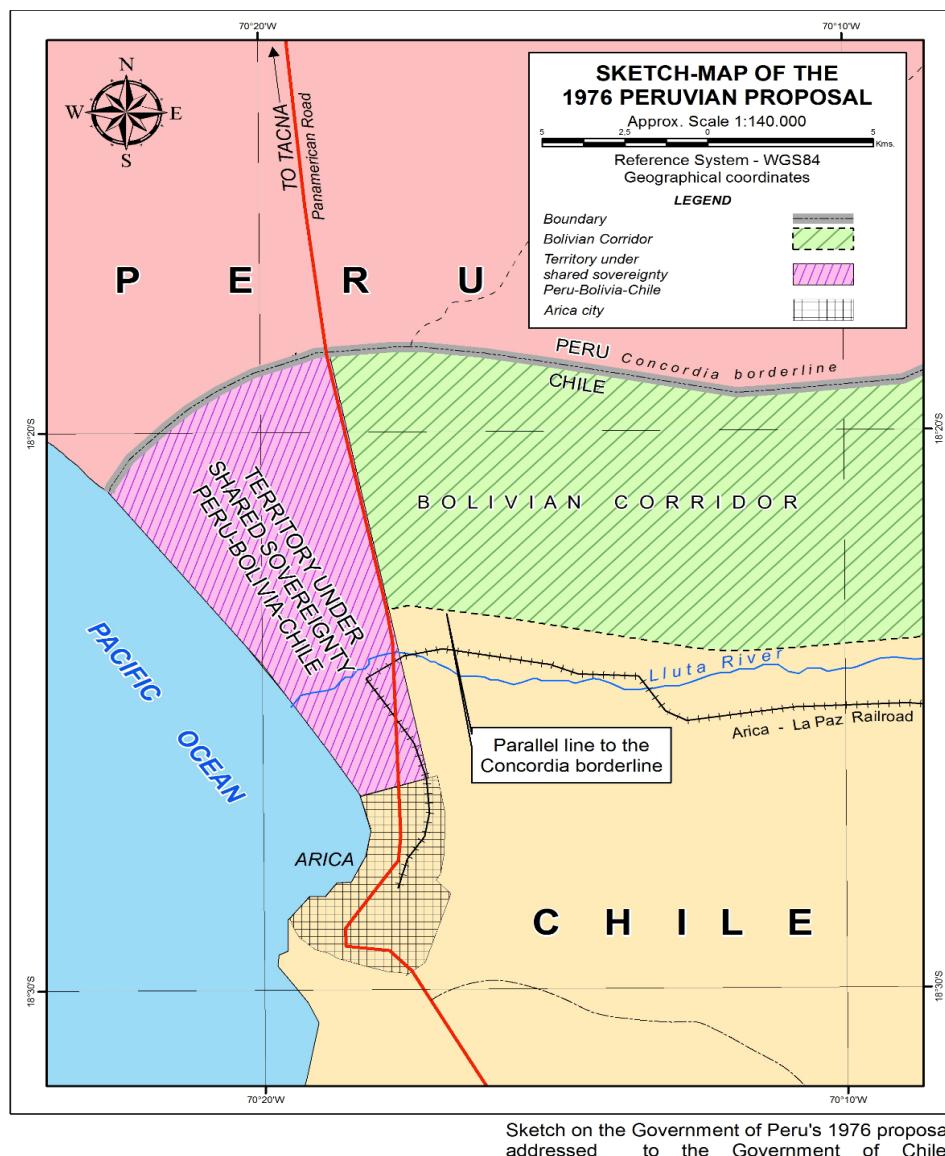
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<sup>211</sup> *Ibid.* pp. 28-29

<sup>212</sup> See BM Vol. II, Annex 26.

<sup>213</sup> See BM Vol. II, Annex 173.

**FIGURE VII: PERUVIAN COUNTERPROPOSAL OF 19 NOVEMBER 1976**



**F. EVENTS IN 1977, INCLUDING THE JOINT DECLARATION OF JUNE 1977**

155. On 8 February 1977, on the second anniversary of the Joint Declaration of Charaña, President Pinochet addressed a Note reassuring President Banzer that:

“Given these difficulties, I believe it is advisable to redouble our efforts and our good will, in order to advance from the state in which the negotiation is currently and reach the goal we have set for ourselves.

Your Excellency can have the highest trust in that my Government will maintain its decision to obtain a good outcome.”<sup>214</sup>

156. On the same day, President Banzer replied that:

“Your Excellency’s comments, reaffirming your determination to move forward in these negotiations from their current position in this crucially important diplomatic process, aimed at overcoming Bolivia’s landlocked situation through a fully sovereign access to the Pacific Ocean, without doubt, constitute a great encouragement to strengthen our efforts to reach the goal that so preoccupies all Bolivians.

I honour your word, Mr President that reflects your Government’s firm decision to search for the fairest and most constructive understanding in the highest spirit of Americanism.”<sup>215</sup>

157. In order to push negotiations forward, the Bolivian Minister of Foreign Affairs, Oscar Adriázola, visited his Chilean counterpart in June 1977. This meeting ended with the signature of yet another Joint Declaration, noting that:

“the dialogue established through the Declaration of Charaña corresponds to the effort of the two governments of deepening and strengthening bilateral relations between Chile and Bolivia, through the 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 Pacific Ocean freely and with sovereignty.”<sup>216</sup>

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<sup>214</sup> See BM Vol. II, Annex 74.

<sup>215</sup> See BM Vol. II, Annex 75.

<sup>216</sup> See BM Vol. II, Annex 165.

158. Furthermore, Bolivia and Chile resolved:

“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.”<sup>217</sup>

159. In September 1977, following a meeting between the Presidents of Bolivia, Chile, and Peru, a Joint Communiqué was issued whereby they “agreed to instruct their respective Ministries of Foreign Affairs to continue their efforts to solve the aforementioned problem, inspired by ideas of cooperation, friendship, and peace.”<sup>218</sup> On 23 November 1977, in a Note addressed to the President of Bolivia, the President of Chile confirmed once more that:

“My government appreciates the special importance that the negotiations to grant Bolivia a sovereign access to the Pacific Ocean play in our relationship.

My government remains steadfast in its policy that initiated these negotiations, and is willing to move them forward in accordance with the wishes and intensity Your Excellency considers prudent.”<sup>219</sup>

160. Despite these reassurances, Chile’s new demand of a territorial exchange with Bolivia, and its lack of efforts to obtain Peru’s consent to the territorial cession, resulted in the stagnation of negotiations. On 21 December 1977, the President of Bolivia sent a Note to the President of Chile requesting once more the elimination

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<sup>217</sup> *Ibid.*

<sup>218</sup> See BM Vol. II, Annex 129.

<sup>219</sup> See BM Vol. II, Annex 76.

of the condition of a territorial exchange. With the regard to Peru's consultation, the note stated:

“Your Government, Mr President, refused to consider the Peruvian proposal arguing that that it encroached on matters within Chilean sovereignty. Nevertheless, Bolivia expected Chile to make further efforts to clarify the situation, a fundamental clarification to help the Government of Chile complete the principal and legal goal of these negotiations - the transfer of territory.”<sup>220</sup>

161. President Pinochet responded that Chile would not abandon the demand of a territorial exchange:

“Under my Government’s view, the grounds proposed by Chile and broadly accepted in general terms by Bolivia are the only viable and realistic ones that would permit the fulfilment of the desires of the brotherly country ... I am certain - he added- that on those grounds, an agreement susceptible to obtain the acceptance of Peru would be possible to achieve.”<sup>221</sup>

162. In order to determine Chile’s real intentions, the Bolivian Government commissioned a confidential investigation by Special Envoy Willy Vargas. Following a meeting with Chilean Foreign Minister, Patricio Carvajal, in Santiago on 10 March 1978, the Special Envoy presented a report to his Government<sup>222</sup> confirming that Chile would insist on a territorial exchange, and furthermore, that it would not take any steps to persuade Peru to consent to the terms of the agreement between Chile and Bolivia. Chile’s posture effectively deadlocked the negotiations. On 17 March 1978, Bolivia then decided to suspend diplomatic relations with Chile. The Press Release issued by Bolivia to explain its decision, observed that:

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<sup>220</sup> See BM Vol. II, Annex 77.

<sup>221</sup> See BM Vol. II, Annex 78.

<sup>222</sup> See BM Vol. II, Annex 177.

“the confidential investigation, far from finding the required receptiveness to identify new factors which could give effective impact to the action of the Special Representatives, confirmed the existence of very disappointing positions, like the fact that Chile, beyond refusing to change any requirements contained in the document of 19 December 1975, had not made any effort, and did not consider that it had to make any effort, to seek Peru’s prior agreement, under the 1929 Protocol.”<sup>223</sup>

163. The statement further explained that Bolivia will break off diplomatic relations because: “so long as Chile holds to its uncompromising stance, they have lost all meaning for the Bolivian people”<sup>224</sup>. It was not lost on Bolivia that throughout the period when the Government of President Pinochet had proposed diplomatic normalization and negotiations, Chile had been placing landmines on its boundary with Bolivia, beginning in 1973 with the Northern Front Chacalluta coast in the Arica Commune, corresponding to the territories it had offered to transfer to Bolivia<sup>225</sup>.

## **XII. Chile’s Commitments before the OAS (1979-85)**

164. After the rupture of diplomatic relations between Bolivia and Chile in 1978 the OAS had a very important role for the parties to resume negotiations. In this context, Chile began once again to affirm its commitment to negotiate with Bolivia.

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<sup>223</sup> See BM Vol. II, Annex 147.

<sup>224</sup> *Ibid*, p. 95.

<sup>225</sup> The Chilean border, bordering Bolivia and Peru, began to be mined in 1973 and the first area in which this action was taken, according to reports from Chile to the UN, was the Northern Front Chacalluta coast, in the Commune Arica. Moreover, many landmines have been planted throughout Chile. Two years the mining began in this area, President Pinochet, invited President Banzer to discuss sovereign access to the Pacific in favour of Bolivia and the territory strip that Chile proposed exchange with Bolivia ended precisely at the place where major mining occurred. Report of the Republic of Chile on transparency measures pursuant to Article 7º, N° 2 of the “Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction” of the Organization of American States dated 24 May 2012. See BM Vol. II, Annex 179.

#### A. EVENTS OF 1979

165. On 24 October 1979, at the IX General Assembly of OAS, the Chief of the Chilean Delegation, Pedro Daza, declared that “only through dialogue, mutual understanding, and on the basis of serious suggestions, could the path to a sovereign access to the sea for Bolivia be opened.”<sup>226</sup>

166. Two days later, on 26 October 1979, the Bolivian Delegate, Gonzalo Romero, delivered a “Report on the Bolivian maritime issue”, observing that “Chile offered on different occasions Bolivia’s return to the Pacific”, and referred to several specific agreements to negotiate sovereign access to the sea:

“-Under the 1895 Treaty of Transfer of Territories, Chile was bound to transfer Tacna and Arica to Bolivia, should the plebiscite agreed with Peru favoured it.

-Failing that, it committed itself to cede Vítor Inlet, up to Camarones Ravine or a comparable territory.

-On January 1920, Chile committed to cede to Bolivia an access to the sea, north of Arica.

-In 1923, when Bolivia proposed the revision of the 1904 Treaty, Chile accepted to sign a new agreement which satisfies Bolivia’s claim, provided that would not require altering the territorial continuity of Chile.

-In 1950, Chile accepted to enter into direct negotiations ‘aimed at finding a solution that would grant Bolivia its own sovereign access to the Pacific Ocean and for Chile to receive compensation that was not of a territorial character and that took into account its interests effectively’.

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<sup>226</sup> See BM Vol. II, Annex 202.

-In 1956, Chile expressed, again, its commitment to solve Bolivia's landlocked condition through 'Strictly Confidential Negotiations'.

-In 1961, the Chilean Ambassador in La Paz ratified his country's offers, through a memorandum addressed to the Bolivian Foreign Ministry.

-In 1975, new negotiations took place between Bolivia and Chile. The negotiations failed due to Chile's insistence on territorial compensation, which finally resulted in the severance of diplomatic relations between both countries.”<sup>227</sup>

167. A few days later, on 31 October 1979, Chile once again pre-empted criticism and affirmed its commitment to negotiate with Bolivia. The Chilean Delegate, Pedro Daza, 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.”<sup>228</sup> It is noteworthy 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 Trucco Memorandum, and the 1975 Joint Declaration of Charaña.

168. Following Chile's commitment to negotiate with Bolivia based on its previous undertakings, the OAS IX General Assembly adopted resolution N° 426 (IX-O/79). This stated in its preamble that: “it is of continuing hemispheric interest that an equitable solution be found whereby Bolivia will obtain appropriate sovereign access to the Pacific Ocean.”<sup>229</sup>

169. In operative paragraph 1, consistent with Chile's commitments before the OAS and with Bolivia's proposed terms for negotiations, the Resolution called on Bolivia and Chile to:

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<sup>227</sup> See BM Vol. II, Annex 203.

<sup>228</sup> See BM Vol. II, Annex 204.

<sup>229</sup> See BM Vol. II, Annex 191.

“open negotiations for the purpose of providing Bolivia with a free and sovereign territorial connection with the Pacific Ocean. These negotiations shall take into account the rights and interests of the parties involved, and might consider, among other things, the inclusion of a port area for integrated multinational development, as well as, the Bolivian proposal that no territorial compensation be included.”<sup>230</sup>

#### *B.* EVENTS OF 1980 – 1983

170. The following year, in 1980, the X General Assembly of the OAS once again adopted by consensus a resolution N° 481 (X-0/80), reaffirming the “continuing hemispheric interest”<sup>231</sup> in resolving “Bolivia’s access to the sea”<sup>232</sup>. This process would continue and expand in the years that followed.

171. Similar resolutions were adopted in the XI (1981)<sup>233</sup> and XII (1982)<sup>234</sup> General Assemblies of the OAS. The first one was adopted by consensus.

172. The following year, in November 1983, Chilean Foreign Minister Schweitzer again reaffirmed before the OAS General Assembly that “[m]y country is and has been always willing to make a contribution to the beginning of this process.”<sup>235</sup>

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<sup>230</sup> *Ibid.*

<sup>231</sup> See BM Vol. II, Annex 192.

<sup>232</sup> *Ibid.*

<sup>233</sup> See BM Vol. II, Annex 193.

<sup>234</sup> See BM Vol. II, Annex 194.

<sup>235</sup> See BM Vol. II, Annex 205.

173. Furthermore, following this steady stream of resolutions, the XIII session of the OAS General Assembly in November 1983, adopted resolution N° 686 (XIII-0/83) by consensus and with Chile's support urging Bolivia and Chile:

“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, rights and interests of all parties involved.”<sup>236</sup>

174. This resolution was negotiated with great care by Bolivia and Chile through the good offices of Colombia<sup>237</sup>. In its support the delegates of several States noted the commitment undertaken by the Bolivian and Chilean Foreign Ministers to negotiate unresolved disputes, including Bolivia's sovereign access to the Pacific Ocean.<sup>238</sup> The OAS Secretary-General, Ambassador Alejandro Orfila, also referred to the significance of resolution N° 686 (XIII-0/83), emphasizing that granting Bolivia sovereign access to the sea was important to strengthening regional cooperation, and that the Foreign Ministers of Bolivia and Chile were authors of an

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<sup>236</sup> See BM Vol. II, Annex 195.

<sup>237</sup> In 1983, under the Presidency of Hernán Siles in Bolivia, official confidential contact was made between the Parties, through their permanent missions in the headquarters of the OAS in Washington and of the UN in New York and Geneva, with the aim of encouraging the restoration of diplomatic relations as well as the resumption of negotiations over resolving Bolivia's landlocked status. To that end, the Parties accepted the good offices of the President of Colombia, Belisario Betancur, and, the support of the OAS. On 1 October 1983, the Foreign Ministers of Bolivia, Ortiz Mercado, and Chile, Miguel Schweitzer, held an interview in New York in the presence of the Colombian Foreign Minister, Lloreda Caicedo, agreeing to hold informal and confidential talks in Geneva, Washington and New York. See BM Vol. II, Annexes 178 and 206.

<sup>238</sup> Minutes N° 111/83 of the Organization of American States, in which the Chiefs of the Delegation of: Mexico, Argentina, Brazil, Dominican Republic, Peru, El Salvador, Ecuador, Costa Rica, Uruguay, Nicaragua, Antigua and Barbuda, Honduras, Guatemala, Jamaica, United States, Panama, Venezuela, Paraguay, Haiti, Trinidad and Tobago, Bahamas, Dominica, St. Lucia, Barbados, San Vicente, and the Grenadines made a statement, 18 November 1983 (OEA/Ser.P.XIII.0.2, Vol. II.I, 1983) pp. 374-385.

agreement to negotiate which was the basis for resolving a dispute of concern to the Americas<sup>239</sup>.

### C. EVENTS OF 1984

175. Upon adoption of resolution N° 686 (XIII-0/83) on 18 November 1983, the Foreign Ministers of Chile and Bolivia, Jaime del Valle and Gustavo Fernandez, respectively, met in Montevideo in April 1984. On that occasion, Chile expressed President Pinochet's interest in normalizing relations with Bolivia and solving the maritime issue<sup>240</sup>.

176. Following these diplomatic exchanges, on 14 November 1984, at the XIV OAS General Assembly, upon the conclusion of a meeting between the Bolivian, Chilean and Colombian Foreign Ministers, the Colombian Minister, Ramirez Ocampo, told the press that the Foreign Ministers of Chile and Bolivia could meet in Bogotá in January 1985 to agree on the procedural rules for addressing the pending issue<sup>241</sup>.

177. On 17 November 1984 the OAS Assembly adopted resolution N° 701 (XIV-0/84):

“1. To express its satisfaction with the fact that the governments of Bolivia and Chile have accepted the invitation extended by the Government of Colombia to meet next January in Bogotá to start conversations to settle their differences, and particularly, to agree upon a formula that will give Bolivia a free and sovereign territorial outlet to the Pacific Ocean, in a process of rapprochement that would contribute to dialogue and normalizing their relations, on bases

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<sup>239</sup> J. Gumucio Granier, *El enclaustramiento marítimo de Bolivia en los foros del mundo*, Academia Boliviana de Historia, 1993, p. 183.

<sup>240</sup> *Ibid*, p.185.

<sup>241</sup> U. Figueroa, *La Demanda Marítima Boliviana en los Foros Internacionales*, 2007, p. 224.

taking into account the rights and interests of all parties involved.

2. To reiterate its interest in the success of the negotiations aimed at solving the Bolivian maritime issue, with the participation of the States this matter directly concerns.”<sup>242</sup>

#### *D. EVENTS OF 1985*

178. Suddenly, however, and before the negotiations could lead to concrete proposals and solutions, Chile walked away from the diplomatic process. Chilean Minister of Foreign Affairs, Jaime del Valle, issued a communiqué on 14 January 1985 stating that: “the Chilean Government rejects considering the cession of any part of its territory without compensation, fairly and duly agreed upon by the Parties.”<sup>243</sup> On 18 January 1985, he declined to support the Bogotá process through a Communiqué<sup>244</sup>. In response, on 21 January 1985, the Bolivian Foreign Ministry issued a communiqué stating that:

“3. The announced decision of the Chilean Government to not attend the meeting in Bogota breaches a process started with the greatest support of American countries and denotes a lack of will of the current Chilean Ministry of Foreign Affairs to search for solutions to the issues that divide both countries.”<sup>245</sup>

179. In December 1985, ninety years after the conclusion of the 1895 Transfer Treaty, the XIV OAS General Assembly adopted resolution N° 766 (XV-0/85), in which it:

“reiterate its appeal to the governments of Bolivia and Chile that they resume dialogue in a constructive spirit of American solidarity, with a view to finding a satisfactory solution that will provide Bolivia with

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<sup>242</sup> See BM Vol. II, Annex 196.

<sup>243</sup> See BM Vol. II, Annex 156.

<sup>244</sup> See BM Vol. II, Annex 157.

<sup>245</sup> See BM Vol. II, Annex 158.

a sovereign and useful territorial link and access to the Pacific Ocean, taking into account the rights and interests of all Parties involved.”<sup>246</sup>

### **XIII. The “Fresh Approach” to Negotiations (*enfoque fresco*) (1986-1987)**

#### *A. THE NEW BILATERAL APPROACH*

180. Following Chile’s decision to pull out of the Bogota process, a new bilateral approach began during a meeting in New York in 1986, when the Bolivian Foreign Affairs Minister, Guillermo Bedregal, explained the central elements of the proposal that Bolivia would present to his Chilean counterpart, Jaime del Valle<sup>247</sup>. During the XVI OAS General Assembly, held in Guatemala City from 10 to 15 November 1986, Minister Bedregal reported on the progress made within the framework of the new negotiations named the “Fresh Approach”:

“Bolivia wants to note that, in paying heed to the appeals of the international community, it has held promising reconciliatory contact with Chile, which would fulfil the general and sincere intention of securing a fair solution to our landlocked condition. We are pleased to note, Mr. President, Chile’s readiness to progress the negotiations that lead the problem affecting my country towards a happy end.”<sup>248</sup>

181. The Chilean Minister del Valle responded that: “Chile has always made public its willingness to engage with Bolivia over any topics of common interest, even those related to Bolivia’s landlocked condition.”<sup>249</sup> He added that, “on account

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<sup>246</sup> See BM Vol. II, Annex 197.

<sup>247</sup> Bolivia, Ministerio de Relaciones Exteriores de Bolivia, *Tricolor: Historia y Proyecciones de Paz, Desarrollo e Integración del Diferendo Marítimo Boliviano – Chileno*. Ed. Los Amigos del Libro editorial, La Paz, 1988, p. 52. This study is an official publication of the Bolivian State which describes the process termed “Fresh Approach”.

<sup>248</sup> See BM Vol. II, Annex 207.

<sup>249</sup> See BM Vol. II, Annex 208.

of the sovereign will of our Governments, we have started a process of reconciliation between Chile and Bolivia.”<sup>250</sup>

182. In response, the OAS General Assembly adopted resolution N° 816 (XVI-0/86):

“To take note, with satisfaction, of the report of the Government of Bolivia and of the response from the Government of Chile, which have begun a process of *rapprochement* with a view to creating an environment conducive to dialogue and understanding between the two nations, in an effort to resolve the substantive issues that fall within their interests.”<sup>251</sup>

#### *B.* MEETING IN APRIL 1987

183. Subsequently, the Parties held a meeting from 21 to 23 April 1987, in Montevideo<sup>252</sup>. The Bolivian Foreign Minister made it clear from the outset that the purpose of the meeting was to resume negotiations on Bolivia’s sovereign access to the sea: they “come to this meeting to negotiate with Chile a matter, which is vital [and] urgent.”<sup>253</sup>

184. It was reiterated that the Bolivian proposal implied “a useful, continuous, sovereign strip of territory of its own.”<sup>254</sup> The Chilean Foreign Minister responded by pointing out: “the willingness and good faith with which Chile arrived at this meeting in order to explore possible formulas that may result, in a reasonable period of time, in positive and satisfactory outcomes to the benefit of both countries.”<sup>255</sup>

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<sup>250</sup> *Ibid.*

<sup>251</sup> See BM Vol. II, Annex 198.

<sup>252</sup> See BM Vol. II, Annex 130.

<sup>253</sup> See BM Vol. II, Annex 170

<sup>254</sup> *Ibid.*

<sup>255</sup> See BM Vol. II, Annex 169.

185. He recalled with regard to 1975 Joint Declaration of Charaña that:

“[T]he commitment to move forward with the dialogue at different levels was expressly enshrined in order to find a formula for the vital issues both countries faced, for instance, the one related to the landlocked status that affects Bolivia, within the framework of reciprocal benefits and also taking into account the aspirations of the Bolivian and Chilean people.”<sup>256</sup>

### C. BOLIVIA’S TWO MEMORANDA

186. At this meeting, Bolivia submitted two memoranda with concrete proposals for a solution. The first memorandum contained a proposal on the relevant territory that should be transferred to Bolivia. It provided first that:

“1. The Government of the Republic of Chile shall transfer to the Republic of Bolivia a sovereign and useful maritime coast of its own linked to the territory of Bolivia through a strip of land equally appropriate, sovereign, and useful.”<sup>257</sup> (See Figure VIII).

187. It clarified further that: “3. Consequently, the Republic of Chile shall transfer the maritime territory comprised between the base lines or the parallels of the end points of the maritime coast aforementioned in numeral 1 of this Memorandum.”<sup>258</sup>

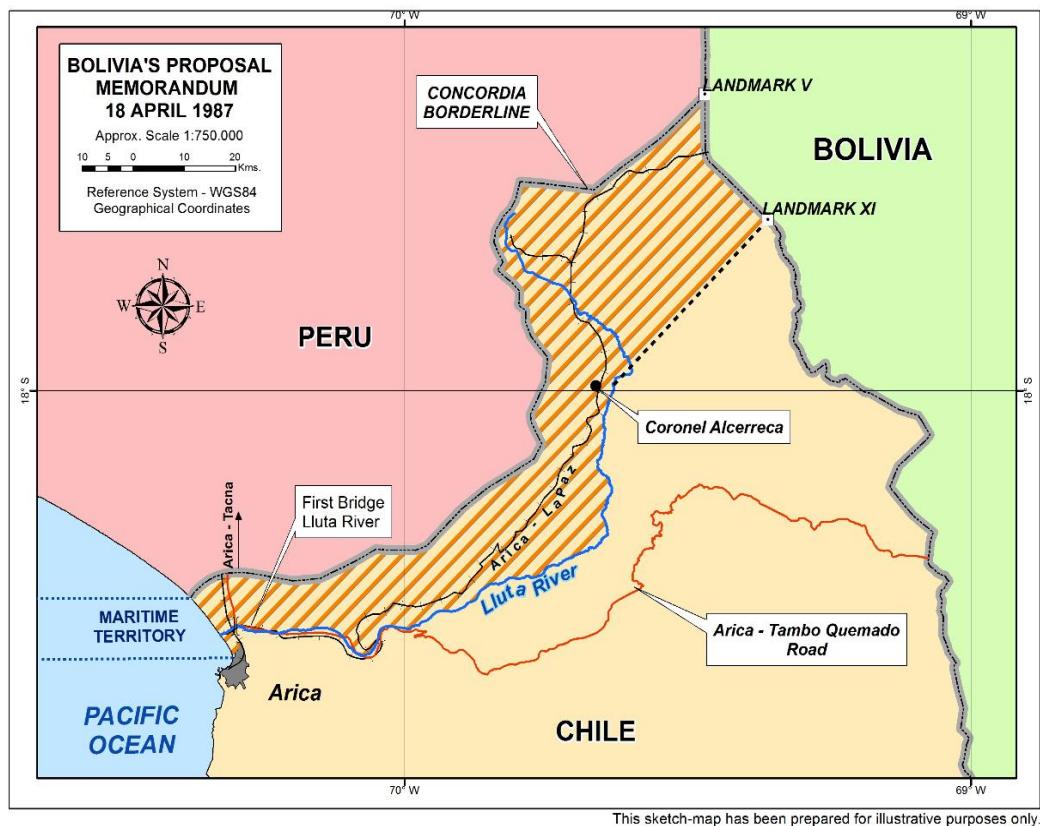
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<sup>256</sup> Annex 169.

<sup>257</sup> See BM Vol. II, Annex 27.

<sup>258</sup> *Ibid.*

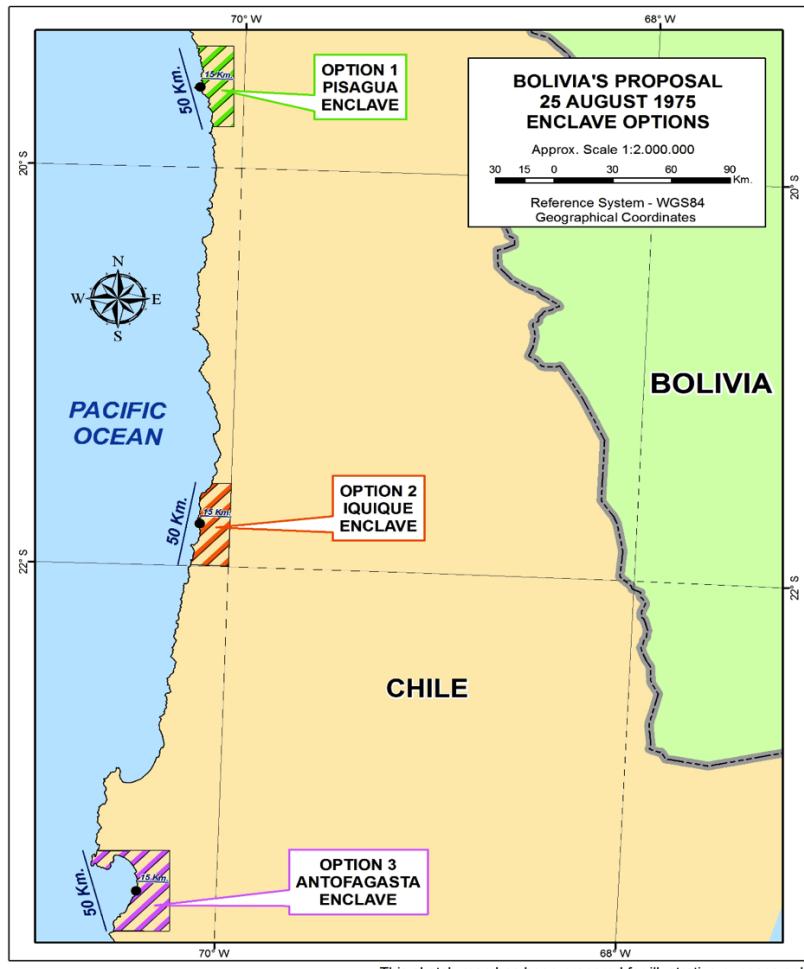
**FIGURE VIII: BOLIVIAN PROPOSAL OF CORRIDOR ACCORDING  
TO MEMORANDUM 1**



188. The second memorandum proposed three alternatives for the permanent transfer of a territorial and maritime enclave in the north of Chile that would not disrupt Chile's territorial continuity. This enclave would be connected to Bolivian territory by means of railways, roads and pipelines, the use of which would be granted to Bolivia, in addition to the feasibility of building an airport in the same area.<sup>259</sup> (See Figure IX).

<sup>259</sup> See BM Vol. II, Annex 28.

**FIGURE IX: BOLIVIAN PROPOSAL OF ENCLAVES ACCORDING TO  
MEMORANDUM 2**



**D. CHILE'S REJECTION OF FURTHER NEGOTIATIONS IN 1987**

189. Chile did not reject Bolivia's proposals. On the contrary, it submitted several questions to the Bolivian delegation requesting further information<sup>260</sup>, to

<sup>260</sup> Bolivia, Ministerio de Relaciones Exteriores, *Tricolor: historia y proyecciones de paz, desarrollo e integración del diferendo marítimo boliviano-chileno*, La Paz, Los Amigos del Libro Editorial, 1988, pp. 119-121.

which Bolivia replied on 22 April 1987<sup>261</sup>. Following the Montevideo meeting, a joint press release confirmed that the Bolivian proposal would be “submitted by Minister del Valle to the consideration of Chile”<sup>262</sup>; and on 6 June 1987, Bolivia and Chile published by agreement the terms of the Bolivian proposal on the corridor and enclaves<sup>263</sup>. Nonetheless, on 9 June 1987, just one and a half months after the Montevideo meeting, Chile abruptly interrupted the negotiation process, issuing a Press Release stating categorically that any transfer of territory to Bolivia would be “unacceptable”:

“After this intense stage of analysis, consultations and detailed information, within the spirit of seriousness and frankness which characterizes Chilean Foreign Policy, the Ministry of Foreign Affairs feels the responsibility to state that for Chile the merits of the proposal alluded to by Bolivia in both of its alternatives: i.e. the transfer of Chilean sovereign territory through a corridor to the north of Arica or of enclaves throughout its coastline, are unacceptable.”<sup>264</sup>

190. In response to this abrupt *volte face*, Bolivia registered its protest<sup>265</sup> and the OAS Permanent Council held a meeting to consider the matter on 17 June 1987. On that occasion, the Bolivian representative, Armando Soriano, read a Communiqué of his Ministry of Foreign Affairs, Guillermo Bedregal, dated 12 June 1987<sup>266</sup>, referring to the 1950 Exchange of Notes between Bolivia and Chile. At the XVII General Assembly of the OAS held 9 to 14 November 1987 in Washington, the Bolivian Minister of Foreign Affairs invoked once again, the 1950 Exchange of Notes with Chile, emphasizing that:

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<sup>261</sup> *Ibid.* pp. 122-126.

<sup>262</sup> See BM Vol. II, Annex 148.

<sup>263</sup> Bolivia, Ministerio de Relaciones Exteriores, *Tricolor: historia y proyecciones de paz, desarrollo e integración del diferendo marítimo boliviano-chileno*, La Paz, Los Amigos del Libro Editorial, 1988, p. 127.

<sup>264</sup> See BM Vol. II, Annex 149.

<sup>265</sup> See BM Vol. II, Annex 131.

<sup>266</sup> See BM Vol. II, Annex 209.

“This agreement, that commits the trust of the Chilean State in its relation with Bolivia, as well as in the whole of the international community, bestows upon Chile the obligation to engage with negotiations already settled on, searching for solutions to this geographical confinement, under the conditions agreed upon in the 1950 Notes.”<sup>267</sup>

191. Chile’s representative, Javier Illanes, had earlier recognized in regard to the 1950 Exchange of Notes and several other agreements and declarations that:

“it is true, Mr. President, that on different occasions Chile has shown itself willing to consider -in a direct dialogue with Bolivia- free of unjust international pressure, anything that Bolivia may have wanted to propose, including, its aspiration for access to the Pacific Ocean.”<sup>268</sup>

192. Contrary to these undertakings however, it maintained its position that it would not negotiate on any sovereign access to the sea by Bolivia, which it deemed to be “unacceptable”.

193. Consequently, the OAS Assembly adopted resolution N° 873 which reaffirmed that it was a “permanent hemispheric interest” to find an equitable solution “whereby Bolivia must obtain sovereign and useful access to the Pacific Ocean”, and further expressed its:

“regret that the talks recently held between Chile and Bolivia have broken off, and once again to urge those 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, on the basis of mutual benefits and the rights and interests of the parties involved.”<sup>269</sup>

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<sup>267</sup> See BM Vol. II, Annex 210.

<sup>268</sup> See BM Vol. II, Annex 211.

<sup>269</sup> See BM Vol. II, Annex 199.

194. The following year, in November 1988, at the XVIII OAS General Assembly, held in San Salvador, the Bolivian Foreign Minister, Guillermo Bedregal, having recounted the several prior agreements to negotiate sovereign access to the sea, remarked that:

“[A]ll these previous situations and diplomatic attempts, unfortunately, did not reach the goal as was hoped. However, they are valuable antecedents that affirm the will to reach an agreement between the parties and, for different reasons, show Chile’s reluctance to conclude the negotiations with Bolivia.”<sup>270</sup>

195. He also emphasized that notwithstanding Chile’s reluctance to reach an agreement: “Bolivia’s maritime issue is still an unresolved problem. Thus, it may, and in fact does, cause tensions and unease in the region.”<sup>271</sup>

196. In adopting resolution N° 930 in 1988, the OAS General Assembly expressed its regret once again and called on Bolivia and Chile to resume negotiations on providing Bolivia with a sovereign outlet to the Pacific Ocean.<sup>272</sup> At the XIX General Assembly of the OAS, held in Washington, in November 1989, adopted resolution N° 989:

“To reaffirm the importance of finding a solution to the maritime problem of Bolivia on the basis of what is mutually advantageous to the parties involved and their rights and interests, for better understanding, solidarity, and integration in the hemisphere, urging the parties to engage in dialogue and leaving the subject open for consideration at any of the next regular sessions of the General Assembly at the request of either of the parties concerned.”<sup>273</sup>

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<sup>270</sup> See BM Vol. II, Annex 213.

<sup>271</sup> *Ibid.*

<sup>272</sup> See BM Vol. II, Annex 200.

<sup>273</sup> See BM Vol. II, Annex 201.

197. In compliance with this resolution, Bolivia submitted an annual report to the OAS General Assembly on the status of negotiations with Chile on sovereign access to the sea. Despite the efforts of the OAS during this period however, Chile's progressive repudiation of its obligation to negotiate would only intensify in the years that followed.

#### **XIV. Negotiations attempts: 1995-2011**

##### *A. 1995: BOLIVIAN-CHILEAN MECHANISM OF POLITICAL CONSULTATION*

198. Following the failure of the “Fresh Approach” (*enfoque fresco*) upon Chile's refusal in 1987 to negotiate sovereign access to the sea, discussions resumed once more in 1995, one hundred years after the conclusion of the 1895 Transfer Treaty. In that year, the Parties decided to launch the Bolivian-Chilean mechanism of Political Consultation (MPC.B-CH) to deal with bilateral issues, covering increasingly wider areas of common interest. In time, Bolivia's confinement from the sea would be reintroduced into these deliberations.

##### *B. EVENTS FROM 2000 TO 2005*

199. On 22 February 2000, following a meeting in the Algarve, Portugal, the Ministers of Foreign Affairs of Bolivia and Chile, Javier Murillo and Juan Gabriel Valdes respectively, issued a Joint Communiqué, in which they agreed upon:

“2. [a] Working Agenda that will be formalized in the subsequent stages of dialogue and which includes, without any exception, the essential issues in the bilateral relationship, in the spirit of contributing to the establishment of a trusting atmosphere that should preside over this dialogue.”<sup>274</sup>

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<sup>274</sup> See BM Vol. II, Annex 150.

200. On 1 September 2000, following a meeting in Brasilia, the Presidents of Bolivia and Chile, Hugo Banzer and Ricardo Lagos respectively, issued a Joint Communiqué in which they:

“reiterated, the willingness of their Governments to engage in a dialogue on all issues concerning their bilateral relations, with no exclusions, with allows for the purpose of creating an atmosphere of reciprocal trust, which permits strengthening mutual relations on the basis of the framework and the positions held by both countries.”<sup>275</sup>

201. In this spirit, Bolivia and Chile started negotiations on a project to export gas from Bolivia to the North American market through a pipeline that would reach a port on the Pacific. During the negotiations from 2000 to 2003, President Lagos proposed to his Bolivian counterpart a concession for a Special Economic Zone for an initial 50-year period<sup>276</sup>. This offer was repeated to the new Bolivian President Jorge Quiroga. At the Summit of the Rio Group in August 2001, the Parties considered the transfer of an enclave with the attributes of sovereignty, but without using this term; and the Presidents entrusted the proposal to their Foreign Ministers for further elaboration<sup>277</sup>. The discussions continued under Bolivian President Gonzalo Sanchez de Lozada and his successor President Carlos Mesa, who recalled that in deliberations with President Lagos of Chile, “he agreed that sovereignty was ‘the question’, but unlike me, he thought that it was at the end of the road and not at the beginning.”<sup>278</sup>

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<sup>275</sup> See BM Vol. II, Annex 159.

<sup>276</sup> See BM Vol. II, Annex 146.

<sup>277</sup> Fernández Saavedra, G., *Ensayos sobre política exterior Memorando Bolivia-Brasil. La IX Asamblea General de la OEA, 1979. Bolivia y Chile, callejón con salida. América Latina y Estados Unidos*. Ed. Plural, 2014.

<sup>278</sup> See BM Vol. II, Annex 186.

202. In October 2005, at the XIV meeting of MPC.B-CH., it was agreed that the maritime issue should be expressly included in negotiations with Chile:

“in the spirit of the Algarve Declaration, of a bilateral agenda without exclusions, the Chilean Delegation took note of the approach formulated by the Bolivian Delegation with regard to the maritime issue, and agreed on the importance of keeping this issue in mind for a future agenda.”<sup>279</sup>

203. By December 2005, Bolivian President, Eduardo Rodríguez Veltzé had held four meetings with Chilean President Ricardo Lagos, hoping for an improvement in bilateral relations:

“The dialogue, without excluding any topic, including the most sensitive such as Bolivia’s landlocked condition, showed clearly that we share the decision to lay the ground -and I believe we have done well – for this new Bolivian-Chilean relation.”<sup>280</sup>

204. In his reply to the Bolivian President, Chilean President Lagos, stated that:

“I can but fully agree with the concepts expressed in your letter. Further, I appreciate that the exercise of analysis and reflection we undergo on each occasion that we meet, has established a kind of positive dialogue, based on trust and mutual respect. That fact certainly contributed to the identify the objectives we agreed to approach in the bilateral agenda, complex though they were.”<sup>281</sup>

#### C. 2006: THE 13-POINT AGENDA

205. In 2006, the Foreign Ministers of Bolivia, David Choquehuanca, and of Chile, Ignacio Walker, held a bilateral meeting in Paris. A Press Release following

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<sup>279</sup> See BM Vol. II, Annex 117.

<sup>280</sup> See BM Vol. II, Annex 80.

<sup>281</sup> See BM Vol. II, Annex 81.

their deliberations expressed: “The desire of the Government of Chile to build a future agenda to face past issues”<sup>282</sup>, recognizing “the necessity of dialogue continuity using an agenda without exclusions...”<sup>283</sup> On 16 April 2006, when asked about the possibility of the cession of territory to Bolivia, Chilean Foreign Minister, Alejandro Foxley, stated that: “We do not exclude it as a possibility, no... I believe it is possible because Chile is very willing, and as I hear from President Morales, this is reciprocal.”<sup>284</sup> That same day, the President of Bolivia, Evo Morales, referring to the declarations of the Chilean Foreign Affairs Minister, stated at a press conference that:

“I am grateful for this great initiative (the Foxley statement), that way of outlining the topic, clearly and publicly, I received information from some authorities, some former Ministers, the former President (Ricardo) Lagos on the great interest to find peaceful solutions, through dialogue, through diplomacy.”<sup>285</sup>

206. At the same press conference, the OAS Secretary-General, José Miguel Insulza, former Foreign Minister of Chile (1994-1999), emphasized that Bolivia’s maritime reintegration was a matter of hemispheric interest for the OAS.<sup>286</sup>

207. Later in 2006, the Presidents of Bolivia and Chile, Evo Morales and Michelle Bachelet, publicly announced the 13-Point Agenda which included all issues in their bilateral relationship. Point VI was identified as the “Maritime Issue”<sup>287</sup>. On 18 July 2006, the Vice-Minister for Foreign Affairs of Chile, Alberto

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<sup>282</sup> See BM Vol. II, Annex 151.

<sup>283</sup> *Ibid.*

<sup>284</sup> See BM Vol. II, Annex 132.

<sup>285</sup> See BM Vol. II, Annex 133.

<sup>286</sup> See BM Vol. II, Annex 134.

<sup>287</sup> Minutes of the XIV meeting of the Political Consultation Mechanism Bolivia - Chile), 1) Development of mutual trust, 2) border Integration, 3) free transit 4) physical integration 5) Economic Complementation, 6) maritime issue 7) Silala and water resources, 8) Instruments poverty

Van Klaveren, confirmed that: “We would like to talk about the maritime issue with Bolivia. We know how relevant it is for Bolivia.”<sup>288</sup> He added that the question of Bolivia’s sovereign access to the sea was important because the Chilean Government is “fully aware of the commitment undertaken many years ago to engage in negotiations over an Agenda without exclusions.”<sup>289</sup>

208. In furtherance of Chile’s commitment, on 25 November 2006, during the XV Session of the MCP.B-CH., “both delegations exchanged criteria regarding the maritime issue and they agreed on the importance of continuing with the dialogue in constructive manner.”<sup>290</sup>

209. The following year, in May 2007, as further meetings of MCP.B-CH emphasized “the need to continue developing trust in the eyes of the public of both countries and stated the importance managing the dialogue”<sup>291</sup>, when asked if the issue of the “Sea for Bolivia” was still on the agenda, the Chilean Foreign Minister, Alejandro Foxley replied: “Yes, it is point 6.”<sup>292</sup> In the same year, the Chilean Minister Secretary-General of Government, Ricardo Lagos Weber, confirmed that:

“[T]he agreements we have with the Bolivian government are reflected in the minutes of the meetings that have been kept on the 13 points of work we have with Bolivia, and of the meetings between Vice-Ministers of Foreign Affairs, including of course, the maritime issue which is on the Agenda.”<sup>293</sup>

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reduction, 9) Security and defense 10) Cooperation to control illicit trafficking of drugs and precursors and essential chemicals, 11) Education, science and technology, 11) Cultures, and 13) Other issues.

<sup>288</sup> See BM Vol. II, Annex 135.

<sup>289</sup> *Ibid.*

<sup>290</sup> See BM Vol. II, Annex 118.

<sup>291</sup> See BM Vol. II, Annex 119.

<sup>292</sup> See BM Vol. II, Annex 136.

<sup>293</sup> See BM Vol. II, Annex 137.

210. Similarly, the interim Chilean Foreign Minister, Alberto Van Klaveren confirmed that: “We have a complete dialogue with Bolivia, we have the Agenda of 13 Points on which we are making progress, and regarding the maritime issue, we have had very serious and productive conversations, but it is a dialogue.”<sup>294</sup>

211. These repeated Chilean promises and reassurances were of immense importance for the Bolivian Government and people. The Bolivian Foreign Minister, David Choquehuanca, declared that, “as never before, Bolivia is close to fulfilling its wish of returning to the coasts of Pacific Ocean.”<sup>295</sup>

212. In subsequent meetings of MCP.B-CH in 2008, analysing the different options they deepened those that are of short term. To advance in this analysis they accorded conducting the corresponding technical studies.<sup>296</sup> In the XVIII meeting of the MCP.B-CH in June 2008, the Head of the Chilean Delegation declared that “one of the priorities of the foreign policy of Chile consists of strengthening bilateral relations with neighbouring countries, especially with Bolivia, through a full and inclusive agenda.”<sup>297</sup>

213. Further meetings were held on 21 November 2008<sup>298</sup>, 30 June 2009<sup>299</sup>, and 13 November 2009<sup>300</sup>. At the same time the possibility of creating a Bolivian enclave on the Chilean coast was also discussed, and they made progress in building mutual trust. In July 2010, at the XXII Meeting of MPC.B-CH, the delegations:

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<sup>294</sup> See BM Vol. II, Annex 138.

<sup>295</sup> See BM Vol. II, Annex 139.

<sup>296</sup> See BM Vol. II, Annex 120.

<sup>297</sup> *Ibid.*

<sup>298</sup> See BM Vol. II, Annex 121.

<sup>299</sup> See BM Vol. II, Annex 122.

<sup>300</sup> See BM Vol. II, Annex 123.

“Reaffirmed that this process reflects a Policy agreed between both governments, and given the high levels of mutual trust reached at this meeting, confirmed that they would maintain this atmosphere so as to encourage bilateral relations to cover the substantial issue of point 6 on the Agenda of 13 Points in this context, and further propose to reach concrete, feasible, and useful solutions in the next and successive meetings of the Mechanism of Political Consultation which benefit understanding and harmony between both countries.”<sup>301</sup>

214. At the end of the meeting, it was agreed that the next meeting at which concrete proposals would be submitted would take place in November 2010, in Arica - Chile.

*D. 2011: CHILE’S REJECTION OF ANY FURTHER NEGOTIATIONS*

215. The Arica meeting was suddenly cancelled by Chile. The OAS Secretary-General, José Miguel Insulza, noted that “[T]he dialogue between Bolivia and Chile, has gone on for a long time and I think it is now time to make concrete proposals.”<sup>302</sup> After years of promises and reassurances, just as the time had finally come to consider concrete proposals, Chile pulled out of further negotiations. The Government of Bolivia, through its Minister of Foreign Affairs, repeatedly asked for the resumption of the MPC.B-CH meetings in order to move forward on the 13 Points Agenda. Chile however refused to reply.<sup>303</sup>

216. After further deliberations, on 7 February 2011, the Bolivian and Chilean Foreign Ministers issued yet another Joint Declaration stating that “the Bi-National

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<sup>301</sup> See BM Vol. II, Annex 124.

<sup>302</sup> See BM Vol. II, Annex 141.

<sup>303</sup> See Notes Verbales of the Ministry of Foreign Affairs of Bolivia BM Vol. II, Annexes 83, 84, 85, 86.

Commission has analysed the progress of the Agenda of the 13 points, especially regarding the maritime issue,<sup>304</sup> and that there was a commitment to “aim at reaching results as soon as possible, on the basis of concrete, feasible and useful proposals for the whole of the agenda.”<sup>305</sup> Nonetheless, on 17 February 2011, in view of the lack of concrete action by Chile to resume negotiations, President Evo Morales of Bolivia, gave a press conference in which he respectfully requested Chile to present a proposal:

“it would be good to have a concrete proposal by 23 March<sup>306</sup>] I take this opportunity to respectfully request the President, the Government, the Chilean people, and I will wait until 23 March for a specific proposal that may act as a basis for a discussion.”<sup>307</sup>

217. The surprising response of the Chilean President to this invitation to negotiate a concrete and meaningful solution to this long-standing dispute left no doubt that Chile had renounced its earlier commitments and obligations: “Chile does not have outstanding border disputes with Bolivia, as they were clearly settled by the Treaty of Peace and Friendship [of 1904], which is fully in force.”<sup>308</sup>

218. Having exhausted every other option, on 7 June 2011, before the OAS General Assembly, the Bolivian Minister of Foreign Affairs, David Choquehuanca, called on the Chilean Minister of Foreign Affairs, Alfredo Moreno, for “the immediate establishment, today, of a process of bilateral and formal negotiations on the basis of a written proposal, specific, feasible, and useful, with all the member

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<sup>304</sup> See BM Vol. II, Annex 166.

<sup>305</sup> *Ibid.*

<sup>306</sup> Bolivia celebrates every 23 March the Day of the Sea [*El Dia del Mar*], the date commemorated by the Bolivian people to recall their loss of its Littoral.

<sup>307</sup> See BM Vol. II, Annex 145.

<sup>308</sup> See BM Vol. II, Annex 164.

States of the Organization of American States as witnesses.”<sup>309</sup> The Chilean Minister of Foreign Affairs bluntly responded that Chile “is not in a position to grant Bolivia a sovereign access to the Pacific Ocean.”<sup>310</sup>

219. Thus, by 2011, after more than a century of agreements, commitments and reassurances encompassing the 1884 Truce Pact, the 1895 Transfer Treaty, the 1920 Act, the 1926 Matte Memorandum, the 1950 Exchange of Notes, the 1961 Trucco Memorandum, and the 1975 Joint Declaration of Charaña, in addition to various Chilean declarations and unanimous OAS resolutions, Chile simply rejected any further negotiations and repudiated its obligations regarding Bolivia’s sovereign access to the sea.

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<sup>309</sup> See BM Vol. II, Annex 231.

<sup>310</sup> See BM Vol. II, Annex 232.





## **CHAPTER II**

### **THE CHILEAN OBLIGATION**

#### **I. Introduction**

220. The chapter is divided into three sections. **Section I** sets out the scope of Chile's obligation to negotiate sovereign access to the sea. **Section II** sets out the relevant legal processes by which international obligations are formed and identifies (with reference to the historical background set out in detail in Chapter I) the key instruments by which Chile's commitment to negotiate with Bolivia over the latter's sovereign access to sea acquired legally-binding force. **Section III** sets out the conclusions, which are in essence that as a matter of international law, Chile has bound itself, both by agreement with Bolivia and by its subsequent conduct and unilateral declarations over an extended period of time, to negotiate a sovereign access for Bolivia to the Pacific Ocean.

#### **II. The Nature of the Obligation to Negotiate**

##### **A. THE SPECIFIC NATURE OF THE OBLIGATION TO NEGOTIATE AGREED UPON BY CHILE**

221. This section sets out the scope of Chile's obligation to negotiate sovereign access to the sea. This obligation is more exacting than a general obligation to negotiate under international law. In particular, Chile is under an affirmative obligation to negotiate in good faith in order to achieve a particular result; namely, a sovereign access to the Pacific Ocean for Bolivia.

222. Chile's obligation should be distinguished from a simple obligation to negotiate which may be satisfied by a short discussion that has reached deadlock. For example, a simple obligation to negotiate as a pre-condition to arbitration may

be satisfied if one party merely makes a proposal that is not accepted by the other<sup>311</sup>. The condition might be said to be fulfilled even though there is no further attempt actively to bring the other party to the negotiating table.

223. Chile's obligation must also be distinguished from the general "obligation to negotiate" in the context of peaceful dispute settlement. In those circumstances, the dispute "presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly."<sup>312</sup> There is merely a preliminary exchange of views in order to determine the existence and scope of the dispute<sup>313</sup>.

224. In each of the two foregoing situations the content of the "obligation to negotiate" is rudimentary. It is, in essence, an obligation (i) to make an initial proposal and (ii) to consider the possibility of settling the dispute by the pursuit of further negotiations.

225. Chile's "obligation to negotiate" in the present case is more exacting<sup>314</sup>. It is a specific obligation under international law to agree upon a specific objective to

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<sup>311</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9, para. 21.

<sup>312</sup> *Maffezini v Spain, Decision on Objections to Jurisdiction of January 25, 2000*, 16 *ICSID Rev.—FILJ* 212 (2001); 5 *ICSID Rep.* 396 (2002); 124 (2003) *ILR* 9, para. 96. Cf., *Oppenheim's International Law* (9<sup>th</sup> ed., 1992), p. 1182, n. 5.

<sup>313</sup> Cf., P. Daillier, M. Forteau, A. Pellet, *Droit international Public*, 8e ed., 2009, pp. 924-925.

<sup>314</sup> See, *Air Service Agreement of 27 March 1946 between the United States of America and France*, (RIAA, Vol. XVIII, p. 484) in which the Arbitral Tribunal recalled (para. 87) that "the duty to negotiate may, in present times, take several forms and thus have a greater or lesser significance. There is the very general obligation to negotiate which is set forth by Article 33 of the Charter of the United Nations and the content of which can be stated in some quite basic terms. But there are other, more precise obligations..."; "Tout d'abord, l'obligation de négocier connaît aujourd'hui des formes plus ou moins qualifiées qui lui donnent un contenu plus ou moins significatif. A côté de l'obligation très générale de recourir à la négociation instituée par l'article 33 de la Charte des

achieve a particular result, which is based on defined principles of international law. Such obligations are imposed by treaty or by customary international law in many circumstances.

226. For example, as regards the imposition of such specific obligations by treaty, the 1982 United Nations Convention on the Law of the Sea<sup>315</sup> requires States Parties to agree upon the terms and modalities for the exercise by land-locked States of transit rights (Article 125), upon rights of participation in the exploitation of any surplus of Exclusive Economic Zone living resources (Article 69), and upon the drawing of maritime boundaries (Articles 74, 83). The duty to reach a certain result by agreement plainly implies not merely a duty to negotiate, but a duty to negotiate in order to reach that agreement.

227. As regards examples of the imposition of specific obligations under customary international law, the sharing of resources such as high seas fisheries<sup>316</sup>, and the drawing of maritime boundaries<sup>317</sup>, have both been identified by the Court as circumstances in which the States concerned are obliged to enter into negotiations in order to pursue an agreement in accordance with defined principles of international law.

228. The obligation to negotiate in the present case arises from the legal commitment made by Chile to negotiate a sovereign access to the sea for Bolivia. The obligation was spelled out expressly in the 1895 Transfer Treaty and

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Nations Unies et dont le contenu se ramène à des exigences assez élémentaires, il y a bien d'autres obligations mieux spécifées..."

<sup>315</sup> 1833 UNTS 3 / [1994] ATS 31 / 21 ILM 1261 (1982).

<sup>316</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3, para. 74.

<sup>317</sup> *North Sea Continental Shelf Case, Judgment, I.C.J. Reports 1969*, p. 47, para. 85.

subsequent legal instruments, and repeatedly reaffirmed by Chile at intervals over the decades.

## B. CONTENT OF THE OBLIGATION TO NEGOTIATE

229. Before turning to the specific content of the duty to negotiate in the present case, the basic principles underlying every duty to negotiate under international law may be recalled, namely (a) that negotiations must be conducted in good faith and (b) that negotiations must be meaningful. The following paragraphs explain how those two basic principles have been developed through the subsequent case law, and identify several more specific aspects of the obligation to negotiate which are applicable in the present case.

### a. *Negotiations must be conducted in Good Faith*

230. The principle of good faith is a fundamental principle of international law<sup>318</sup>. Its importance has been affirmed in the context of the creation, performance and interpretation of treaties<sup>319</sup>, as well as of binding unilateral

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<sup>318</sup> *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, para. 38. See also *Legality of the Threat and Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 264-265, para. 102.

<sup>319</sup> See the VCLT (1969), Art. 26 (“Every treaty in force is binding upon the parties and must be performed by them in good faith”), and Art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”). The Court has observed that where a State has considerable discretion pursuant to the terms of a Treaty, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the Vienna Convention (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, para. 145). See the long list of Treaties cited by Robert Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit*, PUF, 2000, pp. 20-21. See also Tariq Hassan, “Good Faith in Treaty Formation”, 21 *V.J.I.L.*, 443 1980-1981, p. 451; *Affaire des réparations allemandes selon l'article 260 du Traité de Versailles (Allemagne contre Commission des Réparations)*, 3 September 1924, *UNRIA* 1924, Vol I, p. 523; Megalidis (1928), *Recueil des tribunaux arbitraux mixtes institués par les traités de paix*, t. VIII, p. 395.

declarations<sup>320</sup>. As the Court has said:

“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.”<sup>321</sup>

231. As regards the conduct of negotiations, it was expressly stated by the United Nations General Assembly in its Resolution on *Principles and Guidelines for International Negotiations* (adopted on 15 January 1999) that negotiations should be conducted in good faith.<sup>322</sup>

232. In those Principles and Guidelines, the General Assembly confirmed “the importance of conducting negotiations in accordance with international law”, and took as its starting point the fact that “in their negotiations States should be guided by the relevant principles and rules of international law.” The General Assembly

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<sup>320</sup> See, *Guiding Principles applicable to Unilateral Declaration of States capable of creating obligations*, YILC, 2006, vol. II (2), A/61/10 (2006), p. 380, adopted by the International Law Commission in its 58<sup>th</sup> session on 2006, and submitted to the GA; Principle 1 provides that “Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected”.

<sup>321</sup> *Nuclear Tests (New Zealand v. France) Judgment*, I.C.J. Reports 1974, p. 473, para. 49; and *Nuclear Tests (Australia v. France) Judgment*, I.C.J. Reports 1974, p. 268, para. 46.

<sup>322</sup> GA res. 53/101, *Principles and Guidelines for International Negotiations*, A/RES/53/101 (20 January 1999)

then stated that: “Negotiations should be conducted in good faith.”<sup>323</sup>

233. The duty to conduct negotiations in good faith also follows from the more general obligations set out in the *Manila Declaration on the Peaceful Settlement of International Disputes* as follows:

“All States shall act in good faith and in conformity with the purposes and principles enshrined in the Charter of the United Nations with a view to avoiding disputes among themselves likely to affect friendly relations among States (...)

States shall seek in good faith in a spirit of co-operation an early and equitable settlement of their international disputes by any of the following means: negotiation (...)

States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes.”<sup>324</sup>

234. The duty to negotiate in good faith implicates a duty to act in accordance with general notions of reasonableness and fair dealing. Thus, it has been said that:

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<sup>323</sup> *Ibid.*

<sup>324</sup> UNGA Resolution 37/10, *Peaceful settlement of disputes between States*, A/RES/37/10 (15 November 1982) paras. 1, 5 and 11 respectively. See also the *Declaration on Principles on International Law Concerning Friendly relations and Co-Operation Among States in Accordance with the Charter of the United Nations* (A/RES/25/2625, 24 October 1970 UN GAOR, 25<sup>th</sup> Session Supp. 18, 122), which provides: “All States shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect of the maintenance of international peace and security...” See also, The Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 *ILM* 1292, Part V of which provides: “The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice. They will endeavour in good faith and a spirit of cooperation to reach a rapid and equitable solution on the basis of international law. For this purpose they will use such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties.” See also Part X which provides: “The participating States will fulfil in good faith their obligations under international law, both those obligations arising from the generally recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties”.

“The principle of good faith requires parties to a transaction to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage that might result from a literal and unintended interpretation of the agreement between them.”<sup>325</sup>

*b. Negotiations must be Meaningful*

235. The second fundamental principle, similarly emphasized by this Court, is that negotiations must be meaningful. As the Court observed in the *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*:

“the meaning of negotiations for the purposes of dispute settlement, or the obligation to negotiate, has been clarified through the jurisprudence of the Court and that of its predecessor, as well as arbitral awards...States must conduct themselves so that the ‘negotiations are meaningful’.”<sup>326</sup>

236. That negotiations must be meaningful was also recognized by the United Nations General Assembly in the Manila Declaration which states: “Where they choose to resort to direct negotiations, States should negotiate meaningfully...”<sup>327</sup>.

237. The two over-arching duties, namely (i) to negotiate in good faith (which, as noted above, imports a general notion of reasonableness) and (ii) to conduct

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<sup>325</sup> *Encyclopedia of Public International Law*, Vol. 2, Anthony D’Amato, 1995, p. 599. See also Powers, P. J., “Defining the Indefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods”, 1999, 18 *J.L. & Com.* 333, 352, which refers to good faith as “an international doctrine that requires parties to an international transaction to act reasonably, as they would expect the other party to act.”

<sup>326</sup> *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. 685, para. 132.

<sup>327</sup> A/RES 37/10, 15 November 1982, UN GAOR 37<sup>th</sup> Session Supp. 51, 261. See I, para. 10.

meaningful negotiations, are applicable to all negotiations. In the present case, however, Chile is under a more specific obligation to negotiate with Bolivia concerning sovereign access to the sea. It is not merely a matter of identifying and defining the scope of a dispute or disagreement between the two States: rather there is a legal obligation to pursue the realization of a defined objective by means of negotiations. That obligation implies several more specific aspects of the obligation to negotiate, which are elaborated below.

### C. SPECIFIC ASPECTS OF THE OBLIGATION TO NEGOTIATE

238. In light of the specific undertaking by Chile to agree upon Bolivia's sovereign access, this section sets out the content of the obligation to negotiate as follows: (a) the obligation to make proposals in good faith; (b) the obligation to receive and consider proposals in good faith; (c) the obligation to be willing to negotiate over any and all legal modalities which might be proposed; (d) the obligation to avoid unreasonable delay; and (e) the continuing obligation to negotiate.

#### a. *Obligation to Make Proposals in Good Faith*

239. First, there is an obligation to *make proposals* in good faith.

240. To make a proposal in good faith it is necessary that (1) proposals are in fact made and (2) the proposals are made with a genuine intention to resolve the matter in dispute.

241. The need for a proposal to be made is self-evident.

242. The requirement that the proposal be made with a genuine intention to resolve the matter in issue was confirmed by the Court in the *Gulf of Maine* case. That case concerned delimitation of a maritime boundary, and the Court considered what international law required as regards the negotiation of a maritime delimitation between neighbouring states. The Court stated that the parties were under an obligation to negotiate: “in good faith, with a genuine intention to achieve a positive result.”<sup>328</sup>

243. The Court also stated in *Georgia v Russia* that a negotiation requires a: “genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.”<sup>329</sup>

244. These principles were expressed in the definition of ‘negotiation’ in Whiteman’s *Digest of International Law*, as follows: “Negotiation is used, in general, to refer to the exchange and discussion of proposals by the representatives of the parties concerned with a view to reaching a mutually acceptable agreement.”<sup>330</sup>

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<sup>328</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 292, para. 87. This principle is codified in the UNIDROIT Principles of International Commercial Contracts (2004) Article 2.1.15 which provides “It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party”. Similarly the Principles of European Contract Law (1999) Article 2:301 state that “It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party”

<sup>329</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 132, para. 157. See also *Preliminary Objections of Russia*, para. 4.37.

<sup>330</sup> M. Whiteman (ed.) *Digest of United States Practice in International Law*, Washington D.C: US Department of State, 1971. “Whatever form they may take, substantially, negotiations are an exchange of points of view on law and facts, of mutual compromises in order to reach an agreement”. Cf., F. C. Iklé, *How Nations Negotiate*, New York: Harper & Row, 1964: negotiation is “a process in which explicit proposals are put forward ostensibly for the purpose of reaching agreement”; A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 3<sup>rd</sup> ed., 2013, p. 309 “Some treaties require the parties to a dispute to do no more than enter into consultations or

245. Cast in positive terms, a genuine intention to resolve the matter is demonstrated by making proposals that (i) are reasonable, (ii) take into account the position of the other party and (iii) address the subject matter that the parties have agreed to negotiate.

246. Cast in negative terms, this obligation precludes the making of patently unreasonable proposals, proposals that fail to take into account the position of the other party, and proposals which do not address the subject-matter that the parties have agreed to negotiate, for example by failing to offer the other party a means of achieving a goal of the negotiations. If the proposals do not address the precise subject-matter that the parties have agreed to negotiate, then it cannot be said that there is a genuine intention to resolve the relevant matter.

*i. Reasonable proposal*

247. The first indication of a genuine intention to reach agreement identified above is that a reasonable proposal is advanced. This is reflected in the observation of Professor Bin Cheng (when discussing the obligation to negotiate in good faith in the context of the negotiation of a treaty) that: “States in negotiating and concluding treaties are therefore presumed to have proposed nothing which is illusory or merely nominal.”<sup>331</sup>

248. Similarly, the need for a reasonable proposal is also expressed in the *Virginia Commentary to the Law of the Sea*, as follows: “A party should make reasonable proposals for the settlement of a dispute. It should not, however, present

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negotiations with a view to reaching a settlement or on another method of settlement. These have to be implemented in good faith. Therefore, the negotiations must be conducted purposefully”.

<sup>331</sup> Cheng, B., *General Principles of Law as applied by International Courts and Tribunals*, 1953, p. 106.

ultimatums to the other party, or demand that it unconditionally surrender its point of view.”<sup>332</sup>

*ii. Take into account the other party’s interests*

249. The second indication of a genuine intention to resolve a dispute is that the proposal must also take into account the other party’s interests.

250. This is illustrated in the *Fisheries Jurisdiction* case of 1974, in relation to Iceland’s unilateral proclamation of an exclusive fisheries zone, in a passage where the Court directed the parties to negotiate on their respective fisheries rights. The Court stated that: “The task before them [the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other.”<sup>333</sup>

251. Similarly, in the *Lake Lanoux Arbitration*, in the context of a dispute as to the use of the waters of the Lake, the Tribunal noted that “according to the rules of good faith” a State is obliged to:

“take into consideration the different interests at stake, to strive to give them all satisfaction compatible with the pursuit of its interests, and to demonstrate that, on this subject, it has a real solicitude to reconcile the interests of the other riparian with its own.”<sup>334</sup>

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<sup>332</sup> M. H. Nordquist *et al* (eds), *United Nations Convention on the Law of the Sea 1982, A Commentary*, vol. V, (Center for Oceans Law and Policy, University of Virginia, 1989), p. 30, para. 283.5.

<sup>333</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Merits, Judgment, I.C.J. Reports 1974*, p. 3, para.78.

<sup>334</sup> (1957) 12 RIAA 281; 24 ILR 101, p. 119.

*iii. Address the subject matter that the parties agreed to negotiate*

252. A third requirement implicit in the notion of a genuine intention to negotiate in good faith is that the proposal must address the subject-matter that the parties agreed to negotiate. Thus, in *Georgia v. Russia* the Court stated that “the subject-matter of the negotiations must relate to the subject-matter of the dispute.”<sup>335</sup>

253. Adapting the reasoning of the Court, the proposals advanced by a party in the course of negotiations must address the subject-matter regarding which the parties are obliged or have agreed to negotiate. If the proposals advanced do not in fact address the subject-matter regarding which the parties are obliged or have agreed to negotiate, then it cannot be said that the proposals are genuinely intended to lead towards an agreement as to that subject-matter.

254. Applying that principle to the facts of this case, because Chile has assumed an obligation to negotiate a right of a sovereign access to the Pacific Ocean for Bolivia, proposals must be made with a view to achieving that sovereign access. Proposals directed to a different outcome would not reflect the requisite genuine intention to reach an agreement on the defined subject-matter.

*b. Obligation to Receive and Consider Proposals in Good Faith*

255. The second specific obligation (flowing from the general obligation to negotiate in good faith and engage in meaningful negotiations) is an obligation to *receive and consider* proposals in good faith.

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<sup>335</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 161.

256. As with the obligation to *make* proposals in good faith, the requirement for a genuine intention to resolve the matter in dispute also applies when *considering* a proposal. Further, and again like the obligation to make proposals in good faith, the requisite genuine intention encompasses both positive and negative aspects.

257. Cast in positive terms, the obligation (i) requires that proposals be considered carefully, and (ii) necessitates a willingness to consider proposals that involve a modification of a State's position and/or that are adverse to its interests, in order to achieve the stated goal of the negotiations.

258. Cast in negative terms, the obligation prohibits the party receiving the proposal from categorically refusing to modify its own position. To respond otherwise would be to fail to satisfy the obligation to negotiate in good faith and meaningfully.

259. The requirement that a State be willing to contemplate a modification of its position in order to achieve the stated goal of the negotiations is well attested. The decisions of the Court in the *North Sea Continental Shelf Cases* (1969) are instructive. In those cases the Court was asked to indicate the principles and rules applicable to the delimitation of the continental shelf among three adjacent States. The Court found that in the context of such delimitation issues, customary international law provided for an obligation to negotiate. Defining the content of the obligation to negotiate, the Court stated that:

“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 formal 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.”<sup>336</sup>

260. The observations in the *Continental Shelf* cases were made in the context of the specific obligation to negotiate assumed by the parties in an agreement. However, it articulated generally applicable principles, and clarified that the obligation to negotiate assumed by the parties in that case:

“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.”<sup>337</sup>

261. Similarly, the principle is stated in general terms by the learned authors of *Oppenheim*, who say that where States are under a legal obligation to enter into negotiations:

“they must in such circumstances negotiate meaningfully with a view to arriving at an agreement (and thus do not satisfy their obligation if they adopt a negotiating position without contemplating any modification of it).”<sup>338</sup>

262. The general application of the aforementioned principle was also recently confirmed by the Court in the *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*. There, the Court stated that:

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<sup>336</sup> *North Sea Continental Shelf Case, Judgment, I.C.J. Reports 1969*, p. 47, para. 85(a); cited also in *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 47, para. 146.

<sup>337</sup> *North Sea Continental Shelf Case, Judgment, I.C.J. Reports 1969*, p. 48, para. 86.

<sup>338</sup> *Oppenheim's International Law*, 9<sup>th</sup> ed. 1992, Vol. 1, p. 1182.

“the meaning of negotiations for the purposes of dispute settlement, or the obligation to negotiate, has been clarified through the jurisprudence of the Court and that of its predecessor, as well as arbitral awards.... States must conduct themselves so that the ‘negotiations are meaningful’. This requirement is not satisfied, for example, where either of the parties ‘insists upon its own position without contemplating any modification of it’.”<sup>339</sup>

263. Thus it has been confirmed by the Court that there must be a degree of openness and that a party cannot insist upon its own position without contemplating any adjustment of it in order to achieve the stated goal of the negotiations.

264. Arbitral awards have similarly referred to the necessity of being willing to consider a change in position. In *Kingdom of Greece v Federal Republic of Germany*, the Tribunal interpreted a specific agreement between the parties to negotiate; but the Tribunal discussed the meaning of a *pactum de negotiando* in general terms, and its observations are of broader application. The Tribunal stated that it interpreted the expression “negotiate” to mean to:

“confer with another with a view to reaching an agreement...  
...[A] *pactum de negotiando*...means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions taken earlier...It implies a willingness for purpose of negotiations to abandon earlier postings and meet the other side part way...[T]he need for the peaceful solution of differences between States is so great and so essential to the well-being of the community of nations that, when disputants have reached a point of signifying their agreement to negotiate an outstanding dispute, the subsequent negotiations normally ought to lead to a satisfactory and equitable result...[T]o

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<sup>339</sup> *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, para. 132.

be meaningful negotiations have to be entered into with a view to arriving at an agreement.”<sup>340</sup>

265. And in the *dispositif*, the Tribunal decided that: “Meaningful negotiations cannot be conducted if either party insists upon its own position without contemplating any modification of it.”

266. The Tribunal also commented that it was inconsistent with the obligation to negotiate to make a “unilateral decision to refuse to bargain with respect to” one possible outcome (in that case, a possible monetary settlement)<sup>341</sup>.

267. Similarly, in the *Lake Lanoux Arbitration*, the Tribunal noted that all the proposals of the other party must be seriously examined:

“If, in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the State.”<sup>342</sup>

268. The General Assembly’s *Guiding Principles* (cited above)<sup>343</sup> also highlight the need for flexibility in responding to proposals. The Principles provide that: “States should use their best endeavours to continue to work towards a mutually acceptable and just solution in the event of an impasse in negotiations.”<sup>344</sup>

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<sup>340</sup> *Claims arising out of decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (between Greece and the Federal Republic of Germany)*, 26 January 1972, RIAA, Vol. XIX, pp. 60, 62.

<sup>341</sup> *Ibid.*, p. 79.

<sup>342</sup> (1957) 12 RIAA 281; 24 ILR 101, p. 140.

<sup>343</sup> *Supra*, para. 232.

<sup>344</sup> UNGA Res. 53/101, *Principles and Guidelines for International Negotiations*, A/RES/53/101 (20 January 1999), para. 2(g).

c. *Obligation to be willing to negotiate over any and all legal modalities which might be proposed*

269. The components of the duty to negotiate in good faith identified above, namely the obligations both to *make* and then to *receive and consider* proposals in good faith, operate together to ensure that there is not simply a series of claims and directly opposed counter-claims, but a meaningful negotiation which constitutes a genuine attempt to resolve the dispute. These characteristics distinguish negotiations from mere disputations. In the words of this Court:

“In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of ‘negotiations’ differs from the concept of ‘dispute’, and requires — at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.”<sup>345</sup>

270. Similarly, Sir Gerald Fitzmaurice, in addressing the question “what does negotiation mean” in his Separate Opinion in the *Northern Cameroons* case, stated:

“It does not, in my opinion, mean a couple of States arguing with each other across the floor of an international assembly, or circulating statements of their complaints or contentions to its member States. That is disputation, not negotiation.”<sup>346</sup>

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<sup>345</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 132, para. 157.

<sup>346</sup> *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963, Separate Opinion, p. 123.

271. The aforementioned obligations (namely the obligation to make, and also to receive and consider, proposals in good faith) are applicable to the facts of the present case. The present dispute concerns Chile's obligation to negotiate with Bolivia in respect of the establishment of a right of a sovereign access to the Pacific Ocean for Bolivia.

272. It follows that in *making* proposals in good faith, there is an obligation, applicable both to Chile and to Bolivia, to consider a range of options as to the legal modality for securing the right of sovereign access. This is necessary to ensure that the discussions are meaningful and not simply a presentation of a legal claim without taking into account the other party's interests.

273. It also follows that in *receiving* proposal in good faith, there is an obligation on the Parties to consider the various legal modalities which might be proposed by either State for securing the right of sovereign access. For either State to shut the door on any proposal made in good faith as to a given legal modality would be to "insist upon its own position without contemplating any modification of it" contrary to the obligation to negotiate in good faith as defined by this Court.

274. To cast the obligation in positive terms, any and all legal modalities proposed by the other Party for securing the right of access must be considered in good faith. To cast the obligation in negative terms, neither Party may automatically discount a legal modality advanced in good faith by the other Party.

*d. No Unreasonable Delay*

275. The obligation to negotiate in good faith also requires that there be no unreasonable delay: *i.e.*, (i) that proposals are made within a reasonable time-frame,

and (ii) that proposals that have been received are considered and responded to within a reasonable time-frame.<sup>347</sup>

276. Clearly, the time frame depends on the circumstances of the case.<sup>348</sup> However, reasonably prompt action is necessary in order to demonstrate the requisite genuine intention to settle the dispute. It would be inconsistent with such a genuine intention for a party to engage in unreasonable delay in either making or responding to proposals.

277. The proposition that unreasonable or abnormal delays would be contrary to the obligation to negotiate in good faith has been stated as follows:

“Good faith in negotiation can also be evaluated by examining whether the parties...show a willingness to consider promptly adverse proposals or interest...By contrast, a State will be in breach of this obligation if it engages in...abnormal delays.”<sup>349</sup>

278. In the course of the First World War, a number of Greek vessels and goods

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<sup>347</sup> It is notable that Conventions that stipulate the procedure in relation to negotiation of a dispute provide for reasonable timeframes. For example, the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”, 660 UNTS 195, 1965) provides for an inter-State complaint mechanism requiring that communications between the parties are provided within specified time limits (CERD, Arts. 11 and 12). Art. 11 provides “If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.”

<sup>348</sup> “Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith.” (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 96, para. 49.)

<sup>349</sup> H. Owada, “Pactum de Contrahendo, Pactum de Negotiando”, *MPEPIL*, VIII, pp. 18-27; online *MPEPIL*, 1451.

belonging to Greek nationals were destroyed by the German forces, before the entry into war of Greece. The Parties agreed to negotiate on the matter, and, after lengthy discussions between them, the Tribunal on German External Debts unanimously decided, on 26 January 1972, that:

“the expression ‘negotiations’...means that the Government of the Federal Republic of Germany and the Government of the Kingdom of Greece have undertaken to confer with a view to reaching an agreement...In the course of such negotiation, the parties are obliged to make every effort, within a reasonable time, to reach agreement...”<sup>350</sup>

279. Similarly, the Tribunal in the *Lake Lanoux Arbitration* commented that:

“one speaks, although often inaccurately, of the obligation of negotiating an agreement'. In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example...of abnormal delay.”<sup>351</sup>

e. *The Continuing Obligation to Negotiate*

280. The obligation to negotiate in good faith is a continuing obligation, on both parties. As was observed by Judge Padilla Nervo: “The obligation to negotiate is an obligation of *tracto continuo*; it never ends and is potentially present in all

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<sup>350</sup> *Claims arising out of decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (between Greece and the Federal Republic of Germany)*, 26 January 1972, RIAA, Vol. XIX, p. 64.

<sup>351</sup> *Lake Lanoux Arbitration (France v. Spain)*, 16 November 1957, RIAA, Vol. XII, 281; 24 ILR 101, p. 128.

relations and dealings between States.”<sup>352</sup>

281. The obligation to negotiate ceases only once negotiations have succeeded or have been properly and fully exhausted and/or become futile<sup>353</sup>. However, the mere fact that a long period of time has passed is not dispositive of the question whether the negotiation process has been exhausted: “[i]n practice [,] the actual length of negotiations is no test of whether the possibilities of agreement have been exhausted.”<sup>354</sup>

282. Furthermore, the threshold of futility is a high one. It cannot be satisfied in circumstances where not all possible – or at least all reasonably possible – solutions have been considered in good faith, and where a party remains ready to negotiate<sup>355</sup>.

283. The Court in the Advisory Opinion concerning *Legality of the Use of Nuclear Weapons*, has noted that the obligation goes further. The Court declared that the effect of an obligation to negotiate in good faith can in certain circumstances be to create not only an obligation to negotiate but also an obligation to conclude an agreement. Analysing Article VI of the Treaty on the Non-

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<sup>352</sup> *North Sea Continental Shelf Case, Judgment, I.C.J. Reports 1969, Separate Opinion of Judge Padilla Nervo*, p. 92.

<sup>353</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 133, para. 159.

<sup>354</sup> *Legal Consequences for States of the Continued Presence of South Africa In Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion I.C.J. Reports 1971*, p. 44, para. 85. See also the arbitral tribunal in *Government of Kuwait v. American Independent Oil Company* 66 I.L.R. 518, 578 (*Int'l Arb. Trib.* 1982) which referred to “sustained upkeep of the negotiations over a period appropriate to the circumstances.”

<sup>355</sup> Some consider that the threshold is too high: see the Joint dissenting opinion of President Owada, Judges Simma, Abraham, and Donoghue, and Judge *ad hoc* Gaja in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 142.

Proliferation of Nuclear Weapons, the Court declared that it sets out more than an obligation of conduct: there is an obligation of result.

“The legal import of that obligation – the Court notes – goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.”<sup>356</sup>

284. Considering that there is an obligation to conclude the negotiations, the Court held clearly that the obligation to negotiate is not extinguished before a result is obtained:

“There exists an obligation to pursue in good faith and bring to a conclusion (*de mener à terme*, in the French version) negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>357</sup>

285. Most significantly, the Court reached this decision on the basis of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, that reads as follow:

“ARTICLE VI.

Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”

286. The provision contained no explicit direction to “negotiate until successful”: the Court’s decision concerning the continuing obligation was founded upon a commitment to “pursue negotiations in good faith on effective

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<sup>356</sup> *Legality of the Threat and Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 263, para. 99.

<sup>357</sup> *Ibid.* p. 266, para. 105.

measures” to achieve a stated end. Chile’s obligation to negotiate a sovereign access to the sea for Bolivia is of the same nature.

287. This obligation is a permanent obligation. It does not evaporate if one of the parties introduces new demands or otherwise fails to bring the negotiation to a conclusion<sup>358</sup>. If a party negotiates indefinitely without bringing the negotiations to a conclusion, that may be a manifestation of bad faith. That is so in the present case: both Parties have agreed to negotiate over a sovereign access to the sea, and their obligation to negotiate will terminate only when an agreement is concluded materializing in concrete terms the sovereign access to the sea.

#### D. CONCLUSION

288. It is firmly settled law that the obligation to negotiate requires that the parties negotiate in good faith and meaningfully. As demonstrated above, there are also further specific obligations that the parties must satisfy, and pursuant to which a State’s good faith and the extent to which it has engaged in meaningful negotiations can be evaluated.

289. The requirement that the Parties in this case negotiate to secure a specified result gives a special feature to this obligation: it survives until the reaching of that result. As long as the goal of the obligation is not reached, the obligation remains in force. The continuity of the obligation is its key characteristic, and a safeguard against behaviour that does not conform to the requirements of good faith and meaningfulness in the negotiations.

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<sup>358</sup>See this subject, Reuter, P., “De l’obligation de négocier”, *Il processo internazionale, Studi in onore di Gaetano Morelli, Instituto di Diritto internazionale et straniero delle università di Milano*, Vol. Quattrodicesimo, Milano-Giufre. 1975, p. 726 ff.

290. An obligation to negotiate does not cease to exist because the negotiations fail at a given point in time. If that were the case, it would be sufficient for one party to jeopardize negotiations in order to obtain its release from its obligation to negotiate. Such an interpretation of the law would not only be manifestly absurd: it would be a pernicious threat to the credibility of all international negotiations and to the peaceful settlement of international disputes. The obligation to negotiate remains in force so long as the purpose of the obligation is not fulfilled – *a fortiori* when, as in the present case, it is an obligation to negotiate in order to achieve a specific result<sup>359</sup>.

### **III. The Process of Formation of the Chilean Obligation**

#### **A. FORMATION OF OBLIGATIONS IN INTERNATIONAL LAW**

291. The following section sets out the process by which States assume obligations either by agreement or by unilateral acts. This pertains to Chile's agreement to negotiate with Bolivia in order to achieve a specific result; namely, sovereign access to the sea.

##### *a. Obligation Created by Agreements*

292. According to the Vienna Convention on the Law of Treaties<sup>360</sup> (“VCLT”), a treaty is:

“an international agreement in written form concluded between States and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>361</sup>

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<sup>359</sup> See *supra* Chap. II, paras. 239-246.

<sup>360</sup> VCLT, 23 May 1969, UNTS, Vol. 1155, p. 331.

<sup>361</sup> VCLT, Art. 2(1)(a).

293. In addition, according to Article 26 of the VCLT (“*Pacta sunt servanda*”) “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

294. In its Draft Articles on the law of treaties adopted in 1966, the International Law Commission (“ILC”) pointed out that “*Pacta sunt servanda* – the rule that treaties are binding on the parties and must be performed in good faith – is the fundamental principle of the law of treaties” and that the principle according to which “a party must abstain from acts calculated to frustrate the object and purpose of the treaty (...) [is] clearly implicit in the obligation to perform the treaty in good faith.”<sup>362</sup> As the Court has observed, to say that there is a treaty means that the agreement “creat[es] rights and obligations for the Parties.”<sup>363</sup>

295. Oral agreements and tacit agreements can also produce legal effects and be binding as between the parties, including when territorial issues are at stake. The VCLT expressly states that although it does not apply to international agreements not in written form, it shall not affect the legal force of such agreements<sup>364</sup>. For example, in the recent judgment in the *Maritime Dispute (Peru v. Chile)*, the Court relied on the existence of a tacit agreement to decide the initial segment of the maritime boundary between the Parties<sup>365</sup>.

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<sup>362</sup> YILC, 1966, Vol. II, p. 211, Commentary of Art. 23, para. 1) and para. 4).

<sup>363</sup> See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdictions and Admissibility, Judgment, I.C.J. Reports 1994*, p. 122, para. 30. See also *Land and Maritime Boundary between Cameroon and Nigeria, (Cameroon v. Nigeria: Equatorial Guinea intervening) Judgment, I.C.J. Reports 2002*, p. 429, para. 263, and p. 431, para. 268.

<sup>364</sup> VCLT, Art. 3, iii, (a) and (b)

<sup>365</sup> *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. 27 January 2014*, paras. 91, 102.

296. It is also clear from the case law of international courts and tribunals, and in particular of the International Court of Justice, that the question whether an instrument sets forth binding obligations is one of substance, not form. For example, in the *Aegean Sea Continental Shelf* case, the Court observed that there is no rule of international law that prevents a joint communiqué from constituting an international agreement: it is the nature of the act, and not its form, that is the decisive factor<sup>366</sup>.

297. Likewise, in the case of the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* the Court held that the Minutes of a meeting held between the parties (in 1990), signed by the Ministers of Foreign Relations of both States, enumerated commitments to which they had consented and thus constituted an international agreement<sup>367</sup>.

298. Moreover, in the *Kasikili/Sedudu Island* case the Court considered that a communiqué issued by the Presidents of Botswana and Namibia incorporated an agreement from which legal obligations flowed.<sup>368</sup>

299. In the words of the Court:

“Where...as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it...The sole

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<sup>366</sup> *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 40, para. 96. See also, *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, I.T.L.S., 14 March 2012, paras. 89-90: “what is important is not the form or designation of an instrument but its legal nature and content.”

<sup>367</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdictions and Admissibility, Judgment, I.C.J. Reports 1994*, pp. 120 ff., para. 21 ff.

<sup>368</sup> *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, pp. 1106-1108, paras. 102-103.

relevant question is whether the language employed in any given declaration does reveal a clear intention.”<sup>369</sup>

300. The decisive point, therefore, is to determine the intention of the parties to create rights and obligations governed by international law, and to do so objectively. Thus, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court looked at the terms of the text recording the alleged agreement and was not concerned with the subjective state of mind of State representatives when they signed it. The Court did:

“not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter those of the Foreign Minister of Qatar. 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.”<sup>370</sup>

301. Where this determination is not clear in a particular case, the question must be resolved by examining the relevant text and the circumstances of its conclusion. Relevant factors include the procedure by which an instrument has been formalized, and the subsequent behaviour of the parties. In the *Iron Rhine* arbitration, the Arbitral Tribunal decided that “a key factor in distinguishing a ‘non-legally binding instrument’ from a treaty is the intention of the parties”, which can be ascertained by the circumstances that preceded its adoption, its content and legal

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<sup>369</sup> *Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections I.C.J. Reports 1961*, pp. 31-32

<sup>370</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdictions and Admissibility, Judgment, I.C.J. Reports 1994*, pp. 121-122, para. 27.

significance and the circumstances that followed its adoption<sup>371</sup>.

302. In addition, it is noteworthy that in this last case, the Arbitral Tribunal said that “[t]he Parties agree that, as a matter of international law, the March 2000 MoU is not a binding instrument”, but observed that “[a]t the same time, it was clearly not regarded as being without relevance”, in particular because the Parties “have in fact given effect to a number of provisions of the March 2000 MoU”. As a result, the Tribunal decided that since the Parties did not treat the MoU as “legally irrelevant”,

“[p]rinciples of good faith and reasonableness lead to the conclusion that the principles and procedures laid down in the March 2000 MoU remain to be interpreted and implemented in good faith and will provide useful guidelines to what the Parties have been prepared to consider as compatible with their rights under Article XII of the 1839 Treaty.”<sup>372</sup>

303. Bolivia will establish that Bolivia and Chile agreed to negotiate a sovereign access to the sea for Bolivia, by concluding agreements which are binding under international law – that is to say, agreements which create international rights and obligations according to the well-established rules and principles set out above. Those instruments express the intention of the Parties to create such international rights and obligations; moreover, as was evidenced in Chapter I, the Parties actually gave effect to this intention by entering into negotiations to materialize this specific result – until recently when Chile unilaterally decided to deny the existence of the agreements and the negotiations to which it had previously consented<sup>373</sup>.

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<sup>371</sup> *Arbitration Regarding the Iron Rhine (“Ijzeren Rijn”) Railway* (Belgium/Netherlands), Award, 24 May 2005, p. 60, para. 142.

<sup>372</sup> *Ibid.*, p. 67, paras. 156-157.

<sup>373</sup> See *infra*, Chap. III.

*b. Obligation Created by Conduct and Unilateral Declarations*

304. It is well established in international law that written and oral declarations made by representatives of States which evidence a clear intention to accept obligations vis-à-vis another State may generate legal effects, without requiring reciprocal undertakings from that other State<sup>374</sup>. Those declarations (for example, declarations by which one State assumes a commitment to do or refrain from doing something in relation to another State) can thus create obligations or limit the rights of the State that makes them, and engage that State's international responsibility if it breaches that commitment.

305. Since the 1933 decision of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland case*<sup>375</sup>, the Court has frequently taken into account such unilateral acts when deciding on the rights and obligations of parties.

306. In the *Nuclear Tests* cases, after examining a series of declarations of the Presidency and Ministries of Foreign Affairs and Defence of the French Republic, which contained commitments to stop atmospheric nuclear tests after 1974, the Court emphatically asserted the principle that: "it is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."

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<sup>374</sup> *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 402 (Judge Jessup, separate opinion): "It is also generally recognized that there may be unilateral agreements, meaning agreements arising out of unilateral acts in which only one party is promisor and may well be the only party bound."

<sup>375</sup> *Legal status of Eastern Greenland, (Denmark v. Norway)*, Judgment, 1933, P.C.I.J. Series A/B, N° 53, pp.71-73.

307. The Court added 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.”<sup>376</sup>

308. The Court has recognized the autonomous character of unilateral acts and confirmed that no subsequent acceptance or response from the other State is required, holding that:

“nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made.”<sup>377</sup>

309. International courts and tribunals can also refer to the conduct of States or their unilateral statements in order to evidence a State’s intent or agreement to commit itself to a particular course of action. These acts or statements can confirm previous agreements. In the *Peru v. Chile* case, for instance, the Court considered that it has to:

“examine (...) relevant practice of the Parties in the early and mid-1950s, as well as the wider context including developments in the law of the sea at that time. It will also assess the practice of the two Parties subsequent to 1954. This analysis could contribute to the determination of the content of the tacit agreement which the Parties reached concerning the extent of their maritime boundary.”<sup>378</sup>

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<sup>376</sup> *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 472, para. 46.

<sup>377</sup> *Ibid.*

<sup>378</sup> *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. 27 January 2014*, para. 103.

310. Similarly, in the *Bangladesh/Myanmar* case, the International Tribunal for the Law of the Sea, when examining the conduct of the parties in order to identify the possible existence of a “tacit or *de facto* agreement”, reviewed the unilateral statements of the States’ officials<sup>379</sup>.

311. In the present case, it has first to be noted that the conduct of the Parties, from the 1884 Truce Pact and the 1895 Transfer Treaty onwards, evidenced their agreement to negotiate a sovereign access to the sea. Indeed, negotiations *actually took place* between the Parties on this specific issue, even though, due to Chile’s attitude in the course of the negotiations, they did not prove successful. The allegation of Chile that negotiations on the sovereign access to the sea were never contemplated and that there was no agreement to negotiate is in sharp contrast with Chile’s own conduct.

312. Second, Chile made numerous unilateral statements which confirmed its agreement to negotiate a sovereign access to the sea for Bolivia. These statements, taken as a whole or individually, are unilateral acts that create legal obligations binding upon Chile. In addition, they evidence and build upon the agreements concluded by Chile with Bolivia and support the legitimate reliance of Bolivia on these agreements. The present section will explain in more detail how these unilateral declarations evidence the agreement of Chile to negotiate a sovereign access to the sea for Bolivia.

313. The evaluation of the legal effect of unilateral acts of States is today facilitated not only by the development of the legal literature and international

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<sup>379</sup> *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, I.T.L.S., Judgment, 14 March 2012, para. 116.

jurisprudence, but also by the work of the ILC on this matter. In particular, the 11 August 2006 ILC *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*<sup>380</sup> reflect customary international law as developed by this Court in its case law.

314. The ILC *Guiding Principles* set out certain requirements which must be satisfied if an oral or written declaration is to bind a State<sup>381</sup>. The requirements are that the declaration is made: i) by an authority vested with the power to bind the State<sup>382</sup>; ii) with the intention of binding the State in accordance with international law<sup>383</sup>; iii) concerning a specific matter<sup>384</sup>; and iv) in a public manner<sup>385</sup>, either addressed to the international community as a whole or made known to its specific addressees<sup>386</sup>.

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<sup>380</sup> “ILC *Guiding Principles*”, ILC, 58<sup>th</sup> session, Geneva, 1 May-9 June and 3 July-11 August 2006, Unilateral Acts of States, Report of the Working Group, Conclusions of the International Law Commission Relating to Unilateral Acts of States. A/CN.4/L.703 (20 July 2006)

<sup>381</sup> ILC *Guiding Principles*: “Unilateral declarations may be formulated orally or in writing” (p. 5).

<sup>382</sup> ILC *Guiding Principles*: “Any State possesses capacity to undertake legal obligations through unilateral declarations” (p. 2); “A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specific areas may be authorized to bind it, through their declarations, in areas falling within their competence” (p. 4).

<sup>383</sup> ILC *Guiding Principles*: “Declarations...manifesting the will to be bound may have the effect of creating legal obligations...” (p. 1).

<sup>384</sup> ILC *Guiding Principles*: “A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms...” (p. 7). In the French version: “Une déclaration unilatérale n’entraîne d’obligations pour l’État qui l’a formulée que si elle a un objet clair et précis...”

<sup>385</sup> ILC *Guiding Principles*: “Declarations publicly made...” (p. 1)

<sup>386</sup> ILC *Guiding Principles*: “Unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities” (p. 6).

*i. Authority vested with the power to bind the state*

315. As to the first requirement, there is no question regarding the representative authority of Heads of State, Heads of Government and Ministers of Foreign Affairs, as well as that of ambassadors or chiefs of mission in the countries in which they are accredited<sup>387</sup>.

316. Regarding the attribution to the State of declarations made by the President of the Republic and by members of the Government acting under his authority, the Court was explicit in the *Nuclear Tests* cases, declaring that: “in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.”<sup>388</sup>

317. Many years earlier, in its 5 April 1933 Judgment on the *Legal Status of Eastern Greenland*, the Permanent Court of International Justice held that a

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<sup>387</sup> Even States that, when responding to ILC consultations, have upheld the application of a restrictive criterion to identify the persons competent to bind States internationally, accept that those persons surely include Heads of State, Heads of Government, Ministers of Foreign Affairs, and ambassadors accredited in the pertinent country (UN Doc. A/C.6/60/SR.16, para. 47, cit. *Ninth Report on Unilateral Acts of States*, by Víctor Rodríguez Cedeño, Special Rapporteur, A/CN.4/569/Add.1, p. 50 note 177). Specifically, the Chilean delegation at the Sixth Commission of the General Assembly opposed the relaxation of the restrictive criterion, out of fear that the addressee be the final determinant over whether an author of a declaration claiming to bind the State was capable of doing so. According to the Chilean delegation, invoking Art. 7.1 (b) of the VCLT, flexibility in this regard was exclusively limited to the bilateral practice of the interested States (UN Doc. A/C.6/60/SR.16, para. 73, cit. *Ninth Report on Unilateral Acts of States*, by Víctor Rodríguez Cedeño, Special Rapporteur, A/CN.4/569/Add.1, p. 50, note 177).

<sup>388</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 269, para. 49; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 474, para. 52. On the representative character of the Head of the State: *Frontier Dispute (Burkina Faso/Mali) Judgment*, I.C.J. Reports 1986, p. 573, para. 39; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment Preliminary Objections, I.C.J. Reports 1996, p. 613, para. 44.

statement by the Minister for Foreign Affairs of Norway, in the name of his Government and on an issue within his competence, in response to a *démarche* from a diplomatic representative of Denmark, bound Norway<sup>389</sup>. This assertion is of particularly noteworthy because of the consequences that it had for Norway in the context of a territorial dispute. The Ihlen Declaration barred Norway from questioning the sovereignty of Denmark over Greenland<sup>390</sup>.

318. In its 14 February 2002 Judgment in the *Arrest Warrant of 11 April 2001* case, the Court stated that the acts of a Minister of Foreign Affairs: “may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State.”<sup>391</sup>

319. In the *Armed Activities in Congo* case (*New Application 2002*), the Court went one step further. On the one hand, it noted that in accordance with its *jurisprudence constante*:

“it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments.”<sup>392</sup>

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<sup>389</sup> *Legal status of Eastern Greenland, (Denmark v. Norway), Judgment, 1933, P.C.I.J. Series A/B, No. 53*, p. 71.

<sup>390</sup> *Ibid.* p. 73.

<sup>391</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, pp. 21-22, para. 53. The Court further observed that: “a Minister for Foreign Affairs, responsible for the conduct of his or her State’s relations, with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office.”

<sup>392</sup> *Armed activities in Congo (New Application 2002) (Democratic Republic of Congo v. Rwanda) Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 2006*, pp. 26-29, paras. 46-48.

320. On the other hand, it considered that:

“with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview.”<sup>393</sup>

*ii. Intention to be bound*

321. Identifying the intention of the State making the declaration is key to determining “whether (these declarations) are intended to have legal effects under international law or whether they are only statements of policy.”<sup>394</sup>

322. Thus, the form the statement takes is not determinative. The Court has stated that:

“With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive.”<sup>395</sup>

323. What is decisive, however, is the intention to be bound under international law, which can only be determined by taking into account all relevant circumstances in which the declaration was made.

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<sup>393</sup> *Ibid.*

<sup>394</sup> Karl Zemanek, “Unilateral Legal Acts Revisited”, K. Wellens (ed.), *International Law: Theory and Practice - Essays in Honour of Eric Suy*, The Hague/Boston/London, Martinus Nijhoff, 1998 p. 210.

<sup>395</sup> *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 267, para. 45; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 472, para. 48. See also, *Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, I.C.J. Reports 1961*, pp. 31-32.

324. The Court stressed the fundamental role of the intention of States in its Judgments on the *Nuclear Tests* cases. As was noted above, it held 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.”<sup>396</sup>

325. After recalling that *dictum* of the Court in the *Nuclear Tests* cases, the Chamber that decided the *Case Concerning the Frontier Dispute* between Burkina Faso and Mali, concluded that:

“it all depends on the intention of the State in question, and the Court emphasized that it is for the Court to “form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation”...In order 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...”<sup>397</sup>

326. The Court confirmed twenty years later that in order to determine what the legal effects of a declaration are, the Court must: “examine its actual content as well as the circumstances in which it was made.”<sup>398</sup>

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<sup>396</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 267, paras. 43-44; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 472, paras. 46-47.

<sup>397</sup> *Frontier dispute (Burkina Faso / Mali)*, Judgment, I.C.J. Reports 1986, pp. 573- 574, paras. 39-40.

<sup>398</sup> *Armed activities in Congo (New Application 2002) (Democratic Republic of Congo v. Rwanda)* Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 2006, p. 28, para. 49. See ILC Guiding Principles: Preamble, 3<sup>rd</sup> para., p. 3.

327. The Court recalled that: “a statement of this kind can create legal obligations only if it is made in clear and specific terms.”<sup>399</sup>

328. The ILC has summarized the jurisprudence of the Court as follows:

“In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated”

And

“in the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner.”<sup>400</sup>

329. In its judgments on the *Nuclear Tests* cases, the Court noted that: “the intention (of the State making the declaration) is to be ascertained by interpretation of the act”. Adding that, “[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.”<sup>401</sup>

330. Nevertheless, the Court later reaffirmed: “It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced.”<sup>402</sup>

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<sup>399</sup> *Armed activities in Congo (New Application 2002) (Democratic Republic of Congo v. Rwanda) Jurisdiction of the Court and Admissibility of the Application*, I.C.J. Reports 2006, p. 28, para. 50. Or that, as said in the French version of the Judgment: “une déclaration de cette nature ne peut créer des obligations juridiques que si elle a un objet clair et précis”. The *ILC Guiding Principles* repeat word by word the text of the Court in both versions, English and French (p. 7).

<sup>400</sup> *ILC Guiding Principles*, p. 7.

<sup>401</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 267, para. 44; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 472, para. 47.

<sup>402</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 269-270, para. 51; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 474, para. 53.

331. The Court followed the same approach in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*<sup>403</sup>, *Frontier Dispute (Burkina Faso/Mali)*<sup>404</sup>, and *Armed Activities in Congo (New Application 2002) (Democratic Republic of Congo v. Rwanda)*<sup>405</sup>.

### *iii. Good Faith*

332. 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.<sup>406</sup> The principle is manifested in various specific legal doctrines, such as estoppel, preclusion, and legitimate expectations<sup>407</sup>.

333. As noted above, in the words of the Court in the *Nuclear Tests* cases:

“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance

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<sup>403</sup> *Merits, I.C.J. Reports 1986*, p. 132, para. 261.

<sup>404</sup> *I.C.J. Reports 1986*, pp. 573-574, paras. 39-40.

<sup>405</sup> *I.C.J. Reports 2006*, pp. 28-29, paras. 49-53.

<sup>406</sup> Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, para. 1.

<sup>407</sup> See Emmanuel Voyiakis. ‘Estoppel’, in Oxford Bibliographies: International Law <<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0058.xml?rskey=YuiAZN&result=6>> citing e.g., MacGibbon, I. “Estoppel in International Law.” *International & Comparative Law Quarterly* 7 (1958): 468–513; Kolb, Robert. *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit*. Paris: Presses Universitaires de France, 2001.

of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.”<sup>408</sup>

334. A State is entitled to consider that it is concluding a binding international commitment if the nature of the text, viewed objectively, is such that a party in good faith would understand that text as embodying an international legal commitment. In those circumstances, applying the principles of good faith and legitimate expectations, the party that made the declaration cannot plead its lack of intention to make a legal commitment.

## B. THE KEY EPISODES IN THE PROCESS IN THIS CASE

### i) *Introduction*

335. As was observed in section I of this Chapter, the obligation assumed by Chile is a specific duty to negotiate upon a specific objective (sovereign access for Bolivia to the sea) based on defined principles of international law, most notably good faith.

336. The obligation at the heart of this case arises from agreements between Chile and Bolivia and from subsequent conduct and unilateral acts of Chile which confirm the existence, and the persistence, of the obligation. Bolivia was and is entitled to rely upon Chile acting in a manner that was consistent with Chile’s own representations.

337. Each episode set out in Chapter I and highlighted below, meets the criteria

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<sup>408</sup> *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46; see also para. 51; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 473, para. 49; see also para. 54. The Court quotes this *dictum* in its advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, pp. 264-265, para. 102.

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.

*a. The antecedent: the 1895 Transfer Treaty*

338. Bolivia's landlocked condition, induced by the forced cession of its Department of Littoral, created a problem that was to be solved by mutual agreement between Bolivia and Chile. The Parties agreed that, as a consequence of the conditions imposed by the victor, Chile, for reaching peace and for the normalization of bilateral relations, Bolivia should not remain landlocked. Bolivia thus retained a right to its own and sovereign access to the Pacific Ocean.

339. On this basis, along with the Treaty of Peace and Friendship that formalized the cession to Chile of the occupied Bolivian Littoral under the Truce Pact of 1884<sup>409</sup>, Bolivia and Chile negotiated and concluded the 1895 Transfer Treaty, the implementation of which depended on the final status of the Peruvian provinces of Tacna and Arica occupied by Chile.

340. Chile explicitly bound itself to transfer these provinces to Bolivia if it should acquire "dominion and permanent sovereignty"<sup>410</sup> over them either by direct arrangements or by way of a plebiscite envisaged by the Treaty of Ancón in 1883.

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<sup>409</sup> Art. I. See BM Vol. II, Annex 108.

<sup>410</sup> Art. I. See BM Vol. II, Annex 98.

If, on the other hand, this were not to happen, Chile was obliged to transfer to Bolivia a corridor south of Arica that ran from the Vítor inlet up to the Camarones ravine, or, if this were not possible, a comparable corridor<sup>411</sup>. These provisions were clear with regards both to their scope and their content. They created an international obligation for Chile “to transfer” a pre-defined area of territory, materializing a sovereign access to the sea for Bolivia.

341. Bolivia naturally had a strong preference for Tacna and Arica to be transferred to it. The alternative of the transfer of a corridor south of Arica was obviously very much less favourable to Bolivia. As was noted in Chapter I<sup>412</sup>, Bolivia wished to reaffirm clearly that Chile could not simply choose to transfer a corridor if the conditions set for the transfer of Tacna and Arica were in fact met, and that the “corridor” alternative was a last resort or an “extreme precaution” that, were it to be applied, would have to guarantee the possibility of effective port facilities. This point was accordingly made clear in Protocols that were signed on 28 May and 9 December 1895 respectively<sup>413</sup>. In the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court observed that “in July 1975 the two Parties inserted a correction in the Maroua Declaration, that in so acting they treated the Declaration as valid and applicable...”<sup>414</sup> The situation is similar in the present case, *mutatis mutandis*; and the Protocols plainly bear upon the interpretation of Chile’s obligation.

342. The Treaties and Protocols were signed and ratified by both Bolivia and Chile<sup>415</sup>. The subsequent dealings between the Parties in respect of them were

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<sup>411</sup> *Ibid.* Art. IV.

<sup>412</sup> See BM. Chap. I. paras. 78-84.

<sup>413</sup> See BM Vol. II, Annexes 104 and 105.

<sup>414</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 431, para. 267.

<sup>415</sup> See BM Vol. II, Annex 2.

described in Chapter I<sup>416</sup>.

343. The instruments of ratification of the Treaties of 18 May and of the Protocol on Credit Settlement of 28 May 1895, were duly exchanged, without any qualifications or conditions attached<sup>417</sup>.

344. Chile published the text of the 1895 Peace and Friendship and Commerce treaties in its *Official Gazette*<sup>418</sup> and it invoked the Peace and Friendship Treaty during Bolivian boundary negotiations over the Puna of Atacama with Argentina.<sup>419</sup> The 1895 Transfer Treaty – not published at the time, because of the “reserved” character<sup>420</sup> – was later incorporated in the collection of treaties of Chile<sup>421</sup>.

345. The intent of Chile to grant Bolivia a sovereign access to the sea was reaffirmed after 1904, on many occasions.

*b. The 1920 Act and the 1926 Matte Memorandum*

346. As is recalled in the following paragraphs, the obligation of Chile to provide Bolivia with an access to the sea is reaffirmed, *inter alia*, in the 1920 Act<sup>422</sup>; the Notes of the Chilean Foreign Minister Mr Luis Izquierdo of 6 February 1923<sup>423</sup>;

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<sup>416</sup> See Chap. I, paras. 60-88.

<sup>417</sup> See BM Vol. II, Annex 112.

<sup>418</sup> *Diario Oficial de la República de Chile*, No. 5.397, 2 May 1896. See BM Vol. II, Annex 182.

<sup>419</sup> See Chap. I, para. 88.

<sup>420</sup> See BM Vol. II, Annex 98. Article VII, 1895 Transfer Treaty.

<sup>421</sup> Ministerio de Relaciones Exteriores, Dirección de Documentación, Departamento de Tratados, *Tratados, Convenciones y Arreglos Internacionales de Chile 1810-1976, Tratados Bilaterales, Chile-Bolivia*, T. II, Santiago, Chile, 1977, pp. 79-80.

<sup>422</sup> See BM Vol. II, Annex 101.

<sup>423</sup> See Chap. I, paras. 111-114.

the declarations of Chilean President Alessandri some days later<sup>424</sup>; the different and successive proposals made by Chile in the process of mediation assumed by the President of the United States on the future of Tacna and Arica<sup>425</sup>; the 1926 Kellogg proposal (of 30 November 1926)<sup>426</sup>; the Chilean response to that proposal dated 4 December 1926, and the acceptance of that response by Bolivia<sup>427</sup>.

347. With respect to each of these commitments it will be noted that:

1. They were all given by representatives such as Heads of State, Foreign Ministers, or Ambassadors, who were clearly vested with the authority to bind the State; and
2. The various agreements and statements used terms and formal means of communication, reaffirming the substance of Chile's commitment and expressing an intention to be legally bound.

348. The most salient instances of conduct which illustrates Chile's commitment to the obligation to negotiate a sovereign access to the sea for Bolivia are set out below.

349. In September 1919, Emilio Bello, Minister for Foreign Affairs and Chilean signatory of the 1904 Treaty, acting as plenipotentiary of Chile in La Paz, formulated proposals:

“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 north of Arica as well

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<sup>424</sup> See Chap. I, para. 115.

<sup>425</sup> See Chap. I, paras. 115-118.

<sup>426</sup> See BM Vol. II, Annex 21.

<sup>427</sup> See BM Vol. II, Annex 22.

as the railway line, that is located within those territories subject to plebiscite established by the Treaty of Ancón.”<sup>428</sup>

These proposals were repeated weeks later<sup>429</sup>, and (along with the corresponding response of the Bolivian Minister of Foreign Affairs, Carlos Gutiérrez) were the subject of the 1920 Act<sup>430</sup>.

350. This was not an isolated move. The 1920 Act was followed by further reassurances by senior Chilean officials that Chile would engage in direct negotiations to secure Bolivia’s sovereign access to the sea. Details of the relevant statements are set out in Chapter I<sup>431</sup>. Those statements were made by senior Chilean representatives vested with the authority to bind Chile, and in clear terms.

351. Thus, when Chile rejected the proposal to revise the 1904 Treaty, presented by the Bolivian representative in Santiago, Ricardo Jaimes, in 1923, it opened the door once again to an arrangement to ensure a Bolivian sovereign access to the sea. In the Note sent to the Minister of Bolivia on 6 February 1923, the Chilean Minister of Foreign Affairs, Mr Luis Izquierdo, confirmed that Chile would consider Bolivian proposals “in order to conclude a new Pact which responds to the situation of Bolivia, without modifying the Treaty of Peace and without interrupting the territorial continuity of the Chilean territory.”<sup>432</sup>

352. On 27 February, Chilean President Arturo Alessandri confirmed that Chile was willing to start new negotiations with the aim of facilitating the access of

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<sup>428</sup> See BM Vol. II, Annex 19.

<sup>429</sup> See BM Vol. II, Annex 43.

<sup>430</sup> See BM Vol. II, Annex 101.

<sup>431</sup> See Chap. I, paras. 95-114.

<sup>432</sup> See BM Vol. II, Annex 48.

Bolivia to the sea through its own port<sup>433</sup>.

353. The proposal of the United States Secretary of State, Frank B. Kellogg, made on 30 November 1926, that Chile and Peru cede to Bolivia rights, titles or interests in the provinces of Tacna and Arica, and the reaction of Chile to this proposal, confirmed that the 1904 Treaty was understood to be without prejudice to the agreed intent of Chile and Bolivia to negotiate a sovereign access to the sea<sup>434</sup>.

354. In the extensive response signed by its Minister of Foreign Affairs, Mr Jorge Matte, on 4 December 1926, Chile declared that it had not rejected the idea of conceding a strip of territory and a port to Bolivia and would “honour its declarations in honour its declarations in regard to the consideration of Bolivian aspirations.”<sup>435</sup>

355. The words used by Chile in 1926 were clear: it will “honour its declarations”, that is to say it will fulfil its previous commitment to grant Bolivia a sovereign access to the sea. The reference to the “Bolivian aspirations” were unambiguous since, in the same 1926 Matte Memorandum, Chile referred to the cession of “a strip of territory and a port to the Bolivian nation” and did so following the proposal from Mr. Kellogg that Chile and Peru cede to Bolivia rights, titles or interests in the provinces of Tacna and Arica. The 1926 Memorandum thus confirmed, first, that Chile had previously expressed its intent to grant Bolivia a sovereign access to the sea (Chile had expressed this intent in particular by ratifying the 1895 Transfer Treaty); and second, that Chile viewed its previous agreement as consistent with the conclusion of the 1904 Treaty.

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<sup>433</sup> See Chap. I, para. 114. See BM Vol. II, Annex 51.

<sup>434</sup> On the Kellogg proposal and its background, see Chap. I, paras. 115-118.

<sup>435</sup> See BM Vol. II, Annex 22.

356. Bolivia immediately accepted the Chilean offer (which was transmitted to the Bolivian Foreign Ministry through a diplomatic note signed by the Chilean Representative in La Paz<sup>436</sup>) to proceed with the discussion and examination of the details of the transfer of territory and a port referred to in the 1926 Matte Memorandum. This exchange of communications thus constituted a new written agreement reaffirming Chile's commitment to negotiate with Bolivia to grant it a sovereign access to the sea.

357. It is elementary that the label of an agreement as a "Memorandum" or "note" is not determinative of its legal force. It is the substance and not the form that is relevant. The key points are that the agreement: (i) was in writing; (ii) was agreed by representatives vested with the authority to bind the State; (iii) recorded Chile's pre-existing commitment in clear and precise terms; and (iv) was reached following formal inter-State communications clearly evidencing an intention to be bound.

*c. The 1950 Exchange of Notes*

358. The Exchange of Notes of 1 and 20 June 1950<sup>437</sup> similarly embody an agreement between Bolivia and Chile to negotiate a sovereign access to the sea for Bolivia. These Notes constitute a treaty under international law, as is evidenced by the nature and content of the Notes and by the circumstances that preceded and followed their adoption.

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<sup>436</sup> See Chap. I, para. 116. See BM Vol. II, Annex 53.

<sup>437</sup> See Chap. I, paras. 123-135.

*d. The Nature and Content of the Notes Exchanged*

359. Thus the Note of 1 June 1950 sent by the Ambassador of Bolivia in Santiago to the Minister of Foreign Affairs of Chile proposed “that the Governments of Bolivia and Chile formally enter into direct negotiations to satisfy Bolivia’s fundamental need to obtain its own sovereign access to the Pacific Ocean.”<sup>438</sup>

360. This Note was unequivocal as regards its content, its scope and its purpose. It expressly referred to the need: (i) to “formally enter into direct negotiations”; (ii) on a specific issue, which was unambiguously defined (“to satisfy Bolivia’s fundamental need to obtain its own sovereign access to the Pacific Ocean”, thus “solving the problem of enclosure of Bolivia’s landlocked situation”). This is the language of a commitment to enter into negotiations aimed at securing a specific result: a sovereign access to the sea for Bolivia.

361. Moreover, the 1 June 1950 Note included of two pages of precedents, from the 1895 Transfer Treaty, and the 1920 Act, to the more recent statements of the President of Chile, Mr Gabriel González Videla, ranging from the day of his investiture in 1946 to the date on which the Note was sent, and all evidencing a long and consistent line of legal commitment and conduct. Thus, the context of the proposal of Bolivia was also very clear. It did not come out of nowhere. On the contrary, it was based upon previous agreements by Chile to transfer territory to Bolivia in order to grant it a sovereign access to the sea. Chile was invited to reaffirm its intent (to use Chile’s own words) to “honour its declarations” and keep its word.

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<sup>438</sup> See Chap. I, para. 128. See BM Vol. II, Annex 109 A.

362. The Note dated 20 June 1950, sent in response by the Minister of Foreign Affairs of Chile, was also unequivocal. After faithfully reproducing the Bolivian Note of 1 June 1950, it confirmed that Chile, along with safeguarding the legal situation established by the 1904 Treaty, was willing to study the matter of Bolivia's sovereign access to the sea in direct negotiations with Bolivia<sup>439</sup>.

363. Thus, in its Note dated 20 June 1950, Chile did not challenge at all the content of the Bolivian Note, including the long line of agreements from the 1895 Transfer Treaty onwards. Indeed, Chile endorsed it. Further, Chile confirmed that it agreed on the necessity to grant Bolivia a sovereign access to the sea, and stated that it would "act consistently with this position"<sup>440</sup>. The Exchange of Notes thus evidenced a double agreement: an agreed confirmation of the past agreements referred to in the Notes, and the agreement resulting from the Note itself.

e. *The Circumstances that Preceded the Exchange of Notes*

364. These Notes were the result of a thorough process of negotiation prompted by the determination of the President of Chile, Gabriel González Videla, to provide a progressive solution to the problem of Bolivia's landlocked status. The circumstances that preceded the Exchange of Notes leave no doubt that they constitute an agreement to negotiate a sovereign access to the sea for Bolivia<sup>441</sup>. Though the promises and unilateral declarations of Chile remain binding in and of themselves, the Exchange of Notes in June 1950, thus have a particular importance as a binding agreement between the two States, subject to the principle of *pacta sunt servanda*.

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<sup>439</sup> See Chap. I, para. 130. See BM Vol. II, Annex 109 B.

<sup>440</sup> *Ibid.*

<sup>441</sup> See Chap. I, paras. 123-135.

365. Certain features of the 1950 exchange of Notes bear emphasis. First, as has been described above, it is evident that at various points Chile made commitments to negotiate a sovereign access to the sea for Bolivia, in exchange for non-territorial compensation, and that this was not the result of a sudden improvisation but of extensive diplomatic efforts conducted by senior officials in the acknowledged context of prior agreements to negotiate a sovereign access.

366. Second, the authors and signatories of the Notes – the Bolivian Ambassador and the Chilean Foreign Minister – were clearly vested with the authority to bind their respective States.

367. Third, the terms of the Notes were clear and precise. Chile accepted an obligation to negotiate, and the objective of the negotiation was precisely defined: it concerned a sovereign access to the sea for Bolivia. It is particularly significant that Chile did not suggest that the 1895 Transfer Treaty was inapplicable. To the contrary, Chile committed itself to negotiating a sovereign access to the sea on substantially the same basis, namely, on the territory of Arica in exchange for non-territorial compensation.

368. Fourth, the Parties' intention to be bound is further evidenced by the fact that both the 1 June and the 20 June Notes were carefully drafted and published. It will also be observed that the commitment of Chile followed the formal offer made by Bolivia, which referred explicitly to previous commitments of Chile made in instruments that were indisputably formal, legally-binding, agreements, namely the 1895 Transfer Treaty and the 1920 Act.

369. Fifth, subsequent conduct confirmed that the Parties understood the 1950

commitment to negotiate as a legally binding obligation. Chilean officials reiterated on many occasions Chile's willingness to negotiate with Bolivia in light of its earlier promises and reassurances.

*f. The Circumstances that Followed the 1950 Exchange of Notes (The 1961 Trucco Memorandum)*

370. The 1961 "Trucco Memorandum" sent by Chile and dated 10 July 1961<sup>442</sup>, referred to Note N° 9 of 20 June 1950 of the Chilean Minister of Foreign Affairs as "clear evidence" of Chile's intentions regarding negotiations with Bolivia of a sovereign access to the sea<sup>443</sup>. Ambassador Trucco was especially well qualified to bear witness to this, as he had been Undersecretary of the Ministry of Foreign Affairs when the aforementioned Note was signed. As was noted in Chapter I, in its response to the 1961 Trucco Memorandum, the Bolivian Foreign Minister expressed its "full consent" to initiate negotiations on Bolivia's sovereign access in return for non-territorial compensation<sup>444</sup>.

371. Months later, in a speech made on 28 March 1963, the Minister of Foreign Affairs of Chile tried to downplay the Trucco Memorandum, arguing that it was not an official note and was not signed. To his mind, he claimed, memoranda were "documents widely used in Foreign Ministries" that "serve to record something, so much so that in diplomatic jargon they are called *Aide-Mémoires*."<sup>445</sup>

372. However, it is well-established by the constant jurisprudence of the Court<sup>446</sup>

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<sup>442</sup> See BM Vol. II, Annex 24.

<sup>443</sup> See *supra*, Chap. I, paras. 136-138.

<sup>444</sup> See *supra*, Chap. I, para. 138. See BM Vol. II, Annex 25.

<sup>445</sup> See *supra*, Chap. I, para. 138.

<sup>446</sup> See Section II of this Chapter.

that the denomination given to a document is not determinative of its legal effects, especially when it comes to obligations derived from promises, recognition and agreements. Hence, an Aide-Memoire or Memorandum, or so many other documents with other labels, can be legally binding on those that make them if that is the intention that flows from the way in which they have been drafted. In this case, regardless of the legal value of the Memorandum in itself, what it recalls is the commitment undertaken by Chile in the Note of 20 June 1950, which is clearly official and signed.

373. Moreover, as recalled above, the “intentions” of the Foreign Minister of Chile are not relevant: “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 [Chile] 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.”<sup>447</sup>

374. Bolivia’s legitimate reliance on Chile’s repeated commitments is evident. It appears, for example, from the statements made by Bolivian representatives at the OAS, in October 1979<sup>448</sup>, and June 1987<sup>449</sup>, in both of which explicit reference was made to the 1950 exchange of Notes.

375. The point was made eloquently at the XVII General Assembly of the OAS held on 9 to 14 November 1987, when the Bolivian Minister of Foreign Affairs, Guillermo Bedregal, once again invoked the 1950 Exchange of Notes with Chile,

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<sup>447</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdictions and Admissibility, Judgment, I.C.J. Reports 1994*, pp. 121-122, para. 27.

<sup>448</sup> See *supra*, Chap. I, para. 167-169. See BM Vol. II, Annex 203.

<sup>449</sup> See *supra*, Chapter I, para. 190. See BM Vol. II, Annex 209.

emphasizing that: “This agreement, that commits the trust of the Chilean State in its relation with Bolivia, as well as in 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.”<sup>450</sup>

g. *The 1975 Joint Declaration of Charaña*

376. As explained in Chapter I<sup>451</sup>, Chile reiterated its commitment to negotiate a sovereign access for Bolivia to the sea in the 1975 Joint Declaration of Charaña. This Declaration is binding upon Chile as an international agreement.

377. The Joint Declaration of Charaña was signed by Presidents Hugo Banzer, of Bolivia, and Augusto Pinochet, of Chile, who plainly had the capacity to assume obligations on behalf of their respective States. In the Declaration, Chile stated in clear terms that it agreed to resume diplomatic relations and to negotiate a solution to Bolivia’s confinement from the Pacific Ocean. The Declaration committed both Heads of State 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.”

378. The binding legal character of the declaration is evidenced by the fact that it was included in the Treaty Series of the Ministry for Foreign Affairs of Chile<sup>452</sup>.

379. Following the declaration, the Parties reconfirmed their commitment to

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<sup>450</sup> See BM Vol. II, Annex 210.

<sup>451</sup> See *supra*, Chap. I, paras. 140-141.

<sup>452</sup> Under the name of the “Charaña Process”. See Ministerio de Relaciones Exteriores, Dirección de Documentación, Departamento de Tratados, *Tratados, Convenciones y Arreglos Internacionales de Chile 1810-1976, Tratados Bilaterales, Chile-Bolivia*, Tome II, Santiago de Chile, 1977, p. 259.

negotiate a sovereign access to the sea for Bolivia. For example, Bolivia presented a concrete proposal for negotiations, on 25 August 1975;<sup>453</sup> and on 19 December 1975, in Note N° 686, Chile put in writing (at Bolivia's request) its agreement to open negotiations on a sovereign access<sup>454</sup>.

380. It is significant that on this occasion, Chile applied the secret Protocol of 1929 signed between Chile and Peru and requested the consent of Peru provided for therein<sup>455</sup>, thus indicating that Chile considered that it was negotiating over the grant to Bolivia of a sovereign access to the sea, and with respect to what had previously been Peruvian territories such as Arica.

381. Subsequent confirmations of the obligation to negotiate a sovereign access to the sea for Bolivia were described in Chapter I, and the details will not be repeated here<sup>456</sup>. But one stands out, because it was an agreed bilateral statement that mirrored the language of the obligation in question in the Court's decision in the *Nuclear Weapons* case, which the Court held to be an obligation of result. In June 1977 the Bolivian Foreign Minister, Oscar Adriázola, and the Chilean Foreign Minister, Patricio Carvajal, signed a Joint Declaration which stated that: "they entered into negotiations to find an effective solution that would allow Bolivia to rely on a free and sovereign access to the Pacific Ocean."<sup>457</sup>

382. They reaffirmed the "need of continuing with the negotiations from their current status, aiming at reaching the objective they have undertaken."<sup>458</sup> However, as was described in Chapter I, as a result of Chile's uncompromising stance in the

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<sup>453</sup> See *supra*, Chap. I, paras.144-148.

<sup>454</sup> See *supra*, Chap. I, para. 150-151.

<sup>455</sup> See *supra*, Chap. I.

<sup>456</sup> See Chap. I.

<sup>457</sup> See BM Vol. II, Annex 165.

<sup>458</sup> *Ibid.*

negotiations, namely, its breach of the agreed terms that territorial transfer by Chile would be for non-territorial compensation by Bolivia, diplomatic relations were suspended by Bolivia in March 1978.

*h. The Subsequent Confirmation by Chile of its Agreement within the Framework of the OAS*

383. The OAS and its members have stated that the resolution of Bolivia's landlocked status is of "continuing hemispheric interest", recognising that the situation is a threat to the stability of the region. Numerous unanimous Resolutions of the OAS Permanent Council and the OAS General Assembly have urged the Parties (as was said in resolution N° 426 (IX-O/79), 1979) to "open negotiations for the purpose of providing Bolivia with a free and sovereign territorial connection with the Pacific Ocean", taking into account "the rights and interests of the parties involved." Later resolutions reaffirmed this position<sup>459</sup>.

384. In this context, the OAS resolutions evidence specific legal and binding significance. The relevant parties (Bolivia and Chile) voted in favour of the resolution and where they were the driving force behind the negotiation and adoption of the instrument.

385. For example, resolution N° 686 (XIII-O/83) of 18 November 1983, which was negotiated with great care by Bolivia and Chile through the good offices of Colombia, and was expressly supported by Chile, urged the Parties to begin a process for "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, rights and interests of all parties involved."<sup>460</sup>

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<sup>459</sup> See Chap. I, paras. 170-179.

<sup>460</sup> See BM Vol. II, Annex 195.

386. In an official declaration, the Secretary General of the Organization of American States, Alejandro Orfila, welcomed this resolution, stating that: “the Foreign Ministers of Bolivia and Chile are the great authors of this principle of agreement which could solve the situation that is of concern to the Continent”<sup>461</sup>. International practice acknowledges that multilateral resolutions that are in principle non-binding can be transformed into declarations that bind some (or even all) States that vote for them. The resolution is thus another way in which the Parties can make a commitment that they are bound to fulfil in good faith.

387. The resolution is consistent with the long series of promises made by Chile over the decades to negotiate a sovereign access for Bolivia. Such can also be observed in the interventions and the statements of justification for voting made by Chilean delegates to the General Assembly of the OAS. The formal manner in which they were delivered, in clear terms, by senior officials with authority to bind the State, coupled with their reiteration over the years, evidences a clear intention to be bound<sup>462</sup>.

## **I. The Binding Nature of Chile’s Commitment**

### **A. THE BINDING NATURE OF AGREEMENTS ENTERED INTO BY CHILE**

388. In the light of the above, it is evident that Bolivia and Chile made agreements, legally binding under international law, to negotiate a sovereign access

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<sup>461</sup> See Chap. I, para. 174.

<sup>462</sup> For example, on 31 October 1979, during the IX GA, the Chilean delegate, Pedro Daza, declared: “In the operative part, there is a recommendation for the States, to whom this issue concerns, to enter into negotiations aimed at granting Bolivia a free and sovereign territorial connection to the Pacific Ocean. My country has always been willing to negotiate with Bolivia.” See BM Vol. II, Annex 204.

to the sea for Bolivia. As the 1895 Transfer Treaty, the Exchange of Notes of June 1950, in particular are expressions of an agreement to pursue a lawful aim, formalized in distinct legal instruments by representatives of the States acting within their authority and with the intention of producing legal effects in accordance with international law. The same can be said for other instruments concluded by the Parties, such as the 1926 Matte Memorandum and the Joint Declaration of Charaña in 1975.

389. The terms used in the agreements entered into by Bolivia and Chile are clear. There is nothing vague or ambiguous about them. The Parties have engaged to negotiate in order to achieve a specific result: a sovereign access to the sea for Bolivia.

390. In its note of 20 June 1950, in particular, Chile emphasized that it was “willing to formally enter into direct negotiations” with the clearly indicated aim of “finding a formula that will make it possible to give to Bolivia a sovereign access to the Pacific Ocean of its own”. That must mean at least two things. First, that Chile undertakes to negotiate. Second, that the object of the negotiation is precisely delimited: it concerns a sovereign access to the sea of Bolivia. Moreover, this commitment of Chile followed a formal approach by Bolivia, asking for formal negotiations; and Chile agreed to negotiate *“formally”*. This response cannot be considered to constitute a non-binding declaration. Bolivia was entitled to consider in good faith that Chile intended to bind itself in legal terms to negotiate on the issue of a sovereign access to the sea, whose precise details remained to be worked out. Indeed, this is the only meaning that such a text can reasonably convey.

391. The subsequent conduct of both Parties demonstrates that the Parties understood this commitment to negotiate to be legally binding, and reiterated it, for

example, in the 1961 Trucco Memorandum, and the 1975 Joint Declaration of Charaña.

#### B. THE BINDING NATURE OF UNILATERAL PROMISES MADE BY CHILE

392. Chile's obligation to negotiate with Bolivia over a sovereign outlet to the Pacific Ocean stems not only from the formal agreements but also from Chile's promises, found in different acts and unilateral declarations, made over an extended period of time. These promises meet the conditions required to create legally binding obligations on Chile to negotiate with Bolivia a sovereign access to the Pacific Ocean.

393. The acts and declarations in question are attributable, principally, to Presidents of the Republic of Chile (Alessandri, González Videla, Pinochet) and to Ministers of Foreign Affairs (Izquierdo, Mathieu, Matte, Walker Larraín, Carvajal Prado), who undoubtedly represent the State. They are also attributable to Chile's Ambassadors and Agents before the OAS.

394. Further, Chile's acts and declarations have been made known to the Bolivian authorities (and indeed were often prompted by Bolivian requests), and were always accepted by them. The aim of these acts and declarations, and the terms in which they were made, have been clear and precise: the promise to negotiate with Bolivia a sovereign access to the sea.

395. Any construction of Chile's present commitments as not legally binding would allow Chile to evade any responsibility related to its failure to honour a commitment that was freely undertaken and freely repeated for over a century. This would be incompatible with the principle of good faith. It would allow Chile to profit from its own inconsistency. It would enable States to enter into commitments

for the resolution of what may be major international disputes, knowing that in practice they risk nothing: the means of giving effect to the commitment can be disputed for a time; and then the commitment can be simply shrugged off and completely ignored. The present puts before the Court the question of the value of the basic, most commonly used instrument of international diplomacy. When a State gives its word to do something, does that have any value?

396. When Chile remained silent in the face of Bolivia's declarations, made in connection with its signature of 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 considered that Chile was recognising a situation that it had long promised to correct. Equally, Chile cannot have regarded its own promises as opportunistic tools, to be used at will whenever it suited its own purposes. 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.

#### **IV. Conclusion**

397. The President of Chile, Domingo Santa María, remarked in January 1884 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...must grant it an access of its own to the Pacific...there is a problem that needs a solution here...I repeat, we cannot and we must not kill Bolivia, that is not our interest...”<sup>463</sup>

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<sup>463</sup> See BM Vol. II, Annex 36.

398. Once created, an obligation cannot be extinguished on the whim of the State that has accepted it. Chile cannot walk away from its promises and agreements. *Pacta sunt servanda* and *promissio est servanda*. The obligation in question here is no less tangible than those contained in the territorial clauses of treaties. Bolivia thus respectfully requests the Court to adjudge and declare that Chile has an obligation, owed to Bolivia, that must be complied with. The stability of the international community depends on respect for obligations deliberately and solemnly accepted by States, and on the honouring of commitments to negotiate to achieve specific results that have been agreed upon.



## **CHAPTER III**

### **CHILE'S BREACH OF ITS OBLIGATION**

#### **I. Introduction**

399. This Chapter demonstrates, with reference to the facts set out in Chapter I and the principles set out in Chapter II, that Chile has breached its obligation to negotiate in good faith a sovereign access to the sea for Bolivia. This Chapter is divided into two sections. **Section I** considers the degradation of the negotiations terms. **Section II** considers the refusal of Chile to negotiate a sovereign access, and the consequences that flow from that refusal.

#### **Section I: Degradation of the Negotiations Terms**

##### **A. INTRODUCTION**

400. As described in the previous Chapter, Chile is bound by an obligation to negotiate with Bolivia over a sovereign access to the sea. That obligation includes (i) an obligation to enter into negotiations; (ii) an obligation to negotiate in good faith; and, (iii) an obligation to achieve a precise result, in this case, a sovereign access to the sea for Bolivia.

401. As with any international obligation, a State that fails to fulfil its obligation to negotiate in good faith bears responsibility and the legal consequences flowing therefrom. In particular, there is a duty of cessation, and an obligation to put an end to the violation.<sup>464</sup> As recalled by Chile itself in October 2013 before the Sixth Committee of the United Nations General Assembly:

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<sup>464</sup> *Articles on Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp. (Nº 10) 43, UN Doc. A/56/10 (2001) Art. 30 (a).

“The topic of State Responsibility, in our opinion, constitutes one of the pillars of international law. State Responsibility is a general principle of international law, as good faith in the relations between States, or the principle *pacta sunt servanda*. States have to be internationally responsible for their international wrongful acts.”<sup>465</sup>

402. This principle applies whatever the origin or source of the international obligation that has been breached. Indeed, it is commonly accepted that:

“the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.”<sup>466</sup>

403. In the present case, as was explained by Bolivia in Chapter II, the obligation of Chile arises both from agreements between Chile and Bolivia and from Chile’s unilateral commitments.

404. The principle that the violation by a State of an obligation to negotiate entails the international responsibility of that State was pointed out by the Tribunal in the *Lake Lanoux* Arbitration. There it was said that, although obligations to negotiate may take different forms in international law (and in the present case, Chile’s obligation to negotiate falls into the special category of “*obligation[s] de*

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<sup>465</sup> 68<sup>th</sup> Session of the UN GA, Sixth Committee, Agenda Item 77, *Responsibility of States for International Wrongful Acts*, Statement by Chile (Speaker: Counsellor, Legal Affairs, José Antonio González) 21 October 2013.

<sup>466</sup> ILC, *Articles on State Responsibility*, Commentary on Art. 12, para. 4, *YILC*, 2001, Vol. II, Part Two, Report of the Commission to the General Assembly on the work of its fifty-third session, p. 55.

*négocier liée[s]*”<sup>467</sup> as it incorporates a predetermined result) their breach has certain consequences:

“the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith (*Tacna-Arica Arbitration: Reports of International Arbitral Awards*, Vol. II, pp. 921 et seq.; *Case of Railway Traffic between Lithuania and Poland: P.C.I.J.*, Series A/B, N° 42, pp. 108 et seq.).”<sup>468</sup>

405. Any infringement of the good faith principle in the conduct of negotiations entails a violation of the obligation to negotiate; and *a fortiori* an outright refusal to negotiate constitutes such a violation<sup>469</sup>.

406. For many years Chile did not challenge the fact that it had agreed to negotiate with Bolivia on a sovereign access to the sea. Chile now refuses to enter into *any* negotiation concerning a sovereign access to the sea, challenging even the existence of its obligation to negotiate.

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<sup>467</sup> According to the formula used by Paul Reuter in “De l’obligation de négocier”, *Mélanges Morelli*, 1975, p. 720.

<sup>468</sup> *Lake Lanoux Arbitration (France v. Spain)*, 16 November 1957, 24 ILR 101, p. 128. Original French text in *RIAA*, Vol. XII, pp. 306-307: “...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. 921ff., affaire du trafic ferroviaire entre la Lituanie et la Pologne, Cour permanente de Justice internationale, A/B 42, p. 108 et suiv.)”. See also *supra*, Chap. II, paras. 251, 267, 279.

<sup>469</sup> See for instance Lord McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, p. 29: “a refusal to do so [to negotiate in good faith] amounts to a breach of the obligation”.

## B. THE FAILURE TO NEGOTIATE IN GOOD FAITH

407. As set out above, Chile has, since the end of the War of the Pacific, repeatedly agreed to negotiate with Bolivia over its sovereign access to the sea, and on many occasions has committed itself to do so. Moreover, during the various bilateral negotiations that have taken place Chile has made many unilateral promises on this matter.

408. Chile's repeated commitments and persistent failure to fulfil those commitments extend over many years. At key moments during this period, bilateral commitments were made and reaffirmed by Chile.

409. An assessment of Chile's conduct over this period shows that, while Chile repeatedly agreed that it was necessary to have negotiations in order to grant Bolivia a sovereign access to the sea<sup>470</sup>, Chile systematically reduced the scope and ambit of what it was prepared to consider during negotiations, contrary to prior agreements that it had made. Additional conditions have been imposed by Chile at each turn, and have, so far, blocked any possibility of reaching an agreement. At the same time, Chile has frequently repeated its agreement to negotiate, and thereby kept alive Bolivia's legitimate expectation that these negotiations would succeed. Chile's behaviour has thus been manifestly contradictory.

## C. CHILE'S PROGRESSIVE WITHDRAWAL FROM ITS COMMITMENTS

### a. *Chile's reversals concerning the 1895 Transfer Treaty*

410. The starting point is the 1895 Transfer Treaty, a specific and express

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<sup>470</sup> See *supra*, Chap. I.

agreement to take steps to restore Bolivia's sovereign access to the sea<sup>471</sup>. The entire 1895 Transfer Treaty relates to this issue. The settlement embodied in the 1895 Transfer Treaty was stated in the plainest terms to be a sovereign access to the sea for Bolivia, to be effected by a transfer of territory to Bolivia from Chile. Chile committed itself to give Bolivia "a free and natural access to the sea", by one of two alternative solutions: if the plebiscite under the Treaty of Ancón with Peru (or another procedure) granted Chile sovereignty over the region of Tacna and Arica, then Chile agreed to transfer that territory to Bolivia (Article I); if Chile did not gain sovereignty over the territories of Tacna and Arica, then it agreed to cede to Bolivia the area from the Vítor Inlet up to the Camarones ravine, or an equivalent territory (Article IV).<sup>472</sup> In either case, Bolivia was to have a sovereign access to the Pacific Ocean.

411. The significant point is that from 1895 the position was that, while the precise boundaries of the area remained to be settled<sup>473</sup>, there was no doubt whatever that Chile was committed, and bound as a matter of international law, to the creation of a sovereign access to the sea for Bolivia by the transfer of an area of the territory now held by Chile. A legal duty for Chile to negotiate the realisation of Bolivia's sovereign access to the sea arose from the express terms of the 1895 Transfer Treaty<sup>474</sup>.

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<sup>471</sup> See BM Vol. II, Annex 98.

<sup>472</sup> It was subsequently made clear that Bolivia regarded the primary obligation to be the transfer of Tacna and Arica under Art. I, and that the provisions of Art. IV had a supplementary character, only coming into effect if the transfer of Tacna and Arica proved to be impossible: "It is understood that to this end both Governments shall prioritize the acquisition of the territories of Tacna and Arica and that the solutions established under Article IV of the said Treaty are only supplementary and contingent in nature" (1895 Explanatory Protocol, see BM Vol. II, Annex 104). See Chap. I, paras. 78-80.

<sup>473</sup> See BM Vol. II, Annex 98.

<sup>474</sup> See BM Vol. II, Annex 112.

412. The commitment in the 1895 Transfer Treaty had consequences for Chile. Decisions of international courts and tribunals confirming that good faith has to guide the conduct of the parties subsequent to their commitment are abundant. In the *Lake Lanoux* Arbitration, the Tribunal considered that conduct incompatible with good faith included “disregard of the agreed procedures” and “systematic refusals to take into consideration adverse proposals or interests.”<sup>475</sup> Similarly, according to the Greek-Turkish mixed Arbitral Court:

“Il est de principe que déjà avec la signature d’un traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire au traité en diminuant la portée de ses clauses.”<sup>476</sup>

413. Furthermore, the 1920 Act, which constitutes the Minutes of a meeting between Bolivia and Chile, signed and approved by their respective representatives, noted that while the Tacna and Arica issue was not yet resolved between Chile and Peru, Chile remained:

“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.”<sup>477</sup>

414. In those words Chile both reiterated its willingness to do what was needed to grant Bolivia a sovereign access to the sea, and simultaneously took a step back from the content of its specific proposals. In the 1895 Transfer Treaty, Chile had agreed that if it were to obtain the territories of Tacna and Arica, it would transfer

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<sup>475</sup> *Lake Lanoux* Arbitration (*France v. Spain*), 16 November 1957, 24 *ILR* 101, p. 128, original French in *RIAA*, Vol. XII, pp. 306-307. Original French: “...de mépris des procédures prévues, de refus systématique de prendre en considération les propositions ou les intérêts adverses....”

<sup>476</sup> See *A.A. Megalidis v Turkey*, Judgment of 26 July 1926, Annual Digest 1927-1928, Case N° 272, p. 395.

<sup>477</sup> See BM Vol. II, Annex 101.

them to Bolivia in their entirety. In 1920 Chile would only agree that sovereign access was to be effected through the cession of *a part* of the north of the region of Arica. At that time, the outcome of the Tacna and Arica question between Peru and Chile was not yet known, but the attitude of Chile in 1920 was quite clear. Chile was continuing to encourage the belief that it would fulfil its commitments to Bolivia, while limiting the scope of the specific proposals that it had made in the past – a practice that was to continue in the following years.

415. Chile had made it clear in 1920 that it still agreed to grant Bolivia a sovereign access to the sea; but later it deliberately impeded its ability to fulfil its obligation because of the terms of the peace agreement it concluded with Peru.

416. Shortly after, the American Secretary of State, Frank B. Kellogg, proposed in a Memorandum of 30 November 1926 that the region of Tacna and Arica be ceded in its entirety to Bolivia. The Chilean Foreign Minister, Jorge Matte, responded on 4 December 1926, stating that the Government of Chile had not rejected the idea of granting a strip of territory and a port to the Bolivian nation. What Kellogg had proposed was nothing more than that which Chile had promised in the 1895 Transfer Treaty<sup>478</sup>. Chile's reference to a strip of land and a port, rather than the entire region of Tacna and Arica, indicated that Chile had already reduced the scope of what it had committed itself to in 1895.

417. It is against this background that on 3 June 1929 the Treaty between Chile and Peru was signed, settling the dispute between these two States over Tacna and Arica. Chile and Peru agreed to share the said territories, Tacna going to Peru and Arica to Chile. As a result, the first option set out in the 1895 Transfer Treaty immediately became feasible, and Chile was now able to fulfil its duties to Bolivia

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<sup>478</sup> See BM Vol. II, Annex 21.

by granting to Bolivia that which it had obtained from Peru, *i.e.* the territory of Arica.

418. Such a transfer did not take place, however, and Chile's conduct fell short of that required by the principle of good faith. Instead of fulfilling its obligations to Bolivia, Chile concluded an Additional Protocol with Peru, annexed to the Treaty concluded on 3 June 1929, in which Chile limited its scope of action in its relations with Bolivia. Pursuant to this Protocol,

“The Governments of Peru and Chile shall not, without prior agreement between them, cede to any third power the whole or part of the territories which, in accordance with the Treaty of this date, come under their respective sovereignties...”<sup>479</sup>

419. That Protocol resulted in the creation of a new condition (the agreement of Peru), compliance with which was out of the control of Bolivia and Chile. Peru's consent would have to be obtained in the future whenever Chile proposed to grant Bolivia a sovereign access to the sea. In this way, Chile deliberately impeded its own ability to fulfil the promises made to Bolivia.

*b. Chile's Conduct in the Period of the 1950 Exchange of Notes*

420. Chile appeared to have a more forthcoming policy at the end of Second World War on the issue of Bolivia's sovereign access to the sea. In 1944, the President of Chile, Juan Antonio Rios, affirmed that Chile was willing to consider this issue in a positive manner<sup>480</sup>. His successor, President Gabriel González Videla, made the relevant efforts to give form to this commitment<sup>481</sup>.

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<sup>479</sup> See BM Vol. II, Annex 107.

<sup>480</sup> See BM Vol. II, Annex 55.

<sup>481</sup> See *supra*, Chap. I, paras. 123, 125, 126, 128, 133 and 135.

421. At the first meeting between President González Videla and the representatives of Bolivia (the Minister of Foreign Affairs and the Ambassador of Bolivia to Chile) on 8 November 1946, however, Chile excluded from consideration the possibility of the transfer of the entire province of Arica to Bolivia, which had been placed under Chilean sovereignty following the conclusion of the 1929 Treaty with Peru<sup>482</sup>.

422. In December 1949, the Bolivian ex-President, Enrique Hertzog, held a meeting with the Chilean President where Chile recognized that granting Bolivia a sovereign access to the sea would constitute a historic reparation, but reiterated that the transfer of Arica was off the table<sup>483</sup>. Chile was willing only to cede a port to the north of the town. On the other hand, Chile clearly stated that no territorial compensation would be required from Bolivia in exchange for the cession of territory<sup>484</sup>.

423. This episode demonstrates Chile's formal confirmation of its agreement to negotiate with Bolivia over a sovereign access to the sea without any territorial compensation. Moreover, the discussions that led to the conclusion of the 1950 Exchange of Notes show how Chile once again reduced the scope of its actual offer, in contrast with its previous commitments<sup>485</sup>.

*c. Chile's Conduct in 1975*

424. Some years later, Chile yet again reduced the scope of the negotiations. Negotiations resumed in 1975 on the initiative of the Presidents of Chile and

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<sup>482</sup> See *supra*, Chap. I, paras. 125.

<sup>483</sup> See BM Vol. II, Annex 64.

<sup>484</sup> *Ibid.*

<sup>485</sup> See *supra*, Chap. I, paras. 123-135.

Bolivia, following a meeting in Charaña on 8 February 1975. On 26 August 1975, Bolivia set out what it considered to be the key points of the negotiation<sup>486</sup>. The Chilean response was sent on 19 December 1975, and took a much more restrictive position than it had taken in 1950<sup>487</sup>.

425. The proposal referred only to a territorial strip of land in the north of Arica, with its corresponding maritime areas (territorial sea, exclusive economic zone and continental shelf). But an additional condition was imposed, in the form of a demand for a simultaneous exchange of territories<sup>488</sup>. This was clearly inconsistent with prior agreements whereby Chile's transfer of territory would be in exchange for non-territorial compensation by Bolivia.

426. Therefore in 1975 Bolivia was expected to cede to Chile a territory equivalent in area to the one it was due to receive in the north of Arica. Moreover, the maritime area attached to the strip of land to be ceded to Bolivia was also to be compensated by an area of land equivalent to its surface area. Finally, Bolivia was expected to grant to Chile the possibility of using the waters of the Lauca River, and also to declare the ceded territory a demilitarized zone<sup>489</sup>.

427. Unfortunately, Chile would not modify its position, including its demand for territorial compensation by Bolivia. Given the manifest inconsistency of this position with prior agreements, Bolivia had no alternative but to break off diplomatic relations with Chile in protest, on 17 March 1978<sup>490</sup>.

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<sup>486</sup> See BM Vol. II, Annex 174.

<sup>487</sup> See *supra*, Chap. I, paras. 144-154.

<sup>488</sup> See *supra*, Chap. I, paras. 151, 152, 186-188.

<sup>489</sup> See BM Vol. II, Annex 73.

<sup>490</sup> See BM Vol. II, Annex 147.

*d. Conclusion Concerning the Key Episodes*

428. To conclude, in 1895 Chile agreed to cede to Bolivia Tacna and Arica, subject to gaining sovereign rights over these territories. At the same time, this transfer of territory was not subject to conditions. In 1950, Chile limited the cession to a part rather than the whole of the territory of Arica which, moreover, did not include the city and port of Arica. In 1975, Chile added a new condition in the form of territorial compensation by Bolivia.

429. As set out in Chapter II above, the Court has stated that parties must conduct themselves “so that the ‘negotiations are meaningful’.”<sup>491</sup> Parties cannot arbitrarily revoke their commitments or ignore agreements on the terms of negotiations, especially where there is an obligation to achieve a particular result.

430. Bolivia has acted with flexibility and in good faith by being willing to negotiate on the basis of Chile’s proposals, even though they became less and less consistent with the original agreement of the parties on the scope and modality of a sovereign access to the sea.

431. Chile, however, has systematically hardened its position by adding new conditions and reducing the scope of its proposals. Currently, it even denies that negotiations have to take place at all<sup>492</sup>.

432. As the Court put it in 1969 in the *North Sea Continental Shelf* cases, “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 formal process of negotiation as a

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<sup>491</sup> *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, para. 132.

<sup>492</sup> See *infra*, Chap. III, Sec. II.

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.”<sup>493</sup>

433. Similarly, the United Nations General Assembly affirmed in 1998 in its resolution 53/101 on *Principles and Guidelines for International Negotiation* that “States should endeavour to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their progress” and that “States should use their best endeavours to continue to work towards a mutually acceptable and just solution in the event of an impasse in negotiations.”<sup>494</sup> The Court equally indicated in 1984 that the parties are under an obligation to negotiate “in good faith, with a genuine intention to achieve a positive result.”<sup>495</sup>

434. These principles, which have been detailed in Section I of Chapter II, have been breached by Chile as it has systematically reduced the scope of its proposals, in contravention of its own earlier commitments, without trying at any time to accommodate in specific terms the legitimate interests of Bolivia.

#### D. CONCLUSION CONCERNING THE OVERALL PATTERN OF CHILE’S CONDUCT

435. These conclusions have been reached by examining particular episodes in the history of attempts to give Bolivia its own sovereign access to the sea. The same

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<sup>493</sup> *North Sea Continental Shelf Case, Judgment, I.C.J. Reports 1969*, p. 47, para. 85(a).

<sup>494</sup> UNGA Res. 53/101, 8 December 1998, para. 2 (e) and (g).

<sup>495</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA), Judgment, I.C.J. Reports 1984*, p. 246, para. 87.

picture appears from an overview of the whole of that history.

436. For more than a century, Chile has repeatedly and formally committed itself to negotiate with Bolivia a sovereign access to the sea. As was shown in Chapter I, these commitments have been made by the highest Chilean authorities. These various statements, which gave rise to legitimate expectations of Bolivia, stand in marked contrast to the consistent reduction in the scope of the proposals made by Chile.

437. As set out in Chapter II, the obligation to negotiate entails that the Parties act in good faith. Pursuant to this obligation, parties are required genuinely to try and to reach an agreement that satisfies their mutual concerns and interests. This obligation has been identified by the Court in other cases, where it has determined that “the parties are under an obligation to enter into negotiation with a view to arriving at an agreement.”<sup>496</sup>

438. Chapter II also explained that the obligation to negotiate implies that negotiations must not be excessively protracted. In the present case, negotiations have lasted for decades, punctuated by occasional progress followed by long pauses. During this period, Chile’s behaviour has been manifestly contradictory: it has reiterated on many occasions its agreement to negotiate with Bolivia a sovereign access to the sea, while at the same time it has repeatedly imposed increasingly narrow limits on what it is prepared to discuss as a possible modality for realization of that sovereign access.

439. The principle of good faith obliges Chile to resume negotiations in order to reach an agreement with Bolivia. In other words, Chile is “bound under the general

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<sup>496</sup> *North Sea Continental Shelf Case, Judgment, I.C.J. Reports 1969*, p. 47, para. 85(a).

rules of international law by the principle of good faith to continue conversations with the aim of reaching an agreement”<sup>497</sup>, bearing in mind that this obligation is predetermined by the commitments already undertaken by Chile.

## **Section II: The Refusal of Chile to Negotiate a Sovereign Access to the Sea and its Consequences**

### **A. THE REFUSAL OF CHILE TO NEGOTIATE THE SOVEREIGN ACCESS**

440. As it is evident from the previous section, Chile has agreed on many occasions to negotiate over a sovereign access to the sea. At no point did Chile argue that there were no pending issues between the Parties, or that negotiations were not required, or that negotiations were precluded by the mere existence of the 1904 Treaty, or by any other legal impediment. In fact, Chile did negotiate, although not always in good faith.

441. Surprisingly, Chile’s current position is the opposite. Chile today holds that it was *never* formally bound by any obligation to negotiate a sovereign access to the sea, that it was *never* the intention of the Parties to require such negotiations, and that Chile is not required to discuss this issue with Bolivia.

442. This position was officially asserted in a Note Verbale N° 745/183 dated 8 November 2011. According to Chile, “[n]one of the background information mentioned in the letter of 8 July 2011 [i.e. the letter submitted to the Court by Bolivia in the *Peru v. Chile* case] supports the inference of any recognition of an

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<sup>497</sup> *Case concerning the consecutive reclamations of the Greek-German Mixed Arbitral Court decisions established in relation to the Article 304 from the Party X of the Treaty of Versailles (between the Greece and the Federal Republic of Germany)*, Award, 26 January 1972, RIAA, Vol. XIX, pp. 27-64, para. 30.

obligation to negotiate sovereign access to the sea.”<sup>498</sup> Chile at present refuses to consider any negotiation with a view to granting Bolivia a sovereign access to the sea, whatever its practical modalities.

443. The shift to this outright refusal to negotiate was first signalled in 1987. In April 1987, there was a concrete proposal from Bolivia, which, in line with the discussions held in previous years, focused on the alternatives of the creation of a territorial and maritime enclave in the northern Chilean territory, or the cession of a territorial strip, neither of which (strip or enclave) would have damaged the territorial unity of Chile<sup>499</sup>.

444. In these circumstances, Chile was expected, on the one hand, to acknowledge its agreement to negotiate with Bolivia, as it had done the previous years, and, on the other hand, to bring forward counter-proposals, or even simply to discuss in detail the Bolivian proposal. But it did not. After having asked Bolivia in April 1987 for some more detail on the extent of its proposal<sup>500</sup>, Chile abruptly announced, on 9 June 1987, that there was no ground for any negotiation over a sovereign access to the sea<sup>501</sup>. Chile stated, through its Minister of Foreign Affairs, that “the merits of the proposal alluded to by Bolivia in both of its alternatives: i.e. the transfer of Chilean sovereign territory through a corridor to the north of Arica or enclaves throughout its coastline, are unacceptable.”<sup>502</sup> It added that it did not want to create false expectations for the Bolivian Government and the Bolivian

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<sup>498</sup> See BM Vol. II, Annex 82.

<sup>499</sup> See BM Vol. II, Annexes 169 and 149.

<sup>500</sup> Questions from the Delegation of Chile in Relation to the Proposals of Bolivia of 21 April 1987, quoted in Bolivia, Ministerio de Relaciones Exteriores. *Tricolor: historia y proyecciones de paz, desarrollo e integración del diferendo marítimo boliviano-chileno* (La Paz, Los Amigos del Libro Editorial, 1988) pp. 119-121.

<sup>501</sup> See BM Vol. II, Annex 149.

<sup>502</sup> *Ibid.*

People, who would be left frustrated.

445. The rejection of the Bolivian proposals did not rely, on Chile's side, on the specific terms of Bolivia's proposals, which could have been the subject of negotiation and reciprocal concessions. Chile's refusal was based on a point of principle: it refused to engage in any negotiation aimed at the establishment of a sovereign access to the sea for Bolivia. According to Chile, negotiations between the two States could only be considered provided that they would not lead to any territorial cession – which is to say, on the condition that they would not involve any sovereign access to the sea.

446. Thus, Chile stated, in its Press Release dated 9 June 1987, that it was ready to “collaborate with [Bolivia] in seeking formulas that, without altering the territorial or maritime heritage of Chile, allow the creation of bilateral integration that effectively serves the development and well-being of the two peoples.”<sup>503</sup> In refusing any solution that would grant a sovereign access to the sea to Bolivia, Chile was acting inconsistently with its agreement to negotiate such an access. Chile did not explain the reasons for this change in policy.

447. The General Assembly of the OAS expressed its regret at the deadlock in negotiations that followed. Having reaffirmed its previous resolutions in which it had “declared it to be of permanent interest to the hemisphere that an equitable solution be found whereby Bolivia must obtain sovereign and useful access to the Pacific Ocean”, the Assembly “resolve[d] to regret (...) that the talks recently held between Chile and Bolivia have broken off, and once again to urge those 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, on the basis of

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<sup>503</sup> *Ibid.*

mutual advantage and the rights and interests of the parties involved.”<sup>504</sup>

448. Only a few months after the Chilean Note of 9 June 1987, Chilean authorities informed Bolivian authorities, on 14 September 1987, of their willingness to continue talks with Bolivia<sup>505</sup>. The invitation, which claimed “formally” to “continue a series of meetings of the Bi-National Commission created by common agreement in September 1986” was, however, very vague. Chile referred only to its “ongoing willingness (...) to continue to refine methods of effective and reciprocal cooperation with Bolivia”<sup>506</sup>. Further, Chile seemed to introduce further additional restrictions which were not defined and which, considered in light of the statement of 9 June 1987, meant that any negotiation concerning a sovereign access to the sea was, in fact, excluded.

449. Chile continued to adopt an inconsistent position. On the one hand, Chile regularly said it was open to bilateral negotiations “without any exclusion” or “without exception”, thus reiterating its agreement to negotiate a sovereign access to the sea; but on the other hand, *at the same time* it firmly maintained its refusal to negotiate anything which might lead to territorial changes.

450. It was only in 1995 that both Parties resumed the dialogue that had been halted by Chile in 1987. In 1995, they agreed on the creation of the Mechanism of Political Consultation of Bolivia-Chile (MPC.B-CH), charged with managing issues on the agenda in the relations between the States. After holding meetings in Rio de Janeiro and Havana, in July and November 1999, the Ministers of Foreign Affairs of Bolivia and Chile met in the Algarve (Portugal) on 22 February 2000. On this occasion, they released a joint statement, which expressed their agreement:

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<sup>504</sup> See BM Vol. II, Annexes 199 and 200.

<sup>505</sup> See BM Vol. II, Annex 79.

<sup>506</sup> *Ibid.*

“define a Working Agenda that will be formalized in the subsequent stages of dialogue and which includes, without any exception, the essential issues in the bilateral relationship, in the spirit of contributing to the establishment of a trusting atmosphere that should preside over this dialogue (...) [and] reaffirm the will to engage in the dialogue that has been launched.”<sup>507</sup>

451. It is important to note that, in this statement, Chile agreed that talks were to deal with any subject, “without exclusion”. The Presidents of the two States, Ricardo Lagos and Hugo Banzer, also adopted a plan for talks without exception on 1<sup>st</sup> September 2000<sup>508</sup>. The Working Group regarding Bolivian-Chilean Bilateral Issues (GT-AB) held its first meeting on 8 and 9 August 2005, under the administration of Presidents Ricardo Lagos and Eduardo Rodríguez Veltzé. This first meeting had “the purpose of exchanging proposals and forwarding in the establishment of a common broad, and without-exclusion agenda.”<sup>509</sup> Once again, both Parties indicated their agreement to entirely open-minded negotiations, “without exclusions”.

452. On 18 July 2006, Alberto Van Klaveren (Vice-Foreign Minister of Chile), stated that:

“We would like to talk about the maritime issue with Bolivia. We know of how relevant it is for Bolivia (...) The claim for an access to a maritime coast ‘is also an important issue’ for Chile (...) What we are saying is that we are willing to hold this dialogue (...) Your government is “fully aware of the commitment undertaken many years ago to engage in negotiations over an Agenda without exclusions.”<sup>510</sup>

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<sup>507</sup> See BM Vol. II, Annex 150.

<sup>508</sup> See BM Vol. II, Annex 159.

<sup>509</sup> See BM Vol. II, Annex 116.

<sup>510</sup> See BM Vol. II, Annex 135.

453. In July 2006, a new discussion agenda was formalized, called the “Agenda of 13 Points”. Point 6 dealt with the “Maritime Issue”. It was in the context of this new discussion agenda that, during the XV Session of the Mechanism of Bolivian-Chilean Political Enquiries which took place in November 2006, it was declared that:

“In the spirit of the wide bilateral agenda with no exclusions, both delegations exchanged criteria regarding the maritime issue and agreed on the importance to continue this dialogue in a constructive manner.”<sup>511</sup>

454. In an interview given to the newspaper *El Mercurio*, after the OAS General Assembly of 2007, the Chilean Foreign Minister was asked whether “the sea for Bolivia” was among the issues considered under this bilateral agenda. He answered *positively*: “Yes, it is point 6” (referring to Point 6 of the Agenda of 13 points, on “The Maritime Issue”). He added that “[w]e do not want to set deadlines; we have an educational task at hand to explain to people that in the 21<sup>st</sup> century, countries have to integrate genuinely, not only rhetorically.”<sup>512</sup>

455. In June 2008, the Head of the Chilean Delegation declared once again at the XVIII meeting of the MCP.B-CH, that “one of the main priorities of the foreign policy of Chile consists of strengthening bilateral relations with neighbouring countries, especially with Bolivia, through a full and inclusive agenda without exclusions.”<sup>513</sup>

456. These statements indicate that the Chilean authorities, at the highest level, agreed that negotiations between the two Parties should deal with any pending issue

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<sup>511</sup> See BM Vol. II, Annex 118.

<sup>512</sup> See BM Vol. II, Annex 136.

<sup>513</sup> See BM Vol. II, Annex 120.

between them, without exclusion or exception, and in particular with the maritime issue. These authorities acknowledged that sovereign access to the sea of Bolivia was an integral part of the Points to be discussed. These statements were in full conformity with the commitments undertaken by Chile, which are legally binding on it<sup>514</sup>. Chile insisted, furthermore, on the fact that this was one of its foreign policy priorities.

457. In 2009, discussions between the two Parties took a more specific form. The possibility of creating a Bolivian enclave on the Chilean coast, of a length of 28 km, was considered<sup>515</sup>. The position finally adopted by Chile, however, revealed that in reality it was not prepared to accept any such solution. According to the terms employed by the Chilean Minister of Foreign Affairs,

“indeed, there have been conversations within the framework of what the former Minister of Foreign Affairs stated, but they were not sufficiently set so as to be considered a formal offer (...) we considered that an enclave in the middle of our country, of that size, did not serve the interest of Chile.”<sup>516</sup>

458. Similarly, explaining why Chile had rejected the idea of a coastal enclave in favour of Bolivia (an idea on which Presidents Morales’s and Bachelet’s administrations had developed proposals), Chile’s Foreign Minister Alfredo Moreno explained that “[t]he alternatives that imply dividing the country in two, we believe, are not alternatives which benefit Chile. (...) [w]e want to find all solutions that help provide a better access to the sea for Bolivia, but at all times looking out for Chile’s interests, and Chile’s interests will never be in something that could divide the country.”<sup>517</sup> Interestingly, it was to take into account Chile’s

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<sup>514</sup> See *supra*, Chapter II.

<sup>515</sup> See BM Vol. II, Annex 143.

<sup>516</sup> See BM Vol. II, Annex 144.

<sup>517</sup> See BM Vol. II, Annex 142.

concern to maintain its territorial unity that the Bolivian proposal of April 1987 had striven to ensure that the sovereign access would not create any territorial discontinuity for Chile. This proposal had, however, also been rejected<sup>518</sup>.

459. During the meeting of the MPC.B-CH held in July 2010, as witnessed by the Minutes of that meeting, the two delegations:

“Reaffirmed that this process reflects a Policy agreed between both governments, and given the high levels of mutual trust reached at this meeting, confirmed that they would maintain this atmosphere so as to encourage bilateral relations to cover the substantial issue of point 6 on the Agenda of 13 Points in this context, and further propose to reach concrete, feasible, and useful solutions in the next and successive meetings of the Mechanism of Political Consultation which benefit understanding and harmony between both countries.”<sup>519</sup>

460. The following meeting was due to be held in November 2010, in the city of Arica but was postponed by Chile, without suggesting a new date<sup>520</sup>.

461. On 7 February 2011, in the city of La Paz, the Foreign Ministers of Bolivia and Chile met. After this meeting, they issued a joint declaration, which stated:

“the High level Bi-National Commission examined the progress of the Agenda of the 13 points, especially regarding the maritime issue, water resources, the Arica-La Paz railroad, the legal issues and economic development. The Ministers of Foreign Affairs have also set out future projects, which, taking into account the sensitivity of both Governments, will aim at reaching results as soon as possible, on the basis of concrete, feasible and useful proposals for the whole of the agenda. Finally, both Ministers of Foreign Affairs agreed to work on arranging a future meeting between the Presidents of

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<sup>518</sup> See *supra*, Chap. I, para. 189.

<sup>519</sup> See BM Vol. II, Annex 124.

<sup>520</sup> See BM Vol. II, Annex 140.

Bolivia and Chile, Evo Morales and Sebastian Piñera.”<sup>521</sup>

462. As was recalled in Chapter I<sup>522</sup>, on 17 February 2011, with no indication that Chile would in fact resume negotiations regarding the Agenda of 13 points (as had been agreed on 7 February), and in the absence of any specific proposals, the President of Bolivia gave a press conference, which was reported by the media in both Chile and Bolivia. The newspaper *Los Tiempos* quoted the statement of President Morales as follows:

“it is about time that there are specific proposals so as to discuss them (...) it would be good to have a concrete proposal by 23 March. I take this opportunity to respectfully request the President, the Government, the Chilean people, and I will wait until 23 March for a specific proposal that may act as a basis for a discussion (...) this would bring tremendous satisfaction for the Bolivian people.”<sup>523</sup>

463. No proposal arrived from Chile. On the contrary, the Chilean President declared on 23 March 2011 that “Chile has no pending border disputes with Bolivia, all of them were clearly settled by that Treaty [of 1904], which is fully in force.”<sup>524</sup> That declaration was in complete contradiction to the previous declarations of the Chilean authorities regarding an agenda “without exclusion” and negotiations over a sovereign access to the sea. In reaction to the subsequent referral of the matter by Bolivia to international institutions, the Minister of Defence of Chile, Andres Allamand, stated on 30 May 2011 that Chile had prestigious, professional and trained armed forces, which were in a position “to enforce the treaties and to protect the sovereignty and territorial integrity of the country.”<sup>525</sup> Such an attitude was in plain contradiction to the underlying notion of

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<sup>521</sup> See BM Vol. II, Annex 166.

<sup>522</sup> See *supra*, Chap. I, para. 216.

<sup>523</sup> See BM Vol. II, Annex 145.

<sup>524</sup> See BM Vol. II, Annex 167.

<sup>525</sup> See BM Vol. II, Annex 168.

a negotiation.

464. Similarly, on 7 June 2012, President Piñera declared that “[t]he Bolivian Government must understand that treaties and agreements must be complied with. Consequently, Chile will ensure the Treaty of 1904 is respected and will always respect it also.”<sup>526</sup> On 27 September 2012, President Piñera also declared that “not only does the Chilean President enforces treaties signed by Chile but he shall have them enforced and he shall defend our territory, our sea, our skies and our sovereignty with all the strength of the world.”<sup>527</sup>

465. These statements demonstrate the breach by Chile of its legal commitments. Since 1987 it has on the one hand formally agreed to a bilateral dialogue on any pending issue between the parties “without any exclusion or exception”, including the issue of a sovereign access to the sea (as it was bound to do so under international law), while on the other hand stating, for example before the OAS, its categorical refusal to engage in any negotiation over a sovereign access<sup>528</sup>.

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<sup>526</sup> See BM Vol. II, Annex 152.

<sup>527</sup> See BM Vol. II, Annex 153.

<sup>528</sup> During the annual debate on the “Maritime Problem of Bolivia” which has been on the agenda of the Organization since 1979. See BM Vol. II, Annex 218. Minutes of Twenty-Fourth Regular Session of the General Assembly (OEA/Ser.P/XXIV.O.2, Vol. II.I, 1995) p. 239; See BM Vol. II, See BM Vol. II, Annex 219. Minutes of Twenty Fifth Regular Session of the General Assembly (OEA/Ser.P/XXV.O.2, Vol. II.I, 1996) pp. 225-226. 6 June 1995; See BM Vol. II, Annex 220. Minutes of Twenty-Sixth Regular Session of the General Assembly (OEA/Ser.P/XXVI.O.2, Vol II.I, 1997) p. 82; See BM Vol. II, Annex 221. Minutes of Twenty-Seventh Regular Session of the General Assembly (OEA/Ser.P/XXVII.O.2, Vol. II.I, 1998) pp.185-186 See BM Vol. II, Annex 223; Minutes of Thirtieth Regular Session of the General Assembly (OEA/Ser.P/XXX.O.2, Vol. II.I, 2000) p. 168 See BM Vol. II. Annex 224; Minutes of Thirty-First Regular Session of the General Assembly (OEA/Ser.P/XXXI.O.2, Vol. II.I, 2001) pp. 141-143; See BM Vol. II, Annex 227. Minutes of Thirty-Fifth Regular Session of the General Assembly (OEA/Ser.P/XXXV.O.2, Vol. II.I, 2005) p. 147. And see also in the same tenor BM Vol. II, Annex 226 Minutes of Thirty-Fourth Regular Session of the General Assembly (OEA/Ser.P/XXXIV.O.2, Vol. II.I, 2004) p. 166; See Annex 228: Minutes of Thirty-Eighth Regular Session of the General Assembly (OEA/Ser.P/XXXVI.O.2, Vol. II, 2008), p. 166.

466. Chile's refusal to discuss the modalities of a Bolivian sovereign access to the sea, repeated many times within a multilateral framework, constitutes clear evidence of its refusal to negotiate such an access – in contravention both of its own declarations in a bilateral framework and its obligation to negotiate.

467. To take some more clear examples: while calling for the renewal of the dialogue on 14 September 1987, Chile declared at the General Assembly of the OAS of 1988 that any question related to the sovereign access to the sea was an “artificial dispute”<sup>529</sup>. Adopting an extreme position, and contradicting its previous conduct, Chile declared that it “rejects, as it always has done, the proposals of Bolivia that have as their aim the modification of the 1904 Treaty.”<sup>530</sup> Bolivia has no such aims<sup>531</sup>.

468. Similarly, the proposal formulated by Chile in 1990 before the General Assembly of the OAS that consisted in “find[ing] formulas that allow the perfection of the transit rights and facilities to aid Bolivia's access to the sea”<sup>532</sup>, can now be seen as an implicit rejection of any negotiation related to a *sovereign* access to the sea.

469. Chile declared in 1991, in reply to a statement by the Bolivian Representative related to the “Maritime Problem of Bolivia”, that the Chilean position was based on the following principles: “the defence of its territorial

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<sup>529</sup> See BM Vol. II, Annex 212.

<sup>530</sup> *Ibid.*, p. 390.

<sup>531</sup> See *supra*, Chap. I, paras. 89-93

<sup>532</sup> See BM Vol. II, Annex 214.

integrity, a respect for its sovereignty, faithful compliance with treaty-based obligations, to name but a few (...)"<sup>533</sup> This signalled that any negotiation related to the grant of a sovereign access to the sea for Bolivia was excluded.

470. Even more explicitly, Chile declared to the OAS General Assembly in 1992 that:

"The problems relating to the maritime issue to which my distinguished colleague refers, he knows perfectly well that they have been solved by way of treaty and our country has consistently reiterated the principle of the inviolability of treaties. It is for that reason that we have no interest in returning to the past, what interests us now is to walk arm in arm with Bolivia and all other countries of the Continent into the future."<sup>534</sup>

471. The same position was repeated the following year, in these terms:

"Nevertheless, the words of the distinguished Minister of Foreign Affairs of Bolivia oblige us to reiterate that which Chile has held without variation: the territorial issues that Bolivia raises have been dealt with by a treaty that was validly agreed to and is fully in force. Thus, what is at stake here is respect for the principles that form the structure that regulates the peaceful lives of those peoples subject to international law and, in particular, the inter-American system, such as faithful compliance with treaties, the territorial integrity of States and the no-intervention in the sovereign affairs of others."<sup>535</sup>

472. The same position was reaffirmed, in almost identical terms, by Chile in

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<sup>533</sup> See BM Vol. II, Annex 215.

<sup>534</sup> See BM Vol. II, Annex 216.

<sup>535</sup> See BM Vol. II, Annex 217.

1994<sup>536</sup>, 1995<sup>537</sup>, 1996<sup>538</sup> and 1997<sup>539</sup>. In 1997, Chile asserted that “there exists no border dispute or pending issue over matters of territorial sovereignty between Chile and Bolivia”<sup>540</sup>. It is not enough, however, to assert that there is no dispute for such a dispute not to exist under international law<sup>541</sup>.

473. In 1999, Chile strongly reaffirmed its position, under which all questions of sovereignty had been definitively settled by the 1904 Treaty, adding that any attempt to renegotiate the Treaty of 1904 “would create, in our region, unacceptable instability.”<sup>542</sup> Chile did not further substantiate this assertion; Bolivia does not seek to renegotiate the 1904 Treaty; and it is not apparent how the grant of an enclave or a sovereign corridor for Bolivia could constitute a threat to the region. By contrast, unresolved disputes *do* potentially create such instability. Chile went so far as to announce that it would even refuse an offer to restore diplomatic relations with Bolivia in return for the reopening of negotiations on this issue<sup>543</sup>.

474. In 2000, in 2001, and in 2003, Chile restated that it was of the view that there was no territorial dispute between the two States; and it proposed discussions only on improving Bolivian rights of transit, excluding any sovereign access to the sea<sup>544</sup>. Similarly, in 2004 and 2005, Chile said that it was ready to talk to Bolivia,

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<sup>536</sup> See BM Vol. II, Annex 218.

<sup>537</sup> See BM Vol. II, Annex 219.

<sup>538</sup> See BM Vol. II, Annex 220.

<sup>539</sup> See BM Vol. II, Annex 221.

<sup>540</sup> *Ibid.*, p. 186.

<sup>541</sup> As emphasised by the Court, “it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute *any more than a mere denial of the existence of the dispute proves its non-existence*”: *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Preliminary Objections, Judgment of 21 December 1962*, p. 328 (italics added).

<sup>542</sup> See BM Vol. II, Annex 222.

<sup>543</sup> *Ibid.*

<sup>544</sup> See BM Vol. II, Annexes 223.

but only on condition that the negotiations would not deal with the issue of the sovereign access to the sea. The same position was reaffirmed by Chile when it stated that “The Treaty of Peace and Friendship of 1904 ended all disputes or issues between our countries and constitutes a fundamental pillar in determining our bilateral relations.”<sup>545</sup>

475. Even though Chile had formally accepted, at the bilateral level and in conformity with its obligation to negotiate, the opening of a dialogue with Bolivia “without exclusion” or exception<sup>546</sup>, in 2008 (as well as in 2009 and 2010) it again limited the scope of negotiations by excluding any possible consideration of a sovereign access to the sea. In that year, Chile declared (incorporating the substance of the Note dated 9 of June 1987)<sup>547</sup> that:

“... in [the] thirteen Point Agenda [<sup>548</sup>] it is both current and obvious that one of the issues included is the so-called maritime issue. Under this point the aim is to try to find, in a constructive spirit and with creativity, possible formulas that might grant Bolivia a better access to the Pacific Ocean, reserving Chile’s legal and political positions on this topic. For that reason one cannot identify a sovereign access to the sea as an aim of this process, as my country would not have agreed to develop that point on the agenda on those terms.”<sup>549</sup>

476. Similarly, the Minister of Foreign Affairs of Chile stated unambiguously before the General Assembly of the OAS in 2011 that “Chile has clearly stated that

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<sup>545</sup> See BM Vol. II, Annex 224. See also Annexes 226 and 227.

<sup>546</sup> *Supra*, para. 199.

<sup>547</sup> See *supra*, Chap. I, paras. 190-191.

<sup>548</sup> On the 13 Point Agenda, see *supra*, paras. 206-215.

<sup>549</sup> See BM Vol. II, Annexes 228-230. See BM Vol. II. Annex 228. Minutes of Thirty-Eighth Regular Session of the General Assembly (OEA/Ser.P/XXXVI.O.2, Vol. II, 2008), p. 166. See also BM Vol. II. Annex 229. Minutes of Thirty-Ninth Regular Session of the General Assembly (OEA/Ser.P/XXXVI-O.2, Vol. II, 2009) pp. 194-196 and BM Vol. II. Annex 230. Minutes of Fortieth Regular Session of the General Assembly (OEA/Ser.P/XL.O.2, Vol II, 2010), pp. 141-143.

it is not in a position to grant Bolivia a sovereign access to the Pacific Ocean, far less without some sort of compensation”<sup>550</sup>. The President of Chile considered it worthwhile to reiterate before the United Nations General Assembly, in September 2011, that:

“there are no territorial issues pending between Chile and Bolivia. They were settled once and for all by the Treaty of Peace and Friendship of 1904, that is to say, concluded more than 100 years ago now.”<sup>551</sup>

477. In 2012, the contradictions in Chile’s successive positions were once again brought to the fore. In a single speech before the General Assembly of the OAS, Chile’s Minister of Foreign Affairs stated (i) that Chile had always been open to negotiation regarding Bolivia’s “access to the sea”, (ii) that the failure of the negotiations was attributable to Bolivia, and not to Chile, and (iii) that Chile had always considered that “proposals which imply a transfer of sovereignty” were excluded.<sup>552</sup>

478. The assertion that the negotiations over a sovereign access to the sea would somehow be precluded because of the existence of the 1904 Treaty, is inconsistent with Chile’s own conduct. On many occasions, particularly before 1987, Chile held negotiations with Bolivia and made a commitment to grant a sovereign access to the sea to Bolivia, without any suggestion that the 1904 Treaty was in any way an obstacle to the realization of that goal.

479. There can be no doubt that Chile’s current refusal to engage in any negotiation concerning the establishment of a sovereign access to the sea is in

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<sup>550</sup> See BM Vol. II, Annex 232.

<sup>551</sup> See BM Vol. II, Annex 164.

<sup>552</sup> See BM Vol. II, Annex 233.

breach of its obligations to Bolivia. As set out in Chapter II above, it was stated by the Court in *Georgia v. Russia* that the very idea of negotiations “requir[e] – at the very least – a genuine attempt by one of the parties to engage in discussions with the other disputing party, with a view to resolving the dispute.”<sup>553</sup>

480. In *Macedonia v. Greece* the Court observed that “the meaning of negotiations for the purposes of dispute settlement, *or the obligations to negotiate*, has been clarified through the jurisprudence of the Court and that of its predecessor, as well as arbitral awards” and pointed out in that context that:

“As the Permanent Court of International Justice already stated in 1931 in the case concerning *Railway Traffic between Lithuania and Poland*, the obligation to negotiate is first of all ‘*not only to enter into negotiations*, but also to pursue them as far as possible, with a view to concluding agreements’...” In other words, an agreement to negotiate “does imply that serious efforts towards that end [i.e. reaching an agreement] will be made” (1972 *Greece-Germany Arbitration*, *UNRIAA*, vol. XIX, p. 57).<sup>554</sup>

481. Reference has also been made above to the 1972 Greece-Germany Arbitration where, the Tribunal decided that “a unilateral decision to refuse to bargain with respect to a possible monetary settlement on the ground that the claims were not legally sustainable constitutes a position incompatible with the provisions of Article 19 requiring an effort be made to achieve a mutually acceptable

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<sup>553</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, *I.C.J. Reports 2011*, p. 132, para. 157.

<sup>554</sup> *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, para. 132, italics added.

result”<sup>555</sup>. In a similar vein, the Permanent Court of International Justice decided in *Railway Traffic* that “an unjustified breaking off of the discussion” is a breach of an agreement to negotiate<sup>556</sup>. And in its 2006 *Guiding Principles applicable to Unilateral Declaration of States capable of creating obligations*, the ILC adopted Principle 10, according to which “A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily.”<sup>557</sup>

482. For Chile to assert that there is no pending territorial issue between the parties as a result of the 1904 Treaty cannot justify its refusal to negotiate. It is a *non sequitur*. Chile has agreed on many occasions to negotiate with Bolivia over a sovereign access to the sea, and it cannot now claim that there is no room for negotiations because the 1904 Treaty has (since 1904) settled all territorial issues pending between the two States.

483. To list a few examples:

-The Chilean Legation in Bolivia stated in a memorandum dated 9 September 1919 that Chile “is willing to try that Bolivia acquires an access to the sea of its own, *by ceding it an important part of the zone north of Arica*<sup>[558]</sup> and the railroad (...) *independently of what established in the Treaty of Peace of 1904 (...)*”,<sup>559</sup>

-On 10 January 1920, Chile agreed, “Independently from what has been established under the Treaty of Peace of 1904”, to enter into negotiations with Bolivia to

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<sup>555</sup> *Claims arising out of decisions of the Mixed Greco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (between Greece and the Federal Republic of Germany)*, 26 January 1972, RIAA, vol. XIX, p. 62, para. 79.

<sup>556</sup> *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys) Advisory Opinion*, 1931, P.C.I.J. Series A/B, No. 42, p. 128.

<sup>557</sup> *Guiding Principles applicable to Unilateral Declaration of States capable of creating obligations*, YILC, 2006, Vol. II (2), A/61/10 (2006), p. 380.

<sup>558</sup> See BM Vol. II, Annex 43. And *supra*, Chap. I, para. 99.

<sup>559</sup> See *supra*, Chap. I, para. 100.

“acquire the prospect of incorporating an important and significant maritime province into its territory, thus leaving behind its landlocked status.”<sup>560</sup>

-On 23 June 1926, Chile pointed out that “we accept to sacrifice, in favour of Bolivia, a part of the Department of Arica” and then to a “transfer of the territory to Bolivia.”<sup>561</sup> Such a cession was once again not considered by Chile as precluded by the 1904 Treaty;

-The same is true of the agreement undertaken by Chile in 1950 to negotiate with Bolivia with a view to grant it a sovereign access to the sea;<sup>562</sup>

-In a Memorandum dated 10 July 1961, Chile once again stated that it agreed with formal negotiations: “Chile has always been willing, along with preserving the legal situation established by the 1904 Treaty, to examine directly with Bolivia the possibility of satisfying the aspirations of the latter and the interests of Chile”<sup>563</sup>;

-In its Note dated 19 December 1975, the Chilean’s Ministry of Foreign Affairs also declared that “the Chilean response is based on a mutually convenient agreement that would take into account both countries’ interest without containing any innovation to the stipulations of the Treaty of Peace, Friendship, and Commerce signed between Chile and Bolivia on 20 October 1904” and that “the cession to Bolivia of a sovereign coast linked to Bolivian territory through a territorial strip with the same type of sovereignty would be considered.”<sup>564</sup> It was

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<sup>560</sup> See BM Vol. II, Annex 101 and *supra*, Chap. I, paras.90-114.

<sup>561</sup> See BM Vol. II, Annex 20 and *supra*, Chap. I, paras. 115-117.

<sup>562</sup> See *supra*, Chap. I, paras. 123-135 and 420-423.

<sup>563</sup> See *supra*, Chap. I, paras. 136-138.

<sup>564</sup> See *supra*, Chap. I, paras. 149-153.

then once again clear to Chile that the cession of a sovereign coast was not precluded by the 1904 Treaty;

-In 31 October 1979, Chile reaffirmed before the OAS that it “has always been willing to negotiate with Bolivia” and that “on many opportunities, [it] pointed out the Chilean disposition to negotiate with Bolivia a solution to its aspiration of having a free and sovereign access to the Pacific Ocean.”<sup>565</sup> This position was reiterated before the OAS on 18 November 1983.<sup>566</sup>

484. Chile agreed on many occasions that negotiations with Bolivia could lead to a cession of territory. Even in its Rejoinder in *Peru v. Chile*, submitted to the Court on 11 July of 2011, Chile described the negotiations of 1975 as having in view a “cession of Chilean territory along the Chile-Peru land boundary”<sup>567</sup>. The sovereign corridor considered in 1975, which would have allowed Bolivia to obtain a sovereign access to the sea, would have had the effect, according to Chile, that “Bolivia would acquire a maritime zone between the Hito N° 1 parallel, which constitutes the Chile-Peru maritime boundary, to the north, and another parallel, to the south, which would pass through the point at which *the new land boundary between Chile and Bolivia* would reach the sea.”<sup>568</sup>

485. Indeed, Chile has explicitly pointed out on many occasions that the negotiations over a *sovereign* access to the sea on which it agreed were *independent* of the 1904 Treaty.

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<sup>565</sup> See *supra*, Chap. I, paras. 167-169.

<sup>566</sup> See *supra*, Chap. I, paras. 173-174.

<sup>567</sup> *Rejoinder of Chile*, 11 July 2011, *Maritime Dispute (Peru v. Chile)*, I.C.J., paras. 3.17-3.18 (emphasis added).

<sup>568</sup> *Ibid.*

486. In these circumstances, it is not possible for Chile to claim today, in order to justify its refusal to negotiate, that it never took part in a negotiation the outcome of which would be a modification of the territorial status between the two countries, or that such negotiations were precluded by the 1904 Treaty.

B. CONSEQUENCES OF THE BREACH BY CHILE OF ITS OBLIGATION TO  
NEGOTIATE

487. Chile has attempted to maintain two inconsistent positions. On the one hand, Chile has on many occasions (i) agreed, in a binding manner, to negotiate with Bolivia a sovereign access to the sea, (ii) acknowledged that there is a pending issue between the Parties with regard to the sovereign access of Bolivia to the sea which needs to be settled through negotiations, and (iii) entered into negotiations with Bolivia, and even initiated some of these negotiations, in order to determine the practical modalities of a Bolivian sovereign access to the sea.

488. On the other hand, Chile now denies (i) that it has undertaken any commitment to negotiate, and (ii) that it is necessary or appropriate to hold such negotiations, arguing (retrospectively) that since the adoption of the 1904 Treaty there has been no pending issue between the Parties on the sovereign access to the sea. It is also evident that Chile did not pursue the negotiations in which it did engage, in good faith.

489. These inconsistencies in Chile's conduct are incompatible with its obligation to negotiate in good faith with Bolivia over a sovereign access to the sea. Consequently, Bolivia asks the Court to find that Chile has breached its obligation to negotiate a sovereign access to the Pacific Ocean, and to require Chile to put an end to this breach by fulfilling its obligation.

490. The obligation to ensure the cessation of a wrongful act is one of the consequences of a breach of international law, especially when the breach, as in this case, is continuous<sup>569</sup>. In such a situation, the Court will ask the responsible State to put an end to its wrongful conduct. As the Court stated in the *Wall* Opinion,

“The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 145); *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 44, para. 95; *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82).”<sup>570</sup>

491. When the breach of the obligation arises from an omission, the obligation of cessation takes the form of an obligation to act. In the *Belgium v. Senegal* case, the Court decided that:

“in failing to comply with its obligation under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. Senegal must therefore take without further delay the necessary measures to submit the case to its

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<sup>569</sup> See *Articles on Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR. Supp. (No. 10) 43, UN Doc. A/56/10 (2001) Article 30, and its Commentary, in *YILC*, 2001, Vol. II (2), pp. 88-91, in particular para. 4 of the Commentary: “Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act”.

<sup>570</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion I.C.J. Reports 2004*, p. 197, para. 150.

competent authorities for the purpose of the prosecution, if it does not extradite Mr. Habré.”<sup>571</sup>

492. This conclusion applies, *mutatis mutandis*, to the present case. Since Chile breached its obligation to negotiate a sovereign access to the sea and refuses today to comply with this obligation, it must under international law cease its wrongful conduct. Chile is thus today under the legal duty to fulfil this said obligation.

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<sup>571</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 121. See also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, paras. 137 and 139 (4).



## CONCLUSIONS

493. This *Memorial* has shown that Chile is obliged to negotiate in good faith a right of sovereign access to reconnect Bolivia with the sea.

494. Following a detailed account of the evolution of the dispute over sovereign access during the period between Bolivia's expulsion from its coastal territory up to the present (in Chapter I), the Memorial has identified the nature and content of Chile's duty and explained the legal processes by which Chile's actions and statements gave rise to a legally-binding obligation to fulfil the duty to negotiate (in Chapter II).

495. The evidence of Chile's breach of that obligation has been set out in detail in Chapter III.

496. Mutual trust is a precondition for any negotiation. The conduct of a party during negotiations can damage this trust if it leads the other party to be uncertain about the sincerity or good will of its counterpart. At the extreme, an outright refusal to negotiate closes the key route to the peaceful settlement of disputes under international law. In such a situation, the reopening of that route and the reinstatement of a relationship of trust in which both sides recognize that they are committed and bound to persist with negotiations requires the involvement of a third party. It is for this reason that Bolivia has submitted the present case to the International Court. Through this application, Bolivia seeks to recommence credible negotiations characterized by good faith, in which prior agreements and commitments will not be denied.

497. As stated in the opening paragraphs of this *Memorial*, Bolivia does not ask the Court to define the precise scope or modalities of the right to sovereign access to the sea. Bolivia requests that Chile should fulfil this obligation in good faith to achieve the particular result of a sovereign access to the Pacific based on the terms agreed upon by the parties since at least the 1895 Transfer Treaty;

498. It is indisputable that: “[E]very internationally wrongful act of a State entails the international responsibility of that State.”<sup>572</sup> Accordingly, Bolivia asks the Court to decide that the Parties must resume negotiations in good faith upon a means of implementing Bolivia’s right to a sovereign access to the Pacific. The two States themselves will then negotiate the precise terms of Bolivia’s sovereign access, taking into account in good faith the proposals already made.

499. Such a decision will “ensure recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.”<sup>573</sup> A decision will therefore ensure that negotiations on a sovereign access to the sea for Bolivia are in fact resumed, and that they are conducted in good faith, within a reasonable time and effectively.

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<sup>572</sup> Article 1 *Articles on Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp. (No. 10) 43, UN Doc. A/56/10 (2001)

<sup>573</sup> *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory) Judgment 1927 P.C.I.J. Series A, No. 13*, p. 20.

## **SUBMISSIONS AND PRAYER FOR RELIEF**

500. For the reasons given in this Memorial, and reserving the right to supplement, amplify or amend the present submissions, 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.

17 April 2014

**Eduardo RODRÍGUEZ VELTZÉ**  
Agent of the Plurinational State of Bolivia



## LIST OF FIGURES

<b>FIGURE I: BOLIVIA'S LOCATION IN SOUTH AMERICA.....</b>	15
<b>FIGURE II: OFFICIAL MAP OF BOLIVIA (1859).....</b>	17
<b>FIGURE III: TREATY OF TERRITORIAL LIMITS BETWEEN BOLIVIA AND CHILE OF 10 AUGUST 1866.....</b>	21
<b>FIGURE IV: TREATY OF TERRITORIAL LIMITS BETWEEN BOLIVIAN AND CHILE, 6 AUGUST 1874.....</b>	22
<b>FIGURE V: TERRITORIES CONTEMPLATED BY THE 1895 TRANSFER TREATY.....</b>	34
<b>FIGURE VI: CHILEAN PROPOSAL OF 19 DECEMBER 1975.....</b>	65
<b>FIGURE VII: PERUVIAN COUNTERPROPOSAL OF 19 NOVEMBER 1976.....</b>	68
<b>FIGURE VIII: BOLIVIAN PROPOSAL OF CORRIDOR ACCORDING TO MEMORANDUM 1.....</b>	82
<b>FIGURE IX: BOLIVIAN PROPOSAL OF ENCLAVES ACCORDING TO MEMORANDUM 2.....</b>	83