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FACULTAD DE DERECHO

Informe sobre el fallo de la Corte Internacional de Justicia relativo a la obligación de negociar de buena fe un acceso al Océano Pacífico en el caso Bolivia c. Chile

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RESUMEN

El presente informe tiene como objetivo exponer y analizar el razonamiento que llevó a la Corte Internacional de Justicia a fallar en contra de la pretensión boliviana respecto de la existencia de una obligación de negociar, por parte de Chile, un acceso al Océano Pacífico a favor de Bolivia. En este sentido, la primera parte evaluará el fallo de la excepción preliminar, que planteo Chile, respecto a la falta de competencia de la Corte Internacional de Justicia en el caso. En según lugar, se ahondará en el concepto de obligación de negociar en el Derecho Internacional Público advirtiendo, especialmente, las diferencias entre las negociaciones de medios y las de resultados. En tercer lugar, se analizará la suficiencia de la evaluación de la Corte Internacional de Justicia al determinar si las declaraciones unilaterales generaron o no efectos jurídicos. Al respecto, se planteará una crítica ya que el análisis no incorporó la evaluación del contexto y circunstancias en las que estas fueron hechas. Finalmente, se hará una revisión de la postura de la Corte Internacional de Justicia respecto de las demás pruebas presentadas por Bolivia. En definitiva, este informe pretende evaluar los aspectos más resaltantes de este fallo a fin de plantear observaciones y críticas.

Palabras clave

Corte Internacional de Justicia, Bolivia, Chile, obligación de negociar, declaraciones unilaterales

ABSTRACT

The present report aims to present and analyze the reasoning that led the International Court of Justice to rule against Bolivia's claim regarding the existence of an obligation on the part of Chile to negotiate access to the Pacific Ocean in favor of Bolivia. In this regard, the first part will assess the ruling on the preliminary objection raised by Chile concerning the lack of competence of the International Court of Justice in the case. Secondly, it will delve into the concept of the obligation to negotiate in Public International Law, particularly noting the differences between negotiations of means and those of outcomes. Thirdly, it will analyze the sufficiency of the International Court of Justice's assessment in determining whether unilateral declarations did or did not have legal effects. In this regard, a critique will be presented as the analysis did not incorporate an assessment of the context and circumstances in which these declarations were made. Finally, a review will be made of the International Court of Justice's stance regarding other evidence presented by Bolivia. In conclusion, this report aims to evaluate the most notable aspects of this ruling in order to provide observations and criticisms.

Keywords

International Court of Justice, Bolivia, Chile, obligation to negotiate, unilateral declarations

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PRINCIPALES DATOS DEL CASO

N° EXPEDIENTE	Caso N° 153 de la Corte Internacional de Justicia – "Obligación de Negociar Acceso al Océano Pacífico"
ÁREA(S) DEL DERECHO SOBRE LAS CUALES VERSA EL CONTENIDO DEL PRESENTE CASO	Derecho Internacional Público
IDENTIFICACIÓN DE LAS RESOLUCIONES Y SENTENCIAS MÁS IMPORTANTES	Caso N° 51 y N° 52 de la Corte Internacional de Justicis – "Casos de la plataforma continental del Mar del Norte" Caso N° 62 – Plataforma continental del Mar Egeo Caso N° 135 – "Plantas de celulosa en el Río Uruguay"
DEMANDANTE/DENUNCIANTE	Estado Plurinacional de Bolivia
DEMANDADO/DENUNCIADO	República de Chile
INSTANCIA ADMINISTRATIVA O JURISDICCIONAL	Corte Internacional de Justicia – Instancia única (Art. 60 del Estatuto de la Corte Internacional de Justicia)

I. INTRODUCCIÓN

1.1. Justificación de la elección de la resolución

El fallo de la Corte Internacional de Justicia relativo a la obligación de negociar un acceso al Océano Pacífico en el caso Bolivia contra Chile es complejo y de trascendencia jurídica debido principalmente a los siguientes factores.

Por un lado, Bolivia apeló a una gran variedad de argumentos para sostener sus pretensiones. Dentro de estos, fue necesaria la interpretación de los tratados, identificación de actos unilaterales, el examen de figuras como el estoppel y la aquiescencia, la aplicación del *soft law* y la novedosa prueba del efecto acumulativo. En este orden de ideas, este fallo implicó el examen de diferentes fuentes de Derecho Internacional. Así, la estrategia procesal boliviana pretendió buscar abarcar la mayor parte de escenarios posibles para que se comprobara que Chile se había obligado a negociar un acceso al Océano Pacífico. La complejidad de ello radica en que la Corte Internacional de Justicia tuvo que analizar cada una de las pruebas presentadas a fin de constatar la existencia de la obligación pretendida.

Por otro lado, el contexto histórico es determinante en el análisis jurídico del caso ya que las pruebas presentadas por Bolivia se desarrollan a través de casi un siglo. Por lo que, la labor de la Corte Internacional de Justicia se complejiza aún más a razón de que se debió de considerar el contexto y las circunstancias en las que se produjeron las pruebas presentadas.

En definitiva, la elección de este fallo se debe a que la Corte Internacional de Justicia se avocó a analizar diferentes fuentes de Derecho Internacional Público a fin de sustentar su decisión respecto de la existencia o no de la obligación de negociar un acceso al Océano Pacífico sumado al hecho del contexto histórico.

1.2. Presentación del caso y análisis

El presente caso refiere a la controversia surgida entre el Estado Plurinacional de Bolivia y la República de Chile respecto de la obligación de acceso al Océano Pacífico a favor de Bolivia que fue presentada a la Corte Internacional de Justicia (en adelante CIJ).

En este orden de ideas, el principal problema a abordar es si efectivamente existe una obligación, por parte de Chile, de conceder a favor de Bolivia un acceso al Océano Pacífico. Para responder a ello, será necesario resolver cuatro problemas secundarios. Así, el primero de ellos, se refiere a la excepción preliminar planteada por la República de Chile que cuestiona la competencia de la CIJ para resolver esta disputa. El segundo problema secundario, trata la naturaleza y alcances de la obligación de negociar de buena fe para el Derecho Internacional. El tercer problema secundario, nos remite al examen de los actos unilaterales; es decir, la determinación de las circunstancias en las cuales estos actos se constituyen como fuentes de Derecho Internacional. Finalmente, el cuarto problema secundario, exigirá el análisis de cada una de las pruebas presentadas por Bolivia que sostienen los argumentos a favor de su tesis.

Frente a ello, consideramos que la CIJ determinó correctamente que no existe una obligación por parte de Chile para negociar un acceso al Océano Pacífico a favor de Bolivia. En este orden de ideas, la estrategia procesal boliviana se planteó adecuadamente para sortear el artículo VI del Pacto de Bogotá y acceder a la jurisdicción de la CIJ. Al mismo tiempo, estimamos que la supuesta obligación aducida por Bolivia no podría tratarse de una obligación de resultado en tanto que ni Bolivia ni Chile pactaron una fecha, ni las circunstancias del caso ameritan que la culminación de las negociaciones tenga un final determinado.

Seguidamente, advertimos que la CIJ evaluó las declaraciones unilaterales, señaladas por Bolivia, como prueba de que Chile se comprometió jurídicamente. Si bien las mismas carecen de contenido que evidencie compromiso, la metodología empleada por la CIJ no consideró la evaluación del contexto ni circunstancias de las mismas.

Finalmente, el análisis de las pruebas presentadas por Bolivia permite evidenciar que estas son insuficientes para determinar que Chile se encuentra obligado a negociar.

Para el análisis del caso en concreto, emplearemos doctrina de especialistas en Derecho Internacional, referencias a la jurisprudencia de la Corte Internacional de Justicia y la propia sentencia del caso.

II. IDENTIFICACIÓN DE LOS HECHOS RELEVANTES

2.1. Contexto histórico

La propia Corte Internacional de Justicia, en su considerando 17, del fallo a evaluar, reconoce que, para el caso en cuestión, el contexto histórico reviste especial importancia. Por tanto, es importante mencionar hechos históricos que permiten entender el desarrollo de los alegatos postulados de las partes.

En este orden de ideas, es imperante iniciar los hechos con el proceso de independencia de los Estados sudamericanos del Reino de España que se desarrolló durante el quindenio 1810-1825. De esta forma, los territorios de los nuevos Estados se fundaron sobre el principio de *utis possidetis*, es decir, las fronteras estatales se yuxtapusieron sobre las divisiones administrativas coloniales (Lois, C., 2019, p. 214). Por consiguiente, Bolivia ostentó más de 400 kilómetros de costa a lo largo del Océano Pacífico inmediatamente después de su emancipación. (Ministerio de Relaciones Exteriores de Bolivia, 2014, p. 19).

Posteriormente, el 5 de abril de 1879, Chile declaró la guerra a Perú y Bolivia, la cual se extendió por cinco años. Como resultado de esta contienda bélica, Chile ocupó territorios meridionales peruanos y la totalidad del territorio boliviano adyacente al Océano Pacífico. De esta forma, los tres Estados pusieron fin a las hostilidades mediante la suscripción de diferentes tratados. Así, el 20 de octubre de 1883, Chile y Perú firmaron el Tratado de Ancón; el cual, estableció que Chile ocuparía las provincias de Tacna y Arica durante un periodo de diez años, después de los cuales se realizaría un plebiscito para determinar la soberanía de estos; y, el 4 de abril de 1884, Chile y Bolivia firmaron el Pacto de Tregua en Valparaíso; en el cual, se estableció que Chile gobierna “los territorios desde el paralelo 23 hasta la desembocadura del río Loa en el Pacífico”. (CIJ, 2018, p. 13). Esto, en la práctica, suprimió todo acceso marítimo boliviano.

Finalmente, en el año de 1895, al decimoctavo día del mes de mayo, Chile y Bolivia suscribieron un tratado denominado “Paz y Amistad”; en el cual se, reafirmó el dominio de Chile sobre los territorios bolivianos especificados en el Pacto de Tregua de 1884. Asimismo, se firmó el Tratado de Transferencia de Territorios; en el cual, se especificó que Chile cedería la soberanía de los territorios de Tacna y Arica, en el caso que los obtuviese, de Perú, a perpetuidad, o, en caso de que lo anterior no ocurriera, Chile cedería el territorio especificado en el tratado. Sin embargo, mediante intercambio de notas realizadas entre el 29 y 30 de abril de 1896, se condicionó la entrada en vigor de estos tratados a la ratificación por parte de los Poderes Legislativos de cada uno de los Estados referidos. No obstante, esto no ocurrió, por lo que, los tratados en mención no entraron en vigor. Finalmente, el 20 de octubre de 1904, ambos Estados suscribieron el Tratado de Paz y Amistad; por medio del cual, se reconoció el dominio absoluto y perpetuo de los territorios ocupados por Chile. (CIJ, 2018, p. 13-14).

En resumen, esta cronología de eventos evidencia la perdida de territorio boliviano y al acceso al Océano Pacífico. Desde este punto de vista histórico, en adelante, los hechos acontecidos servirán como argumentos para que ambas partes sostengan sus posturas.

Es en este sentido que, durante las primeras décadas del siglo XX, Bolivia se enfrenta a obstáculos para su desarrollo dada la característica extractiva de su economía y la mediterraneidad resultante de la guerra ya que implica un enorme impedimento para el comercio internacional (Sánchez Solano, J. C., 2015, p. 13-14). Es por esta razón que, la diplomacia boliviana realizó esfuerzos para evidenciar la problemática y buscar una solución en la región. Prueba de estos esfuerzos son el memorándum del 22 de abril de 1910; la reunión del 10 de enero de 1920 entre el Ministro de Relaciones Exteriores de Bolivia y el Ministro Plenipotenciario de Chile en La Paz; la solicitud, por parte de Bolivia, para la revisión del Tratado de Paz de 1904 presentada el 1 de noviembre de 1920 al Secretario General de la Sociedad de Naciones; y las negociaciones, a través del intercambio de notas diplomáticas, realizadas entre 1922 y 1923, entre los Ministerios de Relaciones Exteriores de Bolivia y Chile (CIJ, 2018, p. 14-18).

Ahora bien, durante la década de 1920, el incumplimiento, por parte de Chile, de lo establecido en el Tratado de Ancón respecto a la realización de un plebiscito a las poblaciones de los territorios de Tacna y Arica para definir su destino derivó en tensiones diplomáticas entre Perú y Chile. Ante ello, y considerando el contexto posterior a la Gran Guerra, el presidente estadounidense Woodrow Wilson dispuso que Estados Unidos interviniera como mediadora de esta cuestión. Así, como parte de esta política, el 30 de noviembre de 1926, el Secretario de Estado de los Estados Unidos, Frank B. Kellogg, propuso que los territorios en disputa fuesen cedidos a favor de Bolivia. Frente a ello, las reacciones fueron las siguientes: el 2 de diciembre de 1926, el Ministro de Relaciones Exteriores de Bolivia expresó, al Ministro Plenipotenciario de los Estados Unidos de América en La Paz, la total aceptación de Bolivia a esta propuesta; el 4 de diciembre de 1926, mediante memorándum dirigido al Secretario de Estado de los Estados Unidos, el Ministro de Relaciones Exteriores de Chile rechazó la propuesta; al igual que Perú, mediante memorándum del 12 de enero de 1927 dirigida al Secretario de Estado de Estados Unidos de América. (CIJ, 2018, p. 19-20). Es importante mencionar que el 3 de junio de 1929, Chile y Perú absuelven la cuestión de los territorios en disputa, mediante la suscripción del Tratado de Lima, en el cual acordaron que la soberanía de Tacna pertenece a Perú y la de Arica a Chile. Además, en un Protocolo Suplementario, acordaron que ninguno de los dos Estados podrá ceder alguno de los territorios antes mencionados, a un tercer Estado, sin contar con la aceptación del otro Estado firmante del Tratado de Lima (CIJ, 2018, p. 20-21).

Es a partir de la segunda mitad del siglo XX que las pretensiones bolivianas para obtener un acceso marítimo se evidencian de manera inequívoca. Así, durante la década de 1950, a través de notas diplomáticas, los Ministerios de Relaciones Exteriores de Bolivia y Chile mantuvieron someras negociaciones sin conclusiones o resultados concretos. Durante los primeros años de la década de 1960, retoman comunicaciones respecto a la problemática a raíz del denominado “Memorándum de Trucco”. En este sentido, ante la intención boliviana de plantear el tema de su acceso al Océano Pacífico en la Conferencia Interamericana a realizarse en Quito, Ecuador, en 1961, el embajador de Chile en Bolivia, Manuel Trucco, entregó al Ministerio de Relaciones Exteriores de Chile un memorándum que sostenía la plena disposición de Chile para buscar una salida a la problemática boliviana. Ante ello, la respuesta por parte del Ministerio de Relaciones Exteriores de Bolivia, hecha el 9 de febrero de 1962, expresó el deseo de iniciar

negociación a la brevedad. Sin embargo, el año siguiente, Bolivia rompió relaciones diplomáticas con Chile debido a la problemática del uso de las aguas del río Lauca. Una década más tarde, en 1974, varios Estados de América Latina firmaron la Declaración de Ayacucho, el 9 de diciembre, en el cual se expresa el compromiso por resolver la problemática de la mediterraneidad boliviana. Seguidamente, el 8 de febrero del año siguiente, el presidente boliviano, Hugo Banzer, y el presidente chileno, Augusto Pinochet, suscribieron la Declaración conjunta de Charaña en la que reafirman su total apoyo a la Declaración de Ayacucho. Asimismo, en 1975, se restituyen las relaciones diplomáticas y, mediante intercambio de notas del 28 de junio y 11 de agosto de 1976, se acuerda la conformación de una comisión mixta permanente de ambos Estados para discutir temas de interés común. Para ello, Chile formuló una propuesta basada en intercambio territorial. De esta forma, y conforme a lo establecido en el Protocolo Suplementario del Tratado de Lima, Chile solicitó la opinión de Perú respecto a la cesión de territorio a favor de Bolivia. Al respecto, Perú planteo una contrapropuesta para crear una zona de soberanía tripartita. Frente a estas posturas, el 21 de diciembre de 1977, el presidente boliviano expresó la necesidad de restablecer nuevas condiciones. No obstante, en enero de 1978, Chile precisó que no cambiaría su propuesta. Esto ocasionó que Bolivia suspendiera relaciones diplomáticas el 17 de marzo de 1978 (CIJ, 2018, p. 22-27).

A pesar de las declaraciones hechas por medio de la Organización de los Estados Americanos (en adelante OEA) durante los últimos años de la década de 1970 y los intentos de seguir con las negociaciones durante la década de 1980, no se obtuvo mayores resultados para resolver la problemática boliviana por parte de los dos Estados. Finalmente, en 1995, se reanudaron las conversaciones sobre el tema y el 22 de febrero 2000, los Ministerios de Relaciones Exteriores de ambos estados, emitieron un Comunicado Conjunto denominado “Declaración de Algarve” para resolver problemas bilaterales. En este mismo tono, se iniciaron conversaciones que incluyeron la propuesta chilena para crear una zona económica especial, pero fue rechazada por Bolivia. Todos estos intentos condujeron a que el 17 de julio de 2006 se anunciara la Agenda de 13 puntos, la cual, en su sexto punto, invoca la cuestión marítima boliviana. En este orden de ideas, en 2011, las discusiones se cursaron a través de la creación de una Comisión Binacional de Alto Nivel. Sin embargo, las negociaciones finalizaron el 7 de junio de 2011 ante la negativa del presidente chileno, Sebastián Piñeira, por proveer una propuesta concreta como base para una discusión solicitada por su homólogo boliviano, Evo Morales. (CIJ, 2018, p. 29-30).

2.2. Hechos más importantes del proceso

El 13 de junio de 2013, el Estado Plurinacional de Bolivia inició un proceso en contra de la República de Chile ante la CIJ solicitando que la misma declare que Chile incumplió la obligación de negociar un acuerdo, en favor de Bolivia, para un acceso, en su favor, al Océano Pacífico. En este sentido, el 15 de abril de 2014, Bolivia presentó su memoria en la que se señalaban sus argumentos. Sin embargo, el 15 de julio del mismo año, Chile cuestionó la competencia de la Corte mediante una excepción preliminar. Así, el 7 de noviembre de ese mismo año, Bolivia respondió a lo planteado por Chile.

En este orden de ideas, Chile cuestionó la competencia de la CIJ aduciendo que la frontera con Bolivia había quedado delimitada en virtud del Tratado de Paz y Amistad de 1904; por lo cual, y en virtud del artículo VI del Pacto de Bogotá, la CIJ no es competente de pronunciarse respecto de controversias resueltas antes de 1948. Sin embargo, Bolivia sostuvo que la controversia planteada se origina debido al incumplimiento de compromisos contraídos por parte de Chile posteriores a 1948; ante lo cual, la CIJ es completamente competente. Ante lo señalado, la CIJ falló, respecto a la excepción preliminar, a favor de Bolivia y se declaró competente.

De esta forma, y culminadas las cuestiones previas, la CIJ prosiguió con las cuestiones de fondo analizando los argumentos presentados por las partes en los documentos de memoria, contra-memoria, réplica y dúplica. Al respecto, la CIJ evaluó los argumentos desde los siguientes extremos.

Bolivia sostuvo que Chile sí incumplió la obligación de negociar un acceso marítimo ya que el intercambio de notas de 1950 constituye un tratado bilateral en cuanto cuenta con las características de establecer contenido, alcance y objetivos; el memorándum Trucco de 1961 evidencia la intención de Chile por negociar un acceso marítimo para Bolivia; considera a la Declaración conjunta de Charaña de 1975 como un tratado; los intercambios de notas diplomáticas de 1986 se consideran como acuerdos; en la Declaración de Algarve de 2000 se evidencia la obligación de negociar; la Agenda de 13 puntos es un acuerdo vinculante; y, Chile realizó actos unilaterales como la declaración del presidente Augusto Pinochet el 11 de septiembre de 1975 y otras declaraciones en la OEA en 1979. Por su parte, Chile niega que exista una obligación de negociar un acceso marítimo en favor de Bolivia toda vez que, el intercambio de notas diplomáticas de 1950 no se puede considerar como un tratado; de igual forma, el memorándum Trucco de 1961 tampoco puede considerarse como un tratado; respecto a la Declaración conjunta de Charaña de 1975 tampoco supone evidencia una obligación que vincule a las partes; respecto de las comunicaciones de 1986 tampoco es posible concluir que las partes se vincularon con una obligación; sobre la Declaración de Algarve de 2000 tampoco es posible observar la creación de una obligación; respecto a la Agenda de 13 Puntos, no es posible concluir que exista una obligación debido únicamente al lenguaje empleado ya que es el propio del uso diplomático; finalmente, respecto a las declaraciones unilaterales, Chile expresa que de ellas no se evidencia inequivocablemente la configuración de una obligación. Finalmente, la CIJ analizó todos los documentos fallando en todos sus extremos a favor de los argumentos de Chile y sentenciando que no existió tratado ni declaración unilateral que vincule a Chile a negociar un acceso marítimo a favor de Bolivia. (Ávila Bedragala, L.P., 2021, p. 13-27).

III. IDENTIFICACIÓN DE LOS PRINCIPALES PROBLEMAS JURÍDICOS

3.1. Problema principal

¿Existe una obligación de negociar de buena fe un acceso soberano al Océano Pacífico a favor de Bolivia que Chile habría incumplido?

3.2. Problemas secundarios

1. ¿Es la Corte Internacional de Justicia competente para resolver esta controversia?

2. ¿Cuál es la naturaleza y el alcance de la obligación de negociar de buena fe según el Derecho Internacional Público?

3. ¿La Corte Internacional de Justicia desarrolló adecuadamente bajo cuáles circunstancias las declaraciones unilaterales pueden considerarse como una fuente de creación de obligaciones internacionales?

4. ¿Son válidos los elementos específicos, alegados por Bolivia, como pruebas de que Chile incumplió la obligación de negociar de buena fe respecto de un acceso soberano al Océano Pacífico a favor de Bolivia?

IV. POSICIÓN PERSONAL

4.1. Respuestas preliminares a los problemas principal y secundarios

Respuesta preliminar al Problema Principal: Chile no incumplió la obligación de negociar de buena fe un acceso al Océano Pacífico a favor de Bolivia, ya que no es posible determinar que esta obligación exista. En este sentido, en base a las pruebas presentadas por Bolivia no es posible probar la existencia de fuentes de Derecho Internacional que hayan creado dicha obligación.

Respuesta preliminar al primer Problema Secundario: La Corte Internacional de Justicia sí es competente para resolver la controversia en tanto que los alegatos bolivianos no se refieren al Tratado de Paz y Amistad de 1904 sino a hechos acontecidos y sostenidos en el tiempo por un periodo cercano a un siglo hasta hechos posteriores al año 2000. Por lo tanto, la Corte Internacional de Justicia es competente en virtud del Pacto de Bogotá suscrito tanto por Bolivia como por Chile.

Respuesta preliminar al segundo Problema Secundario: El desarrollo jurisprudencial de la Corte Internacional de Justicia evidencia que existe, en el Derecho Internacional Público, la obligación de negociar de buena fe y se divide en dos tipos: de medios y de resultado.

Respuesta preliminar al tercer Problema Secundario: La Corte Internacional de Justicia no ha establecido una metodología para determinar bajo cuales contextos y circunstancias una declaración unilateral de un Estado tiene consecuencias jurídicas.

Respuesta preliminar al cuarto Problema Secundario: Los elementos específicos presentados por Bolivia no podrían considerarse como pruebas para determinar una obligación por parte de Chile ya que no son inequívocos para determinar su voluntad respecto de la obligación de negociar de buena fe un acceso al Océano Pacífico a favor de Bolivia.

4.2. Posición individual sobre el fallo de la resolución

Concordamos con el fallo de la Corte Internacional de Justicia que determinó que Chile no incumplió la obligación de negociar un acceso al Océano Pacífico a favor de Bolivia en el sentido de que no se pudo probar la existencia de dicha obligación. Sin embargo, consideramos que la Corte Internacional de Justicia debió de haber establecido bajo cuales contextos y circunstancias las declaraciones unilaterales son susceptibles de desplegar efectos jurídicos.

V. ANÁLISIS DE LOS PROBLEMAS JURÍDICOS

La competencia de la Corte Internacional de Justicia en el caso

El Sistema de la Organización de las Naciones Unidas se compone de una compleja red de entidades, siendo la Corte Internacional de Justicia el principal órgano judicial cuyas funciones implican la solución de controversias y la emisión de opiniones consultivas. (Chacón Hernández, D. & Núñez Palacios, S., 2022, p. 22-23)

Desde el final de la Segunda Guerra Mundial y la instauración del Derecho Internacional Contemporáneo, los Sujetos de Derecho Internacional, y en particular los Estados, se someten a solucionar sus controversias de forma pacífica quedando prohibido el uso de la fuerza según lo establecido en el artículo 2, párrafo 4 de la Carta de las Naciones Unidas. A esto se le denomina como Principio de Solución Pacífica de Controversias. Asimismo, la mencionada Carta establece en su artículo 33 que los Sujetos de Derecho Internacional, en virtud de la necesidad de resolver pacíficamente sus diferencias, podrán elegir libremente el medio que las partes consideren idóneo. Así, el primer numeral del citado artículo 33, establece una lista de los diferentes mecanismos a los que se puede acceder; sin que ello implique una lista cerrada. Entre estos mecanismos, se encuentran los tribunales internacionales. Los cuales, son medios jurisdiccionales en el que un tercero resuelve la controversia y no hay posibilidad de apelación. La CIJ, en este sentido, se constituye como un tribunal internacional al cual los Estados pueden acceder para resolver sus controversias de forma pacífica. (Méndez Chang, E., 2014, p. 28-35).

Atendiendo a la concurrencia del principio de solución pacífica de controversias y a la libre elección de medios de resolución, es claro que los Sujetos de Derecho Internacional, en específico los Estados, tendrán la obligación de no acudir a la guerra para resolver sus controversias, pero tendrán la facultad de elegir el mecanismo pacífico a utilizar. No obstante, es evidente que no necesariamente los Estados siempre se pondrán de acuerdo respecto del mecanismo a utilizar.

En este sentido, a pesar de que el estatuto constitutivo de la CIJ, en adelante Estatuto, es parte integrante de la denominada “Carta de las Naciones Unidas”, ello no implica que los Estados signatarios de esta carta accedan automáticamente a la jurisdicción de la Corte ya que se requiere de un acto posterior. (Méndez Chang, E., 2023, p. 10). Por lo que, existe tres vías para que ello ocurra. Por un lado, un Estado puede emitir una declaración unilateral que deberá ser remitida al Secretario General de las Naciones Unidas. De esta manera, se cursará copia de esta declaración a los Estados parte del Estatuto y al Secretario General de la CIJ. Esta forma, conocida como “cláusula facultativa” y establecida en el artículo 36°, inciso 2, del Estatuto. Por otro lado, es posible que se acepte la competencia de la CIJ para resolver las controversias de los Estados mediante acuerdos bilaterales o multilaterales que hayan sido suscrito previamente. Finalmente, el artículo 38, inciso 5, contempla la figura del *fórum prorrogatum*; el cual, implica que un Estado solicita formalmente a la CIJ que curse una solicitud al Estado o Estados demandados para que acepten la jurisdicción de la misma. Solo en caso que haya aceptación, la CIJ podrá decidir sobre el asunto de fondo (Mastaglia, G. T., 2016, p. 150-152).

De esta forma se evidencia que la aceptación de la competencia de la CIJ para resolver las controversias de los Estados no se limita únicamente a una declaración expresa al Organización de las Naciones Unidas, sino que, existen modalidades que se podrían ser denominadas como indirectas, es decir, a través de la solicitud por medio de otro Estado y la aceptación mediante un acuerdo anterior a la controversia.

Respecto de esta última modalidad mencionada, es prudente resaltar que, a nivel regional, existe el Tratado Americano de Soluciones Pacíficas, en adelante Pacto de Bogotá, que encuentra su origen en el artículo 27 de la Carta de la Organización de Estados Americanos. En este, se menciona que los Estados americanos contarán con un tratado que establecerá los medios pacíficos idóneos para resolver sus controversias. En específico, en el artículo XXXI, se establece el reconocimiento *ipso facto*, es decir automáticamente a la suscripción del mismo, la jurisdicción de la CIJ (Herdocia Sacasa, M., 2009, p. 51-54).

Es preciso indicar que tanto Chile como Bolivia son partes del denominado Pacto de Bogotá. El primero ratificó el tratado en 1967 y realizó el depósito en 1974; mientras que el segundo ratificó y realizó el depósito en 2011.

En atención a lo expuesto, y en virtud de lo establecido en el Pactó de Bogotá, Bolivia solicitó formalmente, el 24 de abril de 2013, que la CIJ iniciara un procedimiento contra la República de Chile, como ya se expuso, empero, el 15 de julio de 2014, la República de Chile planteó una excepción preliminar cuestionando la competencia de la CIJ en este asunto.

En este sentido, Chile sostuvo que, en base al artículo VI del Pacto de Bogotá, no existía controversia entre ambos Estados toda vez que el Tratado de Paz y Amistad de 1904 había establecido la soberanía y los límites territoriales. Por lo que, la CIJ carecía de competencia para pronunciarse respecto del tema de fondo. De esta forma, Chile argumentó que, según el artículo invocado, el Pacto de Bogotá establece que las diferencias resueltas, incluyendo los acuerdos vigentes al momento de la suscripción del tratado, es decir, 1948, no podrían ser revisados invocando el artículo XXXI como pretendía hacerlo Bolivia. En definitiva, Chile sostuvo que la intención de Bolivia era la revisión del acuerdo de 1904; por lo tanto, en virtud del artículo VI del Pacto de Bogotá, la CIJ carece de competencia respecto de ello.

El Reglamento de la CIJ, en el primer párrafo del artículo 79°, establece que, presentado un cuestionamiento a la competencia de la CIJ, este deberá ser resuelto antes de continuar con el procedimiento de fondo. El sentido de ello, según señala la doctrina, es la celeridad del proceso ya que cuanto antes se resuelvan las excepciones planteadas, antes se resolverá el fondo del asunto. (Abugattas, G., 2016, p. 234).

Seguidamente, el 7 de noviembre de 2014, Bolivia presentó su declaración escrita que incluía observaciones y conclusiones referentes a la excepción planteada por Chile. Posteriormente, entre el 4 al 8 de mayo de 2015 se realizaron audiencias orales para que ambas partes expusieran sus posiciones. Finalmente, el 24 de septiembre de 2015, la CIJ emitió sentencia resolviendo la excepción preliminar planteada.

Frente a lo postulado por Chile, Bolivia responde que su pretensión ha sido tergiversada ya que en ningún momento se cuestiona la validez del Tratado de Paz y Amistad de 1904 o se pretende que la CIJ modifique el mismo. Por el contrario, Bolivia aduce que la controversia versa respecto a la obligación de negociar un acceso al Océano Pacífico y no al acceso en sí. En este sentido, esta obligación surge a partir de acuerdos y declaraciones sostenidas en el tiempo por casi un siglo siendo que el tema referido era constantemente un punto de agenda para ambos Estados. (Ávila Bedregal, L. P., 2021, p. 14). De esta forma, Bolivia rechazó tajantemente la excepción planteada por Chile y reafirmó que su estrategia procesal evitaría el cuestionamiento del tratado de 1904 y se concentraría en obligaciones surgidas previas y posteriormente a la suscripción del Pacto de Bogotá.

Finalmente, considerando lo argumentado esgrimidos tanto por Chile como por Bolivia, la CIJ decidió que se encontraba dentro de su competencia pronunciarse respecto a la controversia planteada, en base al artículo 79° de su Reglamento y al artículo VI del Pactó de Bogotá, ya que la pretensión, como señaló Bolivia, de la demanda no tiene como finalidad el pronunciamiento sobre el derecho al acceso al Océano Pacífico sino respecto a la existencia de una obligación por parte de Chile y, en caso se pruebe que la misma existe, determinar si Chile habría incumplió con esta obligación y; por tanto, exigir su cumplimiento. En este sentido, la CIJ señaló que la demanda no pretende que se pronuncie respecto al Tratado de Paz y Amistad de 1904 ni de ningún otro tratado anterior al Pacto de Bogotá.

En nuestra opinión, Bolivia estructuró de forma sólida su estrategia procesal tomando en consideración que la República del Perú había demandado previamente a Chile ante la CIJ recurriendo al artículo XXXI del Pacto de Bogotá en 2008 en el fallo sobre la delimitación marítima entre Chile y Perú. Sin embargo, y a pesar de que la CIJ se declaró competente para resolver la controversia, Chile obtuvo una importante declaración de la CIJ que anticiparía un fallo favorable para sus intereses. En este sentido, en el párrafo 33 de la decisión sobre Excepciones Preliminares, la CIJ concluye que aun cuando se determinara la existencia de una obligación de negociar, que Chile habría incumplido, no corresponde a la CIJ determinar el resultado de esa negociación. Con este pronunciamiento, Chile consiguió que la CIJ no pudiese determinar la soberanía de un territorio sino únicamente se podría limitar a declarar la existencia o no de una obligación de negociar. Esto concluyó la aspiración boliviana respecto de que la CIJ se pronunciara otorgándole soberanía de un territorio mediante un fallo judicial.

La Obligación de Negociar de Buena Fe en el Derecho Internacional

Una vez superado el planteamiento de la excepción preliminar por falta de competencia de la CIJ, es necesario evaluar el tema de fondo. En este sentido, se requiere determinar la existencia de la "obligación de negociar de buena fe" como fue alegado por Bolivia.

Al respecto, la doctrina clásica define a la obligación internacional como la relación de dos o más Sujetos de Derecho Internacional cuya finalidad sea producir efectos jurídicos en el ordenamiento internacional (Moreno Quintana, L. M., 1959, p. 153). En el caso concreto, Bolivia afirma que Chile, mediante formas que serán evaluadas

posteriormente, se obligó internacionalmente con el objetivo de producir efectos jurídicos. No obstante, ¿cuál es el contenido de esta obligación?

En este sentido, la negociación, según la doctrina, se define como una discusión o conversaciones entre dos o más Estados con el objetivo de llegar a producir un acuerdo respecto de intereses compartidos o en cuestión entre ellos. De esta forma, podrían distinguirse tres modelos en las relaciones internacionales. La primera, referente al desarrollo progresivo del Derecho Internacional; la segunda, como solución de controversias; y, la tercera, como práctica diplomática orientada a la discusión de temas en común (Arredondo, R., 2019, p. 81). Respecto de esta definición, es posible criticar que no necesariamente toda negociación concluirá con un acuerdo ya que, dependiendo de los intereses particulares de los Estados, es posible que no lleguen a un arreglo que satisfaga a todas las partes involucradas.

Asimismo, se puede diferenciar dos formas de entender una negociación. La doctrina sostiene que se deben de distinguir dos tipos de actos de acuerdo con su intensidad. Por un lado, el *pactum de negociando*, que es de menor intensidad; por lo que, se agota la obligación en la realización misma de la negociación. Es decir, la obligación culmina con la realización de la acción de negociar. Por el contrario, el *pactum de contrahendo* es de mayor intensidad ya que se exige que se apliquen todos los esfuerzos necesarios para la celebración de un acuerdo y, para una parte de la doctrina, la obligación se extinguiría con una acción de resultado, es decir, efectivamente un acuerdo. (Benfeld, J., y Müller, K,. 2018, p. 78-79). De esta forma, resulta evidente que ambos actos se configuran como una forma valida de satisfacer una obligación internacional y se diferenciarían de acuerdo a la intensidad en la que la acción efectivamente satisface la misma.

De esta forma, podemos entender a la negociación como una forma en la que los Sujetos de Derecho desarrollan el Derecho Internacional; por ejemplo, a través de los acuerdos multilaterales en la que los Estados deben de reafirmar o ceder intereses; también es posible entenderlo como un mecanismo de solución de controversias como ya fue mencionado que se encuentra en la Carta de las Naciones Unidas y en el Pacto de Bogotá como alternativas para que los Estados resuelvan pacíficamente sus controversias; y, finalmente, como una práctica diplomática en la cual los Estados intercambian opiniones respecto a intereses en común, lo cual podría o no terminar en un acuerdo. De igual forma, en el sentido operativo, una negociación puede entenderse como una obligación de medios o una obligación de resultados.

Por tanto, para el caso en concreto, resulta evidente que las partes involucradas en esta controversia no comparten la misma definición de la obligación de negociar. Así, la posición boliviana argumenta que Chile se ha obligado a negociar, entendiéndose como un mecanismo de solución de controversias, con un deber de resultado, es decir, *pactum de contrahendo*. Mientras que la posición chilena, sostiene que la negociación forma parte de una práctica diplomática que se solidariza con la problemática de la mediterraneidad de Bolivia. Por lo que, la negociación a la que se han comprometido es para buscar una forma de solucionar aquello sin que esto implique un compromiso, es decir, la posición chilena plantea un *pactum de negociando*.

Esta diferenciación en las posiciones de las partes es especialmente importante ya que incide directamente en el resultado del fallo de la CIJ. En este sentido, es importante mencionar brevemente jurisprudencia de la CIJ en la cual se ha desarrollado la figura de la negociación en el Derecho Internacional.

En primer lugar, en cuanto al fallo del asunto sobre la Delimitación de la Plataforma Continental del Mar del Norte, en la que la que la República Federal de Alemania solicitó a la CIJ determinar los principios y normas de Derecho Internacional aplicables para la delimitación de la plataforma continental que compartía con el Reino de los Países Bajos y el Reino de Dinamarca. Al respecto, la CIJ determinó que la partes estaban en la obligación de negociar con el objetivo de llegar a un acuerdo y no solamente limitarse a un sentido formal. Así, este requisito no se cumplía si una de las partes insistía en su posición sin posibilidades de modificación.

En segundo lugar, en cuanto al fallo sobre la competencia de la CIJ en el caso Plataforma Continental del Mar Egeo, en la que la República de Grecia inició un procedimiento contra la República de Turquía, la CIJ evaluó el comunicado conjunto de Bruselas del 31 de mayo de 1975 en el que los primeros ministros de las partes se comprometían a resolver sus diferencias mediante negociaciones y respecto de la plataforma continental por la Corte Internacional de Justicia. No obstante, esta determinó que el documento en mención no confería competencia sobre cualquier controversia que se suscitara entre las partes. Por tanto, se determinó, entre otras cosas, que la CIJ carecía de competencia para pronunciarse respecto del tema de fondo.

En tercer lugar, en cuanto al caso Plantas de Celulosa del Río Uruguay, en el cual la República de Argentina demando a la República de Uruguay por haber contravenido el Estatuto del Río Uruguay toda vez que el Estado demandado había procedido con la instalación de plantas de celulosa sin el acuerdo previo del Estado demandante y esto ocasionó un impacto ambiental negativo sobre el territorio de este último. Al respecto, la CIJ determinó que Uruguay había incumplido el deber de negociar al haber autorizado la construcción de las plantas de celulosa mientras aún se mantenían la negociación.

De esta forma se aprecia que la CIJ reconoce que las negociaciones entre los Estados son una práctica recurrente en sus relaciones y estas, también, se constituyen como medios para resolver sus diferencias. Al mismo tiempo, establece que las negociaciones deben mantener un sentido encaminado a llegar a un acuerdo y no como un mero formalismo. Empero, esto se refiere al comportamiento en sí de las partes mas no a una obligación por llegar efectivamente a un acuerdo.

En el caso en concreto, en el párrafo 88 del fallo, y como ya lo había anticipado la CIJ en el fallo de las excepciones preliminares, se considera a la negociación como un *pactum de negociando*.

Por otro lado, es necesario establecer la implicancia de la buena fe aplicada a la negociación. En este sentido, el Derecho Internacional cuenta, como uno de sus principales pilares, a la obligación frente a lo pactado. (Huallpa Lozano, J. B. & Huallpa Lozano, E. R., 2020, p, 30). Específicamente, este principio forma parte del Derecho de

los Tratados que refiere a que las partes de un acuerdo se obligan a este y deben cumplirlo de buena fe. Así, las partes deberán cumplir el tratado buscando el objeto y fin por el cual se originó. Una expresión de este principio se encuentra en el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados. Al respecto, es posible aplicar este principio a las negociaciones entre los Estados toda vez que estas deben ser realizadas buscando un objeto y un fin que es llegar a un acuerdo (Saco, V., 2010, p. 301-302). La aplicación de este principio a las negociaciones se evidencia en la jurisprudencia de la CIJ, como ya fue mencionado, en el caso Delimitación de la Plataforma Continental del Mar del Norte; en la que, se estableció que las partes debían de abstenerse de una negociación meramente formal, sino que deben de mantener un compromiso real encaminado a establecer un acuerdo.

Por todo lo mencionado, es claro que la CIJ determinó que el contenido de la obligación de negociar de buena fe un acceso al Océano Pacífico a favor de Bolivia debía de entenderse como una obligación de negociar de tipo *pactum de negociando*, es decir, una obligación de medios. De esta forma, y como se adelantó en el fallo de las excepciones preliminares, la CIJ no podría determinar el resultado de esta negociación.

Consideramos acertado el análisis de la CIJ respecto de este punto en cuanto a que mantiene una línea jurisprudencial y evita desnaturalizar el sentido propio del proceso de negociación. En este orden de ideas, la pretensión boliviana se encamina en todo momento a la obtención de un territorio soberano que le permita un acceso al Océano Pacífico. No obstante, esta insistencia en la posición, que recuerda a lo señalado en el caso Delimitación de la Plataforma Continental del Mar del Norte, resulta incongruente con la problemática primigenia del conflicto. Como se desprende del contexto histórico, el reclamo boliviano se debe a los problemas derivados de la mediterraneidad, especialmente los comerciales. Así, la postura chilena se encuentra acorde a este análisis ya que la solidaridad que haya expresado se refiere a la solución de este problema y no puntualmente a la obtención de territorio soberano a favor de Bolivia. Por tanto, la obligación de negociar no necesariamente se podría limitar al acceso al Océano Pacífico mediante la cesión de territorio soberano.

Como comentario final de este apartado, pareciera que la problemática boliviana actual no solamente radicar en el aspecto económico sino trasciende al ámbito político, cultural y de identidad nacional para el pueblo boliviano. Esto podría explicar el fracaso de la iniciativa “Bolivia Mar” en la cual el Perú cedió a favor de Bolivia una zona franca turística comprendida en cinco kilómetros de largo por 800 metros de ancho de costo mediante el tercer convenio del Convenio Marco “Proyecto Binacional de Amistad, Cooperación e Integración Gran Mariscal Andrés de Santa Cruz”. Sin embargo, aceptar ello implicaría el reconocimiento de la demanda de un Derecho histórico lo que de plano es rechazado por el Derecho Internacional contemporáneo.

Las Declaraciones Unilaterales como Fuente de Derecho Internacional

Los argumentos bolivianos que sustentan la pretensión de la existencia de una obligación de negociar de buena fe un acceso al Océano Pacífico para Bolivia que Chile habría incumplido, pueden clasificarse en tres grupos. Por un lado, los acuerdos bilaterales que ambos Estados suscribieron y que evidenciarían la obligación de Chile.

Por otro lado, las afirmaciones y hechos, que implicarían la obligación, por parte de Chile, a negociar; y, otras figuras jurídicas alegadas por Bolivia (Mora Ramírez D. C., 2021, pp. 27-28).

Para efectos de este informe, resulta de especial interés el desarrollo que la CIJ tuvo respecto del segundo grupo, es decir, las declaraciones y actos unilaterales que Chile habría realizado.

Al respecto, es importante analizar los conceptos. En este sentido, el acto unilateral es una fuente de Derecho Internacional que implica la declaración de voluntad de un Sujeto de Derecho Internacional que genera una obligación internacional plenamente exigible por otros Sujetos de Derecho Internacional (Salmón, E., 2017, p. 119). El acto unilateral se diferencia de la declaración unilateral en el sentido que, esta última se configura como el procedimiento para crear al primero (Holz Rincón, J., 2007, p. 260). De esta diferenciación es posible concluir que no toda declaración unilateral de un Sujeto de Derecho Internacional podrá considerarse como una fuente de Derecho, es decir, como un acto unilateral.

En cuanto a las declaraciones unilaterales, específicamente, la Comisión de Derecho Internacional presentó en 2006 el documento denominado "Principios rectores aplicables a las declaraciones unilaterales de los Estados capaces de crear obligaciones jurídicas". De esta forma, se procuró contar con una base teórica que permitiera que el reconocimiento de las declaraciones políticas de los Estados de aquellas que genuinamente crearan obligaciones internacionales (Comisión de Derecho Internacional, 2006, pp. 401-421).

Estos principios rectores se expresan de la siguiente forma. En primer lugar, las declaraciones formuladas públicamente por un Estado podrán crear obligaciones internacionales fundadas en la buena fe y que podrán ser exigidas por otros Estados. En segundo lugar, se reconoce la capacidad de los Estados para obligarse mediante declaraciones unilaterales. En tercer lugar, es necesario considerar el contenido y todas las circunstancias para determinar los efectos jurídicos de las declaraciones. En cuarto lugar, las declaraciones podrán obligar al Estado únicamente si se realizan por las autoridades con capacidad para ello. En quinto lugar, estas pueden ser orales o escritas. En sexto lugar, en cuanto al destinatario, podrán dirigirse a la Comunidad Internacional o a uno o a un grupo determinado de Sujetos de Derecho Internacional. En séptimo lugar, la interpretación de la obligación deberá realizarse restrictivamente considerando el contexto y las circunstancias en las que se realizó. En octavo lugar, es nula toda declaración que se oponga a una norma imperativa de Derecho Internacional. En noveno lugar, un Estado no puede crear una obligación para otro mediante una declaración unilateral. Finalmente, una declaración unilateral no puede ser revocada arbitrariamente (Comisión de Derecho Internacional, 2006, p.407-408).

En el caso en concreto, Bolivia presentó ante la CIJ un batería de declaraciones que presuntamente generarían obligaciones para Chile (Villamizar Lamus, F., 2019, pp. 156). Por un lado, exhibió tres pruebas anteriores a 1950; en este sentido, el memorando del 9 de setiembre de 1919, la declaración hecha ante la Sociedad de Naciones del 28 de setiembre de 1921, y la nota del 6 de febrero de 1923, según se evidencia en el

párrafo 142. Por otro lado, en cuanto a las pruebas posteriores a 1950, se evidenciaron cinco argumentos que pasaremos a analizar.

En primer lugar, la declaración del presidente chileno Gabriel González Videla de 29 de marzo de 1951. Tomando en cuenta los principios rectores, antes mencionados, de la Comisión de Derecho Internacional, es prudente analizar tanto el contenido como el contexto y circunstancias en las que se dieron. Respecto del primer punto, es evidente que la expresión del presidente Videla se refiere a buscar una solución al problema de la mediterraneidad boliviana; el cual, no necesariamente se puede reducir únicamente a la cesión de territorio soberano. En el mismo tenor, se refiere también al principio *pacta sunt servanda*, en alusión al respeto del tratado suscrito en 1904. No obstante, es necesario evaluar el contexto histórico en el cual se da esta declaración. La historiografía sostiene que el gobierno de Videla priorizó la búsqueda por una solución al problema boliviano ante una conspiración peronista que implicaba una amenaza directa para su soberanía. En este sentido, la posición chilena plantearía un acercamiento al gobierno boliviano antes que la influencia internacional obligara a una cesión desventajosa para Chile (Cortés Díaz, M., 2015, p. 167-168). En este orden de ideas, no se aprecia que la declaración unilateral de Chile implicara la obligación de negociar de buena fe un acceso soberano al Océano Pacífico ya que, como se ha hecho mención, no es la única solución posible a plantear y no se expresó claramente así.

En segundo lugar, la declaración del presidente chileno Augusto Pinochet del 11 de setiembre de 1975, como se evidencia en el párrafo 143 del fallo. De igual manera, no se menciona literalmente que Chile se refiera a la negociación para otorgar a favor de Bolivia un acceso soberano al Océano Pacífico, sino que, de igual forma, ampliamente se invoca a una solución a la problemática de enclave. El contexto histórico sobre el cual se circunscribe esta declaración es la de las posiciones ideológicas del militarismo latinoamericano. En este sentido, el acercamiento chileno-boliviano para las décadas de los setentas y ochentas se motivarían más por el impulso del sector privado (Quitral Rojas, M., 2010, p. 157-158). De esta forma, no es posible sostener que la declaración de Pinochet se haya realizado en los términos que aduce Bolivia.

En tercer lugar, la nota del 19 de diciembre de 1975, respecto a la contrapropuesta de Chile de las directrices para la negociación de un eventual intercambio de territorios, mencionada en el párrafo 143 del fallo. Al respecto, esta declaración, a nuestro entender, no podría siquiera ser considerada dentro del análisis como una eventual declaración que generaría obligaciones internacionales ya que la misma se enmarca en un proceso de negociación que se extendió hasta 1979.

En cuarto lugar, la declaración del representante chileno, ante la Asamblea General de la Organización de los Estados Americanos de fecha 31 de octubre de 1979, evidencia un firme rechazo, no solamente a la cesión de territorio chileno a favor de Bolivia, sino a continuar las negociaciones en búsqueda de una solución para la mediterraneidad boliviana. Por tanto, no es posible considerar las consecuencias de esta declaración como una obligación de negociar de buena fe un acceso al Océano Pacífico.

Finalmente, el discurso del Ministro de Relaciones Exteriores de Chile de fecha 21 de abril de 1987, en el mismo sentido que el punto anterior, su contenido denota el rechazo

a las propuestas de Bolivia. Por tanto, no es posible concluir consecuencias jurídicas que obliguen a Chile a negociar de buena fe un acceso al Océano Pacífico a favor de Bolivia.

Por lo tanto, considerando lo expuesto, es claro que las declaraciones realizadas por Chile no son susceptibles de ser interpretadas como un acto unilateral que implicara la obligación de negociar de buena fe un acceso al Océano Pacífico a favor de Bolivia. No obstante, opinamos que la CIJ debió de haber analizado el contexto y las circunstancias de cada una de las declaraciones realizadas por Chile a fin de contar con una metodología que pueda ser aplicada, en demás casos, para determinar cuándo nos encontramos ante declaraciones que surtan efectos jurídicos.

Elementos específicos alegados por Bolivia

Como fue expuesto anteriormente, Bolivia presentó una amplia variedad de pruebas para sostener la existencia de una obligación que Chile habría incumplido. Al respecto, para efectos de este trabajo, como se mencionó, se han clasificado estas pruebas en tres grupos. El primero, a razón de, los convenios y tratados bilaterales entre ambos Estados; el segundo grupo, que ya fue analizado, lo conforman las declaraciones unilaterales; y, finalmente, otras figuras jurídicas alegadas por Bolivia. En este sentido, a continuación, se evaluarán los elementos específicos alegados en el primer y tercer grupo de pruebas.

Por un lado, en cuanto a los acuerdos bilaterales, Bolivia presentó seis pruebas que fueron confrontadas por Chile y analizadas por la CJI. Consideramos prudente mencionar que, al tratarse de un conflicto de interpretación de tratados, el Derecho Internacional contemporáneo, a través de la jurisprudencia de la CIJ y la costumbre internacional de los Estados, consagra las reglas estipuladas en el artículo 31 y 32 de la Convención de Viena sobre el Derecho de los Tratados de 1969 para su aplicación en la interpretación de los tratados (Novak Talavera, F., 2013, p. 73-74). Así, un tratado se deberá interpretar de buena fe según el sentido corriente de los términos en el contexto para la realización de su objeto y fin. Además, se contará con medios de interpretación complementarios para dilucidar el sentido de estos términos.

A continuación, se presentará el análisis realizado por la CIJ de cada una de las seis pruebas presentadas por Bolivia.

En primer lugar, referente al Acta Protocolizada de 1920 y los intercambios diplomáticos posteriores, la CIJ citó la jurisprudencia en el caso Delimitación Marítima y Cuestiones entre Qatar y Bahrain en la cual se estableció que es posible el surgimiento de obligaciones a partir de las actas protocolizadas siempre y cuando las mismas contengan y enumeren las obligaciones a las que cada Estado se compromete. En el caso en concreto, no solamente no ocurría esto, sino que el penúltimo párrafo hacía mención de que lo establecido en el acta no constituían derechos ni obligaciones para las partes.

En segundo lugar, en cuanto al intercambio de notas de 1950, la CIJ reconoce que es una práctica entre los Estados manifestar el consentimiento mediante el intercambio de

notas diplomáticas para la adopción de un acuerdo. Sin embargo, en el caso en concreto, el intercambio de notas no siguió la práctica en cuanto a que los textos intercambiados no eran idénticos; por tanto, sería imposible sostener que ambas partes se estaban comprometiendo a un mismo acuerdo.

En tercer lugar, se evaluó la Declaración de Charaña de 1975. Al respecto, la CIJ sostuvo que la misma no podría considerarse como un tratado en tanto que el tenor empleado en la redacción del documento expresa un compromiso político antes que jurídico. No obstante, sí reconoce que posteriormente a la referida declaración se evidencia que Chile propuso ceder parte de su costa en Arica a favor de Bolivia y a cambio de territorio, pero debido a que se requería autorización de Perú, según el Protocolo Complementario al Tratado de Lima de 1929, este realizó una contraoferta que fue rechazada tanto por Chile como por Bolivia culminando la negociación.

En cuarto lugar, con respecto a los comunicados de 1986, la CIJ expresó que de estos no se desprende la intención de cualquiera de las partes a comprometerse jurídicamente. En este sentido, las dos declaraciones no se podrían considerar como un acuerdo.

En quinto lugar, la Declaración de Algarve fue desestimada por la CIJ al considerar que el mismo es una declaración política que insta a las partes firmantes a mantener un continuo diálogo.

Finalmente, en cuanto a la Agenda de los 13 puntos, la CIJ advierte que el punto en cuestión hace referencia al “tema marítimo”; por lo cual, es suficientemente amplio para poder considerar que las partes se referían a la obligación de negociar un acceso soberano al Océano Pacífico a favor de Bolivia.

Considerando lo expuesto, es evidente que, al igual que en las declaraciones unilaterales, el principal obstáculo en las pruebas bolivianas es el sentido textual de los compromisos a los que llegan las partes. Concordamos con lo resuelto por la CIJ de que ninguna de los acuerdos bilaterales presentados puede interpretarse en el sentido que argumenta Bolivia. Por lo que, ni siquiera es posible evaluar el contexto y las circunstancias ya que de hacerlo se contravendría la norma de interpretación corriente de los términos.

Por otro lado, la estrategia procesal boliviana planteo apelar a otras figuras jurídicas a fin de establecer la existencia de una obligación de negociar, la cual Chile habría incumplido. Al igual que en los acuerdos bilaterales, Bolivia presenta seis pruebas que son analizadas por la CIJ.

En primer lugar, Bolivia se ampara ante la figura de la aquiescencia al sostener que el silencio de Chile ante las declaraciones emitidas, por parte de Bolivia, referente a su acceso al Océano Pacífico, en los diversos foros conducentes a la firma de la Convención del Mar implican una aceptación de estos por parte de Chile. En este sentido, la aquiescencia es comprendida como un comportamiento que produce efectos jurídicos ante determinadas circunstancias (Peña Silva, F., 2020, p.176). Al respecto, Bolivia alega que Chile, al no haber protestado ante las declaraciones realizadas en el

contexto de las negociaciones de la CONVEMAR, se obligó a negociar. Ante ello, la CIJ señala que ninguna de las declaraciones hechas por Bolivia requería una acción o una respuesta por parte de Chile; por lo que, no es posible invocar la figura de la aquiescencia.

En segundo lugar, Bolivia se acoge a la figura del estoppel; el cual es un recurso procesal que imposibilita un alegato mas no crea, modifica o extingue una situación jurídica (Novak Talavera, F., 1994, p. 153). Así, el estoppel evita que las partes se sustraigan de sus comportamientos precedentes. Para el caso en concreto, Bolivia sostiene que las declaraciones hechas por Chile, durante más de un siglo, constituye un comportamiento del cual no se puede desligar. Por el contrario, Chile respondió que no es posible aplicar el estoppel por el simple hecho de que no existió una voluntad de obligarse a negociar de buena fe un acceso al Océano Pacífico a favor de Bolivia. Tomando esto en consideración, la CIJ determinó que la aplicación del estoppel implica dos requisitos: la existencia de una declaración o conducta de una de las partes y, que la otra parte, se haya perjudicado en base de confiar en esa declaración o conducta. Por lo que, Bolivia no pudo probar que se haya perjudicado en base a las declaraciones hechas por Chile.

En tercer lugar, Bolivia sostuvo que las declaraciones hechas durante el tiempo generaron legítimas expectativas. No obstante, la CIJ indicó que no existe un principio de legítimas expectativas en el Derecho Internacional General; por lo que, este argumento no podría ser considerado.

En cuarto lugar, Bolivia sostuvo que Chile se encuentra obligado a negociar según el Artículo 2, párrafo 3 y al Artículo 33 de la Carta de las Naciones Unidas. En este sentido, la CIJ establece que existe una obligación general de los Estados a resolver sus diferencias de manera pacífica sin contravenir la paz mundial. Sin embargo, no es posible preferir un método de resolución de disputas sobre otro. Por lo que, no es posible que Chile deba de estar obligado a la negociación únicamente ante la invocación de estos dispositivos.

En quinto lugar, Bolivia argumenta que la Resolución N° 686 de la Asamblea General de la Organización de Estados Americanos implicara un tipo de obligación para Chile a pesar de que las mismas no sean vinculantes. Para la CIJ, no es que solamente las resoluciones de la Asamblea General de la Organización de Estados Americanos no ostenten fuerza vinculante para los Estados sino que el citado documento no contiene alguna mención a una obligación que comprometa a Chile.

Finalmente, Bolivia adujo la existencia de un efecto acumulativo. Este, entendido como un fenómeno consistente en la suma de actos y conductas sostenidas en el tiempo que deberían de considerarse, en su conjunto, como un compromiso de negociar un acceso al Océano Pacífico. No obstante, Chile rebatió esta argumentación afirmando que sería contradictorio sostener que existe una obligación resultante de la acumulación de actos, cuando estos de forma individual no generan ninguna obligación. (Infante Caffi, M. T., 2019, p. 52). Respecto a este extremo, la CIJ ni siquiera se pronunció sobre la existencia o no de tal efecto. En este sentido, se inclinó por el razonamiento chileno ya que afirmó que Bolivia no había podido comprobar la existencia de compromisos individuales por

parte de Chile; por lo que, el análisis del efecto acumulativo carecería de sentido. Al respecto, consideramos que este argumento es innovador ya que no se ha logrado identificar su uso en otros casos relativos al elemento territorial de un Estado en el Derecho Internacional Público. En este sentido, y ante una carente explicación doctrinal, en nuestra opinión, el "efecto acumulativo" se fundamentaría en una simple estrategia procesal que pretendería abarcar todos los escenarios posibles. Es decir, en caso el análisis de los actos individuales no fuera suficiente, esto se solucionaría considerando el efecto que provocan todos ellos. Empero, la estrategia boliviana no logró convencer ni de forma parcial con ninguno de sus argumentos en el análisis individual de los actos. Si bien, resulta un argumento novedoso, el mismo carece de convencimiento.

Por lo expuesto, resulta cierto que Bolivia no se limitó a argumentar su posición únicamente apelando a acuerdos y actos unilaterales sino presentó diferentes figuras jurídicas. No obstante, al igual que en las otras pruebas, el contenido fue un obstáculo insuperable en la argumentación boliviana. Concordamos con la CIJ de que ninguna de las pruebas presentadas recurriendo a estas figuras permite interpretar una obligación para Chile.

En definitiva, ninguna de las pruebas, presentadas por Bolivia, pueden ser consideradas como válidas. Así, y en sintonía con las conclusiones de la CIJ, opinamos que las pruebas presentadas por Bolivia carecen de un contenido que evidencie o siquiera permita evaluar la existencia de una obligación de negociar. Si bien se aprecia que Bolivia ha mantenido un reclamo, sostenido en el tiempo, invocando un acceso al Océano Pacífico, no ha sido posible determinar, al menos por las pruebas presentadas, que Chile haya reconocido este reclamo y se obligara a negociar ello. Por el contrario, lo que sí es posible evidenciar es que Chile se solidariza, como ya lo mencionamos, con el problema de la mediterraneidad de Bolivia, pero esto no implica que se obligue a la negociación de un acceso al Océano Pacífico.

VI. CONCLUSIONES

En atención al primer problema secundario, ha quedado constatado que la Corte Internacional de Justicia es competente para conocer la controversia planteada por Bolivia en tanto que su pretensión se basa en la obligación de negociar de buena fe, por parte de Chile, un acceso al Océano Pacífico a favor de Bolivia. Obligación que se desprende de pruebas posteriores a la firma del Tratado de Paz y Amistad de 1904, y que; por lo tanto, no es una controversia resuelta antes de la suscripción del Tratado Americano de Soluciones Pacíficas. No obstante, la Corte Internacional de Justicia precisó que si bien es competente para determinar la existencia o no de la obligación mencionada, no puede determinar el resultado de esa obligación en caso existiese.

En atención al segundo problema secundario, se evidenció que el concepto obligación de negociar de buena fe es reconocido por el Derecho Internacional y ha sido desarrollado tanto por la jurisprudencia como por la doctrina. Al respecto, en cuanto a su finalidad, esta obligación genera dos vertientes. Por un lado, el *pactum de negociando*, es decir la obligación se agota en la conducta del sujeto; y, por el otro, el *pactum de contrahendo*, el cual requiere de la obtención de un resultado concreto. De esta forma, se demostró que una importante parte de la controversia versaba en el hecho de que las partes concebían a esta obligación desde perspectivas contrarias respecto de su finalidad.

En atención al tercer problema secundario, se identificó que las declaraciones unilaterales se constituyen como procedimientos para conformar actos unilaterales que surtan efectos jurídicos. Al respecto, la Comisión de Derecho Internacional cuenta con una base teórica que permite dilucidar las declaraciones políticas de aquellas que producen efectos jurídicos. En este sentido, se deben evaluar el contexto y las circunstancias en las cuales estas declaraciones fueron realizadas. Si bien el contenido de las declaraciones de Chile no demuestra una voluntad para obligarse a negociar de buena fe, consideramos que la CIJ debió de haber evaluado igualmente el contexto y las circunstancias a efectos de contar con una metodología que permita la predictibilidad en este tipo de casos.

Finalmente, en atención al cuarto problema secundario, se demostró que las demás pruebas presentadas por Bolivia, incluyendo los acuerdos bilaterales, la aquiescencia, el estoppel, las legítimas expectativas, las disposiciones en la Carta de las Naciones Unidas, la Resolución N° 686 de la Asamblea General de la Organización de Estados Americanos y la aplicación de un efecto acumulativo fueron insuficientes para determinar que Chile se obligó a negociar un acceso al Océano Pacífico a favor de Bolivia ya que todas ellas carecían de evidencia que demostrara una inequívoca voluntad de obligarse. En este sentido, en las pruebas en las que se logra advertir una voluntad, por parte de Chile, este hace referencia a su solidaridad para solucionar el problema de la mediterraneidad de Bolivia.

Por todo lo anteriormente expuesto, se concluye que no existe una obligación de negociar de buena fe un acceso soberano al Océano Pacífico a favor de Bolivia por

parte de Chile. Por tanto, al no poder determinar su existencia, Chile no ha incumplido la misma.

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INTERNATIONAL COURT OF JUSTICE

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OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN

(BOLIVIA *v.* CHILE)

JUDGMENT OF 1 OCTOBER 2018

2018

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

OBLIGATION DE NÉGOCIER UN ACCÈS À L'OCÉAN PACIFIQUE

(BOLIVIE c. CHILI)

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JUDGMENT

OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN

(BOLIVIA *v.* CHILE)

OBLIGATION DE NÉGOCIER UN ACCÈS À L'OCÉAN PACIFIQUE

(BOLIVIE c. CHILI)

1er OCTOBRE 2018

ARRET

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INTERNATIONAL COURT OF JUSTICE

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OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN

(BOLIVIA *v.* CHILE)

Historical and factual background.

1866 Treaty demarcating boundary between Chile and Bolivia and separating their Pacific coast territories — War of the Pacific and Chile's occupation of Bolivia's coastal territory — 1884 Truce Pact providing Chile to continue to govern coastal region — 1904 Peace Treaty recognizing coastal territory as belonging "absolutely and in perpetuity" to Chile — Minutes of 1920 meetings concerning question of Bolivia's access to the sea ("Acta Protocolizada") — Follow-up exchanges concerning Bolivia's request for revision of 1904 Peace Treaty — 1926 Matte Memorandum expressing Chile's position concerning question of sovereignty over provinces of Tacna and Arica — 1950 exchange of Notes between Bolivia and Chile concerning Bolivia's access to the sea — 1961 Memorandum handed by Chile's Ambassador in Bolivia to Minister for Foreign Affairs of Bolivia ("Trucco Memorandum") — Joint declaration by Presidents of Bolivia and Chile in 1975 expressing agreement to initiate negotiations ("Charaña Declaration") — Resolutions of the Organization of American States ("OAS") concerning Bolivia's sovereign access to the sea — New negotiations opened after 1985 Bolivian presidential elections, known as the "fresh approach" — 2000 Algarve Declaration on essential issues in the bilateral relationship — 13-Point Agenda of 2006, including Point 6 on the "maritime issue".

*

Preliminary considerations.

Meaning and scope of obligation to negotiate — Obligation does not include commitment to reach agreement — Meaning of sovereign access.

*

Alleged legal bases of an obligation to negotiate Bolivia's sovereign access to Pacific Ocean.

Existence of obligation to negotiate to be ascertained as any other legal obligation in international law.

Bolivia's assertion that bilateral agreements establish obligation to negotiate — No obligation to negotiate created by "Acta Protocolizada" — Matte Memorandum contains no acceptance of obligation to negotiate — 1950 exchange of Notes not a binding international instrument — Trucco Memorandum does not create or reaffirm any obligation to negotiate — No binding legal commitment in Charaña Declaration — No obligation to negotiate created by 1986 communiqués — No obligation to negotiate created in Algarve Declaration — No obligation to negotiate created in 13-Point Agenda — Court concludes that no obligation to negotiate established by bilateral agreements.

Bolivia's argument that Chile's declarations and other unilateral acts create obligation to negotiate — Wording of these declarations does not suggest undertaking of legal obligation — No evidence of intention to assume obligation to negotiate — Court concludes that no obligation to negotiate established by Chile's declarations and other unilateral acts.

Bolivia's assertion that obligation to negotiate established through acquiescence — Failure by Bolivia to identify declaration requiring response to prevent obligation from arising — Court concludes that no obligation to negotiate established through acquiescence.

Bolivia's argument based on estoppel — Chile's expressions of willingness to negotiate do not imply obligation to do so — No detrimental reliance by Bolivia — Essential conditions for estoppel not fulfilled — Court concludes that no obligation to negotiate established through estoppel.

Bolivia's argument based on legitimate expectations — References to legitimate expectations found in investor-State arbitral awards — Does not follow from references that principle of general international law exists — Court rejects Bolivia's argument based on legitimate expectations.

Bolivia's argument based on Article 2, paragraph 3, of United Nations Charter and Article 3 of OAS Charter — No obligation to negotiate found in general duty to settle disputes in Article 2, paragraph 3, of United Nations Charter — No obligation to negotiate found in the duty to settle controversies by peaceful procedures set out in Article 3 of OAS Charter — Court concludes that these provisions cannot be the legal basis of an obligation to negotiate.

Bolivia's argument based on resolutions of the OAS — Negotiations recommended but not required — Resolutions not per se binding — Court concludes that no obligation to negotiate can be inferred from content of resolutions or from Chile's position during their adoption.

Bolivia's assertion that instruments, acts and conduct taken cumulatively establish obligation to negotiate — Cumulative consideration of various bases does not change result — Court concludes that no obligation to negotiate established even if all instruments, acts and conduct taken cumulatively.

*

General conclusion.

Chile did not undertake obligation to negotiate Bolivia's sovereign access to Pacific Ocean — Other final submissions of Bolivia consequently rejected — Court's finding should not preclude continued dialogue and exchanges.

JUDGMENT

Present: *President* YUSUF; *Vice-President* XUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN, SALAM; *Judges* ad hoc DAUDET, MCRAE; *Registrar* COUVREUR.

In the case concerning the obligation to negotiate access to the Pacific Ocean,

between

the Plurinational State of Bolivia,

represented by

H.E. Mr. Eduardo Rodríguez Veltzé, former President of Bolivia, former President of the Bolivian Supreme Court of Justice, former Dean of the Law School of the Catholic University of Bolivia in La Paz, Ambassador Extraordinary and Plenipotentiary of the Plurinational State of Bolivia to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Sacha Llorentty Soliz, Permanent Representative of the Plurinational State of Bolivia to the United Nations in New York,

as Co-Agent;

H.E. Mr. Evo Morales Ayma, President of the Plurinational State of Bolivia,

as National Authority;

Mr. Vaughan Lowe, QC, member of the Bar of England and Wales, Emeritus Chichele Professor of International Law, University of Oxford, member of the Institut de droit international,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma de Madrid, member of the Institut de droit international,

Ms Monique Chemillier-Gendreau, Professor Emeritus of Public Law and Political Science at the University Paris Diderot,

Mr. Mathias Forteau, Professor at the University Paris Nanterre,

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Mr. Héctor Arce, Minister of Justice and Institutional Transparency of the Plurinational State of Bolivia,
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as Advisers;

Mr. Guido Vildoso, former President of Bolivia,
Mr. Jorge Quiroga, former President of Bolivia,
Mr. Carlos Mesa, former President of Bolivia,
Mr. José Alberto González, President of the Senate of the Plurinational State of Bolivia,
Ms Gabriela Montaño, President of the Chamber of Deputies of the Plurinational State of Bolivia,
Mr. Rubén Costas Aguilera, Governor of Santa Cruz,
Mr. Esteban Urquizu Cuellar, Governor of Chuquisaca,
Mr. Gonzalo Alcón Aliaga, President of the Council of Magistrates of the Plurinational State of Bolivia,
Ms Segundina Flores, Executive Secretary of the Bartolina Sisa National Federation of Peasant Women,
Mr. Juan Carlos Guarachi, Executive Secretary of the Central Obrera Boliviana,
Mr. Alvaro Ruiz, President of the Federation of Municipal Associations (FAM),
Mr. Juan Ríos del Prado, Dean of the Universidad Mayor de San Simón,
Mr. Marco Antonio Fernández, Dean of the Universidad Católica Boliviana,
Mr. Ronald Nostas, President of Private Entrepreneurs of the Plurinational State of Bolivia,
Mr. Gustavo Fernández, former Minister for Foreign Affairs,
Mr. Javier Murillo, former Minister for Foreign Affairs,
Mr. Carlos Iturralde, former Minister for Foreign Affairs,
Mr. Diego Pary, Permanent Representative of the Plurinational State of Bolivia to the Organization of American States in Washington DC,
Mr. Gustavo Rodríguez Ostria, Ambassador of the Plurinational State of Bolivia to the Republic of Peru,
Mr. Rubén Saavedra, Permanent Representative of the Plurinational State of Bolivia to the Union of South American Nations (UNASUR),
Ms Magdalena Cajias, Consul General of the Plurinational State of Bolivia in Santiago,
Mr. Juan Lanchipa, President of the Court of Justice of the Department of La Paz,
Mr. Franz Zubieta, Director of International Law at the Ministry of Justice and Institutional Transparency of the Plurinational State of Bolivia,
Mr. Roberto Calzadilla, Bolivian diplomat,

as Special Guests;

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Ms Olga Dalbinoë, Doctoral Candidate in Public International Law, Universidad Autónoma de Madrid,
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as Assistant Counsel,

and

the Republic of Chile,

represented by

Mr. Claudio Grossman, member of the International Law Commission, R. Geraldson Professor of International Law and Dean Emeritus, American University, Washington College of Law,

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H.E. Mr. Roberto Ampuero, Minister for Foreign Affairs of the Republic of Chile,

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H.E. Mr. Alfonso Silva, Vice-Minister for Foreign Affairs of the Republic of Chile,
H.E. Ms María Teresa Infante Caffi, Ambassador of the Republic of Chile to the Kingdom of the Netherlands, member of the Institut de droit international,

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H.E. Mr. Luis Winter, Ministry of Foreign Affairs of the Republic of Chile,

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Mr. Coalter G. Lathrop, Special Adviser, Sovereign Geographic, member of the North Carolina Bar,

Mr. José Hernández, Second Secretary, Ministry of Foreign Affairs of the Republic of Chile,

Mr. Giovanni Cisternas, Third Secretary, Ministry of Foreign Affairs of the Republic of Chile,

Mr. Robert Carter Parét, member of the Bar of the State of New York,

as Assistant Advisers,

The COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 24 April 2013, the Government of the Plurinational State of Bolivia (hereinafter "Bolivia") filed in the Registry of the Court an Application instituting proceedings against the Republic of Chile (hereinafter "Chile") with regard to a dispute "relating to Chile's obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean".

In its Application, Bolivia seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such).

2. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Chile; and, under paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Bolivia chose Mr. Yves Daudet. Chile first chose Ms Louise Arbour, who resigned on 26 May 2017, and subsequently Mr. Donald M. McRae.

4. By an Order of 18 June 2013, the Court fixed 17 April 2014 as the time-limit for the filing of the Memorial of Bolivia and 18 February 2015 for the filing of the Counter-Memorial of Chile. Bolivia filed its Memorial within the time-limit so prescribed.

5. Referring to Article 53, paragraph 1, of the Rules of Court, the Governments of Peru and Colombia respectively asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties pursuant to that same provision, the President of the Court decided to grant those requests. The Registrar duly communicated these decisions to the said Governments and to the Parties.

6. On 15 July 2014, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Chile raised a preliminary objection to the jurisdiction of the Court. Consequently, by an Order of 15 July 2014, the President, noting that by virtue of Article 79, paragraph 5, of the Rules of Court the proceedings on the merits were suspended and taking account of Practice Direction V, fixed 14 November 2014 as the time-limit for the presentation by Bolivia of a written statement of its observations and submissions on the preliminary objection raised by Chile. Bolivia filed such a statement within the time-limit so prescribed.

7. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar sent at the same time to the Organization of American States (hereinafter the "OAS") the notification under Article 34, paragraph 3, of the Statute of the Court. As provided for in Article 69, paragraph 3, of the Rules of Court, the Registrar transmitted the written pleadings to the OAS and asked that organization whether or not it intended to furnish observations in writing within the meaning of that Article. The Registrar further stated in the latter

notification that, in view of the fact that the proceedings were dealing with Chile's preliminary objection to the jurisdiction of the Court, any written observations should be limited to that aspect. The Secretary-General of the OAS indicated that that organization did not intend to submit any such observations.

8. Public hearings on the preliminary objection raised by Chile were held from Monday 4 to Friday 8 May 2015. By its Judgment of 24 September 2015, the Court rejected the preliminary objection raised by Chile and found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the Application filed by Bolivia on 24 April 2013.

9. By an Order dated 24 September 2015, the Court fixed 25 July 2016 as the time-limit for the filing of the Counter-Memorial of Chile. The Counter-Memorial was filed within the time-limit thus fixed.

10. By an Order dated 21 September 2016, the Court authorized the submission of a Reply by Bolivia and a Rejoinder by Chile and fixed 21 March 2017 and 21 September 2017 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were filed within the time-limits thus fixed.

11. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings.

12. Public hearings were held from 19 March to 28 March 2018, at which the Court heard the oral arguments and replies of:

For Bolivia: H.E. Mr. Eduardo Rodríguez Veltzé,
Mr. Payam Akhavan,
Ms Monique Chemillier-Gendreau,
Mr. Antonio Remiro Brotóns,
Mr. Vaughan Lowe,
Ms Amy Sander,
Mr. Mathias Forteau,
H.E. Mr. Sacha Llorentty Soliz.

For Chile: Mr. Claudio Grossman,
Sir Daniel Bethlehem,
Mr. Jean-Marc Thouvenin,
Ms Kate Parlett,
Mr. Samuel Wordsworth,
Ms Mónica Pinto,
Mr. Ben Juratowitch,
Mr. Harold Hongju Koh.

*

13. In the Application, the following claims were made by Bolivia:

"For the above reasons Bolivia respectfully 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;

(*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."

14. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Bolivia,

in the Memorial and in the Reply:

"For the reasons given [in Bolivia's Memorial and Reply], 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."

On behalf of the Government of Chile,

in the Counter-Memorial and in the Rejoinder:

"The Republic of Chile respectfully requests the Court to dismiss all of the claims of the Plurinational State of Bolivia."

15. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Bolivia,

"In accordance with Article 60 of the Rules of the Court and the reasons set out during the written and oral phase of the pleadings in the case *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*, the Plurinational State of Bolivia respectfully 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."

On behalf of the Government of Chile,

"The Republic of Chile respectfully requests the Court to dismiss all of the claims of the Plurinational State of Bolivia."

* * *

I. Historical and Factual Background

16. Bolivia is situated in South America, bordering Chile to the south-west, Peru to the west, Brazil to the north and east, Paraguay to the south-east and Argentina to the south. Bolivia has no sea coast. Chile, for its part, shares a land boundary with Peru to the north, with Bolivia to the north-east and with Argentina to the east. Its mainland coast faces the Pacific Ocean to the west.

17. Due to the importance of the historical context of this dispute, the Court will now examine in a chronological order certain events that have marked the relationship between Bolivia and Chile.

18. Many of the documents that set out these events were drafted in Spanish, and they have not always been translated by the Parties into an official language of the Court in an identical manner. Where these differences are material, the Court will, for the sake of clarity, reproduce the Spanish original of those documents, and indicate which Party's translation is being quoted as well as any material variation in the translations provided by the Parties.

1. Events and Treaties prior to 1904, Including the 1895 Transfer Treaty

19. Chile and Bolivia gained their independence from Spain in 1818 and 1825, respectively. At the time of its independence, Bolivia had a coastline of over 400 km along the Pacific Ocean.

20. On 10 August 1866, Chile and Bolivia signed a Treaty of Territorial Limits, which established a demarcation line between the two States, following the 24th parallel of latitude south, separating their Pacific coast territories. The instruments of ratification were exchanged on 9 December 1866. The boundary was confirmed by the Treaty of Limits of 6 August 1874, and the instruments of ratification thereof were exchanged on 28 July and 22 September 1875.

21. On 5 April 1879, Chile declared war on Peru and Bolivia. In the course of this war, which became known as the War of the Pacific, Chile occupied Bolivia's coastal territory. Bolivia and Chile put an end to the hostilities between them with the signature of the Truce Pact of 4 April 1884 in Valparaíso, Chile. Under the terms of the Truce Pact, Chile was, *inter alia*, to continue to govern "the territories from the parallel 23 to the mouth of the Loa River in the Pacific", i.e. the coastal region of Bolivia.

22. The Treaty of Peace between Chile and Peru signed on 20 October 1883 (hereinafter the "Treaty of Ancón") brought hostilities formally to an end between Chile and Peru. Pursuant to Article 2 of the Treaty of Ancón, Peru ceded to Chile the coastal province of Tarapacá. In addition, under Article 3, Chile would remain in the possession of the territories of the provinces of Tacna and Arica for a period of ten years, after which a plebiscite would be held to definitively determine sovereignty over those territories.

23. On 18 May 1895, Bolivia and Chile signed three treaties: a Treaty of Peace and Amity, a Treaty on the Transfer of Territory and a Treaty of Commerce. The Treaty of Peace and Amity reaffirmed Chile's sovereignty over the coastal territory it governed in accordance with the Truce Pact of 4 April 1884. Under the Treaty on the Transfer of Territory, Bolivia and Chile agreed, *inter alia*, that the territories of Tacna and Arica were to be transferred to Bolivia if Chile should acquire "dominion and permanent sovereignty" over them either by direct negotiations or by way of the plebiscite envisaged by the 1883 Treaty of Ancón. Should Chile fail to obtain the two territories mentioned above, either through direct negotiations with Peru or by plebiscite, Article IV of the Treaty on the Transfer of Territory provided that Chile would cede to Bolivia the territory "from the Vítor inlet up to the Camarones ravine, or an equivalent territory". These three treaties were followed by four protocols.

24. On 9 December 1895, Chile and Bolivia agreed to a Protocol on the scope of the obligations in the treaties of 18 May 1895 which clarified the obligations undertaken by the Parties. By an exchange of Notes of 29 and 30 April 1896, it was agreed that these three treaties of 18 May 1895 were to enter into force on the condition that the Congresses of both Chile and Bolivia approved this Protocol. As this condition was never met, the three treaties of 18 May 1895 never entered into force.

2. The 1904 Peace Treaty

25. The Treaty of Peace and Friendship of 20 October 1904 (hereinafter the "1904 Peace Treaty") officially ended the War of the Pacific as between Bolivia and Chile. This Treaty entered into force on 10 March 1905 after the instruments of ratification were exchanged between the Parties. Under the terms of its Article II, the territory occupied by Chile in application of the Truce Pact of 1884 was recognized as belonging "absolutely and in perpetuity" to Chile and the entire boundary between the two States was delimited. Article III provided for the construction of a railroad between the port of Arica and the plateau of La Paz, at the expense of Chile, which was inaugurated on 13 May 1913. Under Article VI, Chile granted to Bolivia "in perpetuity the amplest and freest right of commercial transit in its territory and its Pacific ports". Under Article VII of the Treaty, Bolivia had "the right to establish customs agencies in the ports which it may designate for its commerce" and indicated for this purpose the ports of Antofagasta and Arica.

3. Exchanges and Statements in the 1920s

A. The 1920 "Acta Protocolizada"

26. Before the events of 1920, in a memorandum of 22 April 1910, Bolivia, referring to the dispute between Chile and Peru regarding

the sovereignty of Tacna and Arica, had already expressed the view that:

> "[it] 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 foundation of its existence."

27. In a memorandum of 9 September 1919, submitted by the Minister Plenipotentiary of Chile in La Paz, Bolivia, it was stated, *inter alia*, that Chile was willing to initiate negotiations, independently of what was established by the 1904 Peace Treaty, in order for Bolivia to acquire an outlet to the sea subject to the result of the plebiscite envisaged by the 1883 Treaty of Ancón.

28. On 10 January 1920, the Minister for Foreign Affairs of Bolivia, and the Minister Plenipotentiary of Chile in La Paz met in order to address, *inter alia*, questions relating to Bolivia's access to the sea and documented the series of meetings in writing. These minutes are referred to by the Parties as "Acta Protocolizada".

29. The representative of Chile proposed the following terms of agreement:

> "I. The Treaty of Peace and Amity celebrated between Chile and Bolivia on 20 October 1904 defines the political relations of the two countries in a definitive manner and put an end to all the questions derived from the war of 1879.
>
> II. Chile has fulfilled the obligations that said Treaty imposed on it, and the essence of that negotiation was to link the territory of Tacna and Arica to Chile's dominion, Bolivia expressly committing to cooperate to that result.
>
> III. The Bolivian aspiration to its own port was replaced by the construction of the railway that connects the port of Arica with El Alto de la Paz and the rest of the obligations undertaken by Chile.
>
> IV. The situation created by the Treaty of 1904, the interests located in that zone and the security of its northern frontier, require Chile to preserve the maritime coast that is indispensable to it; however, for the purpose of founding the future union of the two countries on solid ground, Chile is willing to seek that Bolivia acquire its own access to the sea, ceding to it an important part of that zone in the north of Arica and of the railway line which is within the territories subject to the plebiscite stipulated in the Treaty of Ancón.
>
> V. Independently of what was established in the Treaty of Peace of 1904, Chile accepts to initiate new negotiations directed at satisfying the aspiration of the friendly country, subject to the victory of Chile in the plebiscite.

VI. A prior agreement would determine the line that must indicate the limit between the zones of Arica and Tacna that would pass to the dominion of Chile and Bolivia, respectively, as well as all other commercial compensations or compensations of another nature that are the basis of the agreement."

30. The representative of Bolivia then responded as follows:

"III. 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 de La Paz that has facilitated Bolivian trade, contributes to promoting the legitimate aspiration of securing a port that can be incorporated under Bolivian sovereignty. That aspiration will not, however, lead Bolivia to commit any act contrary to the law.

IV. The willingness demonstrated by Chile to obtain for Bolivia an access of its own to the sea, ceding to it a considerable part of the area north of Arica and of the railway line found within the territories subject to the plebiscite established by the Treaty of Ancón, opens the way to more friendly relations between both countries which are necessary for the future union of both peoples by laying solid foundations in line with their common goals."

31. The penultimate clause of the minutes specified that the Minister for Foreign Affairs of Bolivia considered that: "the present declarations do not contain provisions that create rights, or obligations for the States whose representatives make them".

B. Follow-up exchanges (1920-1925)

32. On 1 November 1920, Bolivia wrote to the Secretary-General of the League of Nations with a view to obtaining the revision of the 1904 Peace Treaty by the League of Nations, in accordance with Article 19 of the Treaty of Versailles which provided that the "Assembly may . . . advise the reconsideration by Members of the League of treaties which have become inapplicable".

33. On 28 September 1921, during the Twenty-Second Plenary Meeting of the Assembly of the League of Nations, Bolivia withdrew its request, following the determination by a commission of jurists that the Bolivian request was inadmissible. The reason given was that the Assembly of the League of Nations was not competent to modify treaties, as only the contracting States could do it. Bolivia nevertheless reserved its right to submit this request to the Assembly again.

34. During this meeting, the delegate of Chile replied, *inter alia*, that:

"Bolivia can seek satisfaction through the medium of direct negotiations of our own arranging. Chile has never closed that door to

> Bolivia, and I am in a position to state that nothing would please us better than to sit down with her and discuss the best means of facilitating her development."

The Chilean delegate also stated that:

> "[t]he Bolivian delegation has considered it necessary to make a statement to the effect that it 'reserves its rights'. I trust we are right in thinking that this statement signifies that, in conformity with the opinion of the Jurists, who declare that 'the modification of treaties lies solely within the competence of the contracting States', Bolivia has finally decided to exercise the only right she can assert: namely, the right of negotiation with Chile, not with a view to the revision of the Treaty of 1904 . . . We find it impossible to believe that Bolivia intends, in making this reservation of right, to leave definitely open, and to renew later, even in a different form, a request which is devoid of any legal foundation . . . Chile wishes to state that she will always oppose, as she opposes today, the inclusion in the agenda of the Assembly of any request of Bolivia with regard to a question upon which a ruling has already been given by a Committee of Jurists . . ."

35. In a letter dated 8 September 1922, the Bolivian delegate informed the Secretary-General of the League of Nations that Bolivia reiterated the reservation of its right to submit a request "for the revision or the examination" of the 1904 Peace Treaty and that negotiations with Chile had been "fruitless". On 19 September 1922, the Chilean delegate to the Assembly of the League of Nations responded as follows:

> "in accordance with the declaration made by its delegation at the second Assembly, the Chilean Government has expressed the greatest willingness to enter into direct negotiations, which it would conduct in a spirit of frank conciliation.
>
> I desire to state that the declaration of M. Gutierrez, concerning the mission of the Bolivian Minister at Santiago, is not in accordance with the true facts of the case.
>
> The President of the Republic of Chile . . . informed the Bolivian representative . . . that he did not recognize the right of the Bolivian Government to claim a port on the Pacific Ocean, since Bolivia abandoned that aspiration when it signed the Treaty of Peace of 1904, and obtained in exchange the assumption by Chile of heavy engagements which have been entirely carried out. The President of the Republic added that the aspirations of Bolivia might be satisfied by other means, and that his Government was quite ready to enter into negotiations on this subject in a sincere spirit of peace and conciliation."

36. In 1922 and 1923, parallel to its attempts to revise the 1904 Peace Treaty, Bolivia further continued to negotiate directly with Chile in order to obtain sovereign access to the Pacific Ocean.

37. On 6 February 1923, in response to a Note of 27 January 1923 of the Bolivian Minister for Foreign Affairs and Worship, in which the revision of the 1904 Peace Treaty was proposed, the Chilean Minister for Foreign Affairs stated that the Chilean Government remained open to the Bolivian proposals aimed at concluding a new Pact to address "Bolivia's situation, but without modifying the Peace Treaty and without interrupting the continuity of the Chilean territory". He added that Chile "will devote great efforts to consult [Bolivia], in light of the concrete proposals that Bolivia submits and when appropriate, the bases of direct negotiations leading, through mutual compensation and without detriment to inalienable rights, to the fulfilment of this longing".

38. In a Note dated 12 February 1923 to the Chilean Minister for Foreign Affairs, the Minister Plenipotentiary of Bolivia in Chile requested the revision of the 1904 Peace Treaty and stated that:

> "If the request that I was asked to make does not receive the response that my country expects, and instead you inform me that the Chilean Ministry of Foreign Affairs is willing to hear the proposals that my Government wants to submit to it, in order to enter into a treaty at the right time, and with mutual compensation, which, without modifying the Treaty of Peace and without interrupting the continuity of Chilean territory, considers the situation and Bolivia's aspirations and which your Government would make every effort to bring about, I can do nothing more than tell you that my Government has instructed me to put an end to these negotiations, as the reason for them was to seek a firm and secure basis on which Bolivia's aspirations could be reconciled with Chile's interests."

39. In a Note of 22 February 1923 to the Minister Plenipotentiary of Bolivia in Chile, the Minister for Foreign Affairs of Chile stated:

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

maritime vindication that Your Excellency's note suggests. I would like to take this opportunity to state, once again, my Government's willingness to discuss the proposals that the Bolivian Government wishes to present in this regard."

40. In a press interview of 4 April 1923, the President of Chile, Mr. Arturo Alessandri, made the following statement in which, notably, he referred to the decision of 1922 of Peru and Chile to submit their territorial dispute over Tacna and Arica to arbitration by the President of the United States of America:

"[L]egally, we have no commitment towards Bolivia. We have had our relations completely and definitively settled by the solemn faith undertaken when both countries signed the Treaty of Peace and Amity on 20 October 1904.

. . . . . .

This Treaty, which was highly beneficial to Bolivia and gave it free and perpetual access to the Pacific Ocean, was established on the condition that such country renounce its right to any port claims in the Pacific and Chile, the victorious country, fully paid for the territory that was ceded, since the pecuniary obligations imposed on Chile, which have been religiously performed, represent for Chile an approximate cost of around eight million pounds sterling.

. . . . . .

Notwithstanding the foregoing, I repeat that, in case the arbitral award of Washington allows it, Chile, who insists on its longing to contribute all its resources to the tranquility of America, will generously consider the port aspirations of Bolivia in the form and terms clearly and frequently posed in the Note of the Ministry of Foreign Affairs of Chile, addressed to the Bolivian Minister in Chile, on 6 February."

41. By an arbitral award of 1925, the President of the United States, Mr. Calvin Coolidge, set forth the terms of the plebiscite over Tacna and Arica provided for in Article 3 of the Treaty of Ancón (*Tacna-Arica Question (Chile, Peru)*, 4 March 1925, *Reports of International Arbitral Awards (RIAA)*, Vol. II, pp. 921-958).

C. The 1926 Kellogg Proposal and the 1926 Matte Memorandum

42. On 30 November 1926, the Secretary of State of the United States of America, Mr. Frank B. Kellogg, submitted a proposal to Chile and Peru, regarding the question of sovereignty over the provinces of Tacna and Arica. It reads as follows:

"I have decided to outline and place before the two Governments a plan which, in my judgment, is worthy of their earnest attention . . .

This plan calls for the co-operation of a third power, Bolivia, which has not yet appeared in any of the negotiations, at least so far as my Government is concerned. While the attitude of Bolivia has not been ascertained, save that her aspiration to secure access to the Pacific is common knowledge, it seems reasonable to assume that Bolivia, by virtue of her geographical situation, is the one outside power which would be primarily interested in acquiring, by purchase or otherwise the subject matter of the pending controversy.

With this preface let me now define the concrete suggestion which I have in mind:

(a) 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."

43. On 2 December 1926, the Minister for Foreign Affairs of Bolivia wrote to the Minister Plenipotentiary of the United States of America in La Paz expressing Bolivia's full acceptance of the Kellogg proposal.

44. By a memorandum of 4 December 1926 (the "Matte Memorandum") addressed to the Secretary of State of the United States of America, the Minister for Foreign Affairs of Chile expressed his position towards the proposal of the Secretary of State of the United States of America, in the following terms:

"The [R]epublic of Bolivia which 20 years after the termination of the war spontaneously renounced the total sea coast, asking, as more suitable for its interests, compensation of a financial nature and means of communication, has expressed its desire to be considered in the negotiations which are taking place to determine the nationality of these territories. Neither in justice nor in equity can justification be found for this demand which it formulates today as a right.

Nevertheless, the Government of Chile has not failed to take into consideration, this new interest of the Government of Bolivia and has subordinated its discussion, as was logical, to the result of the pending controversy with the Government of Peru. Furthermore, in the course of the negotiations conducted during the present year before the State Department and within the formula of territorial division, the Government of Chile has not rejected the idea of granting a strip of territory and a port to the Bolivian nation.

. . . . . .

> The proposal of the Department of State goes much farther than the concessions which the Chilean Government has generously been able to make. It involves the definitive cession to the [R]epublic of Bolivia of the territory in dispute, and, although, as the Secretary of State says, this solution does not wound the dignity of the contending countries and is in harmony with the desire, repeatedly shown by the Chilean Government, to help satisfy Bolivian aspirations, it is no less true that it signifies a sacrifice of our rights and the cession of a territory incorporated for 40 years in the [R]epublic by virtue of a solemn [T]reaty, a situation which cannot be juridically altered, except by a plebiscite, whose result offers no doubt whatever in the opinion of the Chilean people."

45. Subsequently, in a Note of 7 December 1926 to the Minister Plenipotentiary of Chile in Bolivia, the Minister for Foreign Affairs of Bolivia noted that, in his country's view, "Chile welcome[d] the proposal issued by the Secretary of State of the United States".

46. Finally, by a memorandum dated 12 January 1927, the Minister for Foreign Relations of Peru informed the Secretary of State of the United States of America that the Peruvian Government did not accept the United States' proposal regarding Tacna and Arica.

4. Bolivia's Reaction to the 1929 Treaty of Lima and Its Supplementary Protocol

47. Due to difficulties arising in the execution of the 1925 arbitral award between Chile and Peru concerning the terms of the plebiscite over Tacna and Arica provided for in Article 3 of the Treaty of Ancón, Chile and Peru agreed to resolve the issue of sovereignty over Tacna and Arica by treaty rather than to hold a plebiscite to determine sovereignty.

48. On 3 June 1929, Chile and Peru concluded the Treaty of Lima, whereby they agreed that sovereignty over the territory of Tacna belonged to Peru, and that over Arica to Chile. In a Supplementary Protocol to this Treaty, Peru and Chile agreed, *inter alia*, to the following:

> "The Governments of Chile and Peru shall not, without previous agreement between them, cede to any third Power the whole or a part of the territories which, in conformity with the Treaty of this date, come under their respective sovereignty, nor shall they, in the absence of such an agreement, construct through those territories any new international railway lines." (Art. I.)

49. In a memorandum to the Secretary of State of the United States of America dated 1 August 1929, upon receipt of this agreement, the Minister for Foreign Affairs of Bolivia affirmed that this new agreement between Chile and Peru would not result in Bolivia renouncing its "policy of restoration of [its] maritime sovereignty".

5. The 1950 Exchange of Notes

50. In the late 1940s, Bolivia and Chile held further discussions regarding Bolivia's access to the sea. Notably, in a Note dated 28 June 1948, the Ambassador of Bolivia in Chile reported to the Minister for Foreign Affairs of Bolivia his interactions with the Chilean President, Mr. Gabriel González Videla, regarding the opening of these negotiations and included a draft protocol containing Bolivia's proposal.

51. In a Note dated 1 June 1950, the Ambassador of Bolivia to Chile made the following formal proposal to the Minister for Foreign Affairs of Chile to enter into negotiations *(Bolivia's translation)*:

> "With such important precedents *(translated by Chile as "background")*, that identify a clear policy direction of the Chilean Republic, I have the honour of proposing to His Excellency 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, solving the problem of Bolivia's landlocked situation on terms that take into account the mutual benefit and genuine interests of both nations."
>
> ("Con tan importantes antecedentes, que al respecto señalan una clara orientación de la política internacional seguida por la República chilena, tengo a honra proponer a Vuestra Excelencia que los gobiernos de Bolivia y de Chile ingresen formalmente a una negociación directa para satisfacer la fundamental necesidad boliviana de obtener una salida propia y soberana al Océano Pacífico, resolviendo así el problema de la mediterraneidad de Bolivia sobre bases que consulten las recíprocas conveniencias y los verdaderos intereses de ambos pueblos.")

52. In a Note of 20 June 1950, the Minister for Foreign Affairs of Chile responded as follows *(Chile's translation)*:

> "From the quotes contained in the note I answer, it flows that the Government of Chile, together with safeguarding the *de jure* situation established in the Treaty of Peace of 1904, has been willing to study through direct efforts *(translated by Bolivia as "direct negotiations")* with Bolivia the possibility of satisfying the aspirations of the Government of Your Excellency and the interests of Chile.
>
> At the present opportunity, I have the honour of expressing to Your Excellency that my Government will be consistent with that position and that, motivated by a fraternal spirit of friendship towards

> Bolivia, is open formally to enter into a direct negotiation aimed at searching for a formula *(translated by Bolivia as "is willing to formally enter into direct negotiations aimed at finding a formula")* that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests."
>
> ("De la citas contenidas en la nota que contesto, fluye que el Gobierno de Chile, junto con resguard[ar] la situación de derecho establecida en el Tratado de Paz de 1904, ha estado dispuesto a estudiar, en gestiones directas con Bolivia, la posibilidad de satisfacer las aspiraciones del Gobierno de Vuestra Excelencia y los intereses de Chile. En la presente oportunidad, tengo el honor de expresar a Vuestra Excelencia que mi Gobierno será con[se]cuente con esa posición y que, animado de un espíritu de eternal amistad hacia Bolivia, está llano a entrar formalmente en una negociación directa destinada a buscar la fórmula que pueda hacer posible dar a Bolivia una salida propia y soberana al Océano Pacífico, y a Chile obtener las compensaciones que no tengan carácter territorial y que consulten efectivamente sus intereses.")

53. The negotiations between Chile and Bolivia did not make any further progress in the following years. On 29 March 1951, the President of Chile, Mr. Gabriel González Videla, stated as follows:

> "[T]he policy of the Chilean Government has unvaryingly been a single one: to express its willingness to give an ear to any Bolivian proposal aimed at solving its landlocked condition, provided that it is put forward directly to us and that it does not imply renouncing our traditional doctrine of respect for international treaties, which we deem essential for a peaceful coexistence between Nations.
>
> . . . . . .
>
> Every time Bolivia has updated its desire for an outlet to the sea, consideration was naturally given to what that country might offer us as compensation in the event that an agreement is reached on this particular matter with Chile and Peru."

6. The 1961 Trucco Memorandum

54. From 1951 to 1957, the exchanges between the Parties were focused on improving the practical implementation of the régime for Bolivia's access to the Pacific Ocean.

55. On 10 July 1961, upon learning about Bolivia's intention to raise the issue of its access to the Pacific Ocean during the Inter-American Conference which was to take place later that year in Quito, Ecuador, Chile's Ambassador in Bolivia, Mr. Manuel Trucco, handed to the Minister for Foreign Affairs of Bolivia a memorandum which he had earlier

addressed to the Minister for Foreign Affairs of Chile, known as the "Trucco Memorandum". It reads as follows *(Chile's translation)*:

> "1. Chile has always been open *(translated by Bolivia as "been willing")*, together with safeguarding the *de jure* situation established in the Treaty of Peace of 1904, to study, in direct dealings with Bolivia, the possibility of satisfying its aspirations and the interests of Chile. Chile will always reject the resort, by Bolivia, to organizations which are not competent to resolve a matter which is already settled by Treaty and could only be modified by direct agreement *(translated by Bolivia as "direct negotiations")* of the parties.
>
> 2. Note number 9 of our Ministry of Foreign Affairs, dated in Santiago on 20 June 1950, is a clear testimony *(translated by Bolivia as "clear evidence")* of those purposes. Through it, Chile states that it is 'open formally to enter into a direct negotiation aimed at searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean *(translated by Bolivia as "expresses having 'full consent to initiate as soon as possible, direct negotiations aimed at satisfying the fundamental national need of own sovereign access to the Pacific Ocean'")*, and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests.'
>
> 3. Given that President Paz Estenssoro manifested his willingness to visit President Alessandri, in response to the invitation made by the President of Chile, it would seem particularly untimely and inconvenient to unsettle public opinion in both countries with the announcement of resorting to international organizations to deal with a problem that the Government of Bolivia has not specified *(translated by Bolivia as "has not resolved")* in its direct relations with the Government of Chile."
>
> ("1. Chile ha estado siempre llano, junto con resguardar la situación de derecho establecida en el Tratado de Paz de 1904, a estudiar, en gestiones directas con Bolivia, la posibilidad de satisfacer las aspiraciones de ésta y los intereses de Chile. Chile rechazará siempre el recurso, por parte de Bolivia, a organismos que no son competentes para resolver un asunto zanjado por Tratado, y que sólo podría modificarse por acuerdo directo de las partes. 2. La nota No. 9 de nuestra Cancillería, fechada en Santiago el 20 de junio de 1950, es claro testimonio de esos propósitos. Mediante ella, Chile manifiesta estar 'llano a entrar formalmente en una negociación directa destinada a buscar la fórmula que pueda hacer posible dar a Bolivia una salida propia y soberana al Océano Pacífico, y a Chile obtener las compen-

> saciones que no tengan carácter territorial y que consulten efectivamente sus intereses.' 3. Habiendo significado el Presidente Paz Estenssoro su voluntad de visitar el Presidente Alessandri, en respuesta a la invitación que el Presidente de Chile le formulara, pareciera especialmente extemporáneo e inconveniente agitar a la opinión pública de ambos países con el anuncio de recurrir a organismos internacionales para tratar de un problema que el Gobierno de Bolivia no ha concretado en sus relaciones directas con el Gobierno de Chile.")

56. In reply to this memorandum, the Ministry for Foreign Affairs of Bolivia, on 9 February 1962, expressed

> "its full consent to initiate, as soon as possible, direct negotiations aimed at satisfying the fundamental national need of its 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".

57. On 15 April 1962, Bolivia severed diplomatic relations with Chile as a consequence of the latter's use of waters of the River Lauca.

58. On 27 March 1963, the Minister for Foreign Affairs of Chile indicated that Chile "was not willing to enter into discussions that could affect national sovereignty or involve a cession of territory of any kind" and denied that the Trucco Memorandum constituted "an official note", emphasizing that it was merely an "Aide Memoire" recalling "a simple statement of points of view at a certain time". It also stated that Chile had an interest in improving "all the means of transport between the two countries" and had proposed to engage in a joint action of economic development.

59. On 3 April 1963, the Minister for Foreign Affairs of Bolivia maintained that the 1950 exchange of Notes was constitutive of a "commitment" of the Parties, a contention rejected by Chile in a letter dated 17 November 1963 to the Minister for Foreign Affairs of Bolivia. In a Note sent by the President of Bolivia, Mr. René Barrientos Ortuño, to the President of Uruguay, Mr. Oscar Diego Gestido, regarding Bolivia's absence from the meeting of the Heads of State of the American nations held in Punta del Este in 1967 and in the subsequent response of the Minister for Foreign Affairs of Chile the opposing views of Bolivia and Chile regarding the nature of the exchange of Notes of 1950 were again in evidence.

7. The Charaña Process

60. On 15 March 1974, a joint communiqué was signed by the Presidents of Bolivia and Chile, General Banzer and General Pinochet, respectively, expressing their agreement to initiate negotiations on "pending and fundamental issues for both nations".

61. On 9 December 1974, several States of Latin America, including Bolivia and Chile, signed the Declaration of Ayacucho which specified, regarding the Bolivian situation, that:

> "Upon reaffirming the historic commitment to strengthen, once more, 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."

62. On 8 February 1975, a Joint Declaration was signed at Charaña by the Presidents of Bolivia and Chile, known as the Charaña Declaration, which stated, *inter alia*, *(Bolivia's translation):*

> "3. In this regard, the Presidents reaffirmed their full support of the Declaration of Ayacucho in which the spirit of solidarity and openness to understandings of this part of America is faithfully reflected.
>
> 4. Both Heads of State, within a spirit of mutual understanding and constructive intent, have decided *(translated by Chile as "have resolved")* to continue the dialogue, at different levels, in order to search for formulas *(translated by Chile as "seek formulas")* to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia, taking into account the mutual interests *(translated by Chile as "their reciprocal interests")* and aspirations of the Bolivian and Chilean peoples.
>
> 5. The two Presidents have decided *(translated by Chile as "have resolved")* to continue developing a policy of harmony and understanding so that, in an atmosphere of co-operation, the formulas for peace and progress in the continent will be found."

> ("3. En este sentido, los Presidentes reafirmaron su plena adhesión a la Declaración de Ayacucho, en la que se refleja fielmente un espíritu solidario y abierto al entendimiento en esta parte de América.
> 4. Ambos mandatarios, con ese espíritu de mutua comprensión y ánimo constructivo, han resuelto se continúe el diálogo a diversos niveles, para buscar fórmulas de solución a los asuntos vitales que ambos países confrontan, como el relativo a la situación de mediterraneidad que afecta a Bolivia, dentro de recíprocas conveniencias y atendiendo a las aspiraciones de los pueblos boliviano y chileno.
> 5. Los dos Presidentes han resuelto seguir desarrollando una política en favor de la armonía y el entendimiento, para que, en un clima de cooperación se encuentre, en conjunto, una fórmula de paz y progreso en nuestro Continente.")

63. In a speech of 11 September 1975, the President of Chile, General Pinochet, stated that:

> "with deep satisfaction I can note . . . the resuming of our traditional links with Bolivia, which has been suspended for over 13 years. Since

the Charaña meeting with the President of Bolivia, we have repeated our unchanging purpose of studying, together with that brother country, within the framework of a frank and friendly negotiation, the obstacles that limit Bolivia's development on account of its landlocked condition. We trust we will find a just, timely and lasting solution."

64. In pursuance of the "dialogue" referred to in the Joint Declaration of Charaña, Bolivia proposed guidelines for negotiations on 26 August 1975. In December of that year, Chile presented its counter-proposal for guidelines, which included a condition of territorial exchange. It reads as follows:

. . . . . .

"*(b)* On this basis, the Chilean response is based on a mutually convenient arrangement that would take into account the interests of both countries and that would not contain any innovation to the provisions of the Treaty of Peace, Amity, and Commerce signed between Chile and Bolivia on 20 October 1904.

(c) As His Excellency President Banzer stated, the cession to Bolivia of a sovereign maritime coastline, linked to Bolivian territory through an equally sovereign territorial strip, would be considered.

(d) Chile would be willing to negotiate with Bolivia the cession of a strip of territory north of Arica up to the Concordia Line based on the following delimitations:

— North Boundary: Chile's current boundary with Peru.

— South Boundary: Gallinazos ravine and the upper edge of the ravine north of the River Lluta, (so that the A-15 highway from Arica to Tambo Quemado would in its entirety be part of Chilean territory) up until a point to the South of Puquios Station, and then an approximately straight line passing through contour 5370 of Cerro Nasahuento and extending to the current international boundary between Chile and Bolivia.

— Area: the cession would include the land territory described above and the maritime territory comprised between the parallels of the end points of the coast that would be ceded (territorial sea, economical zone, and submarine shelf).

(e) The Government of Chile rejects, for being unacceptable, the cession of territory to the south of the indicated limit, that could affect in any way the territorial continuity of the country.

(f) The cession to Bolivia described in section *(d)* would be subject to a simultaneous exchange of territories, that is to say, Chile would at the same time receive in exchange for what it hands over a compensatory area at least equal to the area of land and sea ceded to Bolivia.

The territory that Chile would receive from Bolivia could be continuous or composed of different portions of border territory

. . . . . .

(i) The Government of Bolivia would authorize Chile to use all of the waters in the River Lauca.

(j) The territory ceded by Chile would be declared a Demilitarized Zone and, in accordance with previous conversations, the Bolivian Government would undertake to obtain the express guarantee of the Organization of American States with respect to the inviolability of the ceded land strip

. . . . . .

(m) Bolivia shall commit to respect the easements in favour of Peru established in the Chilean-Peruvian Treaty of 3 June 1929.

(n) The force of this agreement shall be conditioned upon Peru's prior agreement in accordance with Article 1 of the Supplementary Protocol to the aforementioned Treaty."

65. Chile's proposal was accepted by Bolivia as a basis for the negotiations. However, in January 1976, Bolivia specified that its acceptance of the condition of the territorial exchange was subject "to a clarification of the maritime area, in view of the fact that the extension of internal waters, territorial sea and patrimonial sea has not yet been defined by the International Community" and it reserved "the right to negotiate the areas that might be potentially exchanged". In March 1976, the Minister for Foreign Affairs of Bolivia recalled that Bolivia had not assumed definitive commitments on this issue and declared as follows:

> "We have categorically declared that we accept global bases of negotiation that take into account the reciprocal interests of our two countries, particularly as regards those matters on which there is common ground between us. All other matters contained in the documents forming the background to the negotiations, i.e. Bolivia's proposal and the Government of Chile's response, would be addressed at a later stage of the negotiations. Consequently, we want to make clear that our Government has not accepted the demilitarization of the area to be handed over to Bolivia, inasmuch as it would lead to a limitation of sovereignty, the use of the waters of the Lauca River as a whole, or a territorial exchange that would extend over maritime areas."

66. By an exchange of Notes of 28 July and 11 August 1976, Chile and Bolivia agreed to establish a mixed permanent commission, which was created on 18 November 1976, "to discuss any issues of common interest to both countries". Throughout 1976, at several junctures, Bolivia confirmed that it was willing to consider transferring certain areas of its territory for an equivalent portion of Chilean territory.

67. On 19 December 1975, pursuant to the guidelines for negotiations and the Supplementary Protocol to the Treaty of Lima of 3 June 1929, Chile asked Peru whether it agreed with the territorial cession envisaged between Bolivia and Chile. In November 1976, Peru replied with a counter-proposal for the creation of an area under tripartite sovereignty, which was not accepted by either Chile or Bolivia. However, Peru refused to change its position on this matter.

68. On 24 December 1976, the President of Bolivia, General Banzer, publicly announced that he "propose[d] that the Government of Chile modify its proposal to eliminate the condition regarding an exchange of territory" if they were to continue the negotiations. However, throughout 1977, the negotiations continued on the basis of the exchanges of 1975. On 10 June 1977, the Ministers for Foreign Affairs of Bolivia and Chile issued a Joint Declaration, stating that:

> "[t]hey emphasize that the dialogue established via the Declaration of Charaña reflects the endeavouring of the two Governments to deepen and strengthen the bilateral relations between Chile and Bolivia by seeking concrete solutions to their respective problems, especially with regard to Bolivia's landlocked situation. Along these lines, they indicate that, consistently with this spirit, they initiated negotiations aimed at finding an effective solution that allows Bolivia to count on a free and sovereign outlet to the Pacific Ocean.
>
> Taking as a basis both Ministers' constructive analysis of the course of the negotiations regarding Bolivia's vital problem, they resolve to deepen and activate their dialogue, committing to do their part to bring [their] negotiation to a happy end as soon as possible.
>
> Consequently, they reaffirmed the need to pursue the negotiations from their current status."

69. In a letter of 21 December 1977, the President of Bolivia informed his Chilean counterpart that, in order to continue the negotiations, new conditions should be established to achieve the objectives set by the Joint Declaration of Charaña, notably that both the condition of territorial exchange and Peru's proposal for a zone of shared sovereignty between the three countries should be withdrawn. In January 1978, Chile informed Bolivia that the guidelines for negotiations agreed in December 1975 remained the foundation of any such negotiations.

70. On 17 March 1978, Bolivia informed Chile that it was suspending diplomatic relations between them, given Chile's lack of flexibility with respect to the conditions of the negotiations and Chile's lack of effort to obtain Peru's consent to the exchange of territory.

8. Statements by Bolivia and Chile at the Organization of American States and Resolutions Adopted by the Organization

71. On 6 August 1975, the Permanent Council of the OAS, of which Bolivia and Chile are Member States, adopted by consensus resolution CP/RES. 157 which stated that Bolivia's landlocked status was a matter of "concern throughout the hemisphere", and that all American States offered their co-operation in "seeking solutions" in accordance with the principles of international law and the Charter of the OAS.

72. This resolution was followed by 11 other resolutions, reaffirming the importance of dialogue and of the identification of a solution to the maritime problem of Bolivia, adopted by the General Assembly of the OAS between 1979 and 1989. Chile did not vote in favour of any of the 11 resolutions, but did not oppose consensus on three occasions, while making declarations or explanations with respect to the content and legal status of the resolutions adopted.

73. In particular, on 31 October 1979, the General Assembly of the OAS adopted resolution AG/RES. 426, which stated that it was "of continuing hemispheric interest that an equitable solution be found whereby Bolivia [would] obtain appropriate sovereign access to the Pacific Ocean". The representative of Chile protested against the draft resolution, contesting the jurisdiction of the General Assembly of the OAS in this matter, and added in a statement of 31 October 1979 that:

> "Consequently, Chile emphatically declares that, in accordance with the legal rules indicated, this resolution does not obstruct it or bind it or obligate it in any way.
>
> On repeated occasions I have indicated Chile's willingness to negotiate a solution with Bolivia to its aspiration to have free and sovereign access to the Pacific Ocean. The way to reach that goal is direct negotiation, conducted at a level of professionalism and mutual respect, without any interference, suggestions or dictates from anyone.
>
> Once again Bolivia has rejected this way, and the path that it has chosen through this resolution, in an attempt to condition and put pressure on Chile, creates an insuperable obstacle to opening negotiations that will satisfy its aspiration and duly contemplate the dignity and sovereignty of both parties.
>
> This Assembly has closed that path. It has made the possibility of Bolivia obtaining satisfaction of its maritime aspiration more remote.
>
> As long as it insists on the path indicated by this resolution, as long as it rejects the proper and logical path of free negotiations without any conditions between the two countries, as long as it attempts to put pressure on Chile through foreign interference, Bolivia will have no outlet to the sea through Chilean territory. The responsibility will not have been Chile's."

74. In 1983, the General Assembly of the OAS adopted resolution AG/RES. 686. Both Bolivia and Chile took part in drafting this resolution through the good offices of Colombia, which recommended a process of

> "rapprochement . . . directed toward normalizing relations [between Bolivia and Chile] and overcoming the difficulties that separate them — including, especially, a formula for giving Bolivia a sovereign outlet to the Pacific Ocean".

Chile did not oppose consensus, expressing support for the draft resolution, with some reservations.

75. In 1987 and 1988, the General Assembly of the OAS issued two resolutions — AG/RES. 873 and AG/RES. 930 (XVIII-0/88) — expressing

> "regret . . . that the latest talks held between Chile and Bolivia were broken off, and to again urge the [S]tates 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".

9. The "Fresh Approach" of 1986-1987

76. After the presidential elections in Bolivia in July 1985, new negotiations were opened between Bolivia and Chile, within the framework of what was called the "fresh approach". In November 1986, the renewal of Bolivia and Chile's negotiations was reported to the General Assembly of the OAS which took note of it with the adoption of resolution AG/RES. 816. On 13 November 1986, the Ministers for Foreign Affairs of Bolivia and Chile each issued a communiqué in which they stated that they were to carry out the talks, initiated that year, in a meeting scheduled in April 1987. In his communiqué, the Minister for Foreign Affairs of Bolivia specified that they were to consider "the aspects related to the maritime issue of Bolivia".

77. The meeting held between 21 and 23 April 1987 in Montevideo, Uruguay, between the Parties was opened by speeches of the Ministers for Foreign Affairs of Chile and Bolivia. During this meeting, Bolivia presented two alternative proposals to gain access to the Pacific Ocean, both involving the transfer of a part of Chilean territory. The first proposal involved the sovereign transfer to Bolivia of a strip of land linked to the maritime coast and the second one proposed the transfer of a "territorial and maritime enclave in the north of Chile", with three different alternative locations that would not "affect the territorial continuity of Chile". On 9 June 1987, Chile rejected both proposals. On 17 June, before the General Assembly of the OAS, the representative of Bolivia announced the suspension of bilateral negotiations between the two States as a con-

sequence of their inability to reach agreement based on its proposals of April 1987. By a resolution of 14 November 1987, the General Assembly of the OAS recorded the discontinuance of the talks between Chile and Bolivia.

10. The Algarve Declaration (2000) and the 13-Point Agenda (2006)

78. In 1995, the Parties resumed their discussions. They launched a "Bolivian-Chilean mechanism of Political Consultation" to deal with bilateral issues. On 22 February 2000, the Ministers for Foreign Affairs of both countries issued a joint communiqué, the "Algarve Declaration", envisaging a working agenda which would include "without any exception, the essential issues in the bilateral relationship".

79. From 2000 to 2003, the Parties engaged in discussions regarding a Chilean concession to Bolivia for the creation of a special economic zone for an initial time period of 50 years, but the project was finally rejected by Bolivia. On 1 September 2000, the Presidents of Bolivia and Chile, General Banzer and Mr. Lagos, 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".

80. Following different exchanges throughout 2005 and 2006, on 17 July 2006, the Vice-Ministers for Foreign Affairs of Bolivia and Chile publicly announced a 13-Point Agenda, encompassing "all issues relevant to the bilateral relationship" between the Parties, including the "maritime issue" (Point 6). The topics included in the 13-Point Agenda, notably the question of the maritime issue, were discussed in the subsequent meetings of the Bolivian-Chilean mechanism of Political Consultation until 2010.

81. In 2009 and 2010, the creation of a Bolivian enclave on the Chilean coast was discussed between the Parties. In January 2011, the Parties agreed to continue the discussions with the establishment of a High Level Bi-National Commission.

82. On 7 February 2011, the Bolivian and Chilean Ministers for Foreign Affairs issued a Joint Declaration stating that:

> "The High Level Bi-National Commission examined the progress of the Agenda of the 13 Points, especially the maritime issue . . . 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."

83. On 17 February 2011, the President of Bolivia, Mr. Morales, requested "a concrete proposal by 23 March [2011] . . . as a basis for a

discussion". During a meeting on 28 July 2011, the President of Chile, Mr. Piñera, reiterated to his Bolivian counterpart, Mr. Morales, the terms of his proposal based on the three following conditions: the compliance with the 1904 Peace Treaty, the absence of grant of sovereignty and the modification of the provision of the Bolivian Constitution referring to the right of Bolivia to an access to the Pacific Ocean. Given the divergent positions of the Parties, the negotiations came to an end, as the statements of 7 June 2011 of the Heads of the Bolivian and Chilean Legation before the General Assembly of the OAS show.

II. Preliminary Considerations

84. Before examining the legal bases invoked by Bolivia with regard to Chile's alleged obligation to negotiate Bolivia's sovereign access to the Pacific Ocean, the Court will analyse the meaning and scope of Bolivia's submissions.

85. In its submissions, which have remained unchanged since the Application, Bolivia has requested the Court to adjudge and declare that "Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean".

86. While States are free to resort to negotiations or put an end to them, they may agree to be bound by an obligation to negotiate. In that case, States are required under international law to enter into negotiations and to pursue them in good faith. As the Court recalled in the *North Sea Continental Shelf* cases, States "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification" (*I.C.J. Reports 1969*, p. 47, para. 85). Each of them "should pay reasonable regard to the interests of the other" (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132).

87. Negotiations between States may lead to an agreement that settles their dispute, but, generally, as the Court observed quoting the Advisory Opinion on *Railway Traffic between Lithuania and Poland* (*P.C.I.J., Series A/B, No. 42*, p. 116), "an obligation to negotiate does not imply an obligation to reach an agreement" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 68, para. 150). When setting forth an obligation to negotiate, the parties may, as they did for instance in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, establish an "obligation to achieve a precise result" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 99). Bolivia's submissions could be understood as referring to an obligation with a similar character.

88. As the Court observed in its Judgment on the preliminary objection, "Bolivia does not ask the Court to declare that it has a right to sovereign access to the sea" (*I.C.J. Reports 2015 (II)*, p. 605, para. 33). What Bolivia claims in its submissions is that Chile is under an obligation to negotiate "in order to reach an agreement granting Bolivia a fully sovereign access" (*ibid.*, para. 35).

89. In its Judgment on Chile's preliminary objection, the Court determined "that the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean" (*ibid.*, para. 34). As the Court observed, this alleged obligation does not include a commitment to reach an agreement on the subject-matter of the dispute.

90. The term "sovereign access" as used in Bolivia's submissions could lead to different interpretations. When answering a question raised by a Member of the Court at the end of the hearings on Chile's preliminary objection, Bolivia defined sovereign access as meaning that "Chile must grant Bolivia its own access to the sea with sovereignty in conformity with international law". In its Reply, Bolivia further specified that a "sovereign access exists when a State does not depend on anything or anyone to enjoy this access" and that "sovereign access is a regime that secures the uninterrupted way of Bolivia to the sea — the conditions of this access falling within the exclusive administration and control, both legal and physical, of Bolivia".

III. The Alleged Legal Bases of an Obligation to Negotiate Bolivia's Sovereign Access to the Pacific Ocean

91. In international law, the existence of an obligation to negotiate has to be ascertained in the same way as that of any other legal obligation. Negotiation is part of the usual practice of States in their bilateral and multilateral relations. However, the fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate. In particular, for there to be an obligation to negotiate on the basis of an agreement, the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound. This intention, in the absence of express terms indicating the existence of a legal commitment, may be established on the basis of an objective examination of all the evidence.

92. Bolivia invokes a variety of legal bases on which an obligation for Chile to negotiate Bolivia's sovereign access to the Pacific Ocean allegedly rests. The arguments concerning these bases will be examined in the following paragraphs.

93. The Court will first analyse whether any of the instruments invoked by the Applicant, in particular bilateral agreements, or declarations and

other unilateral acts, gives rise to an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The Court will then examine, if necessary, the other legal bases invoked by the Applicant, namely acquiescence, estoppel and legitimate expectations. Finally, the Court will address, if warranted, the arguments based on the Charter of the United Nations and on the Charter of the OAS.

1. Bilateral Agreements

94. Bolivia's claim mainly rests on the alleged existence of one or more bilateral agreements that would impose on Chile an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. According to Bolivia, the Parties reached some agreements that either establish or confirm Chile's obligation to negotiate. These alleged agreements occurred in different periods of time and will be analysed separately in chronological order.

95. Bolivia argues that, like treaties in written form, oral and tacit agreements can produce legal effects and be binding between the parties. Bolivia submits that, even though the 1969 Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention") does not apply to such agreements, their legal force, according to Article 3 of the Vienna Convention, is not affected. Bolivia maintains that, whether an instrument is capable of setting forth binding obligations is a matter of substance, not of form. Bolivia contends that the intention of the Parties to create rights and obligations in a particular instrument must be identified in an objective manner.

96. Chile acknowledges that, in order to assess whether there is a binding international agreement, the intention of the Parties must be established in an objective manner. However, Chile argues that, following an analysis of the text of the instruments invoked by Bolivia and the circumstances of their formation, neither State had the intention to create a legal obligation to negotiate Bolivia's sovereign access to the sea. According to Chile, an expression of willingness to negotiate cannot create an obligation to negotiate on the Parties. Chile argues that, if the words used "are not suggestive of legal obligations, then they will be characterizing a purely political stance". Chile further maintains that only in exceptional cases has the Court found that a tacit agreement has come into existence.

* *

97. The Court notes that, according to customary international law, as reflected in Article 3 of the Vienna Convention, "agreements not in written form" may also have "legal force". Irrespective of the form that agreements may take, they require an intention of the parties to be bound by legal obligations. This applies also to tacit agreements. In this respect, the Court recalls that "[e]vidence of a tacit legal agreement must be com-

pelling" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 735, para. 253).

A. The diplomatic exchanges of the 1920s

98. In Bolivia's view, the 1920 "Acta Protocolizada" of a meeting between the Minister for Foreign Affairs of Bolivia and the Minister Plenipotentiary of Chile in La Paz (see paragraphs 26-31 above) "plainly [constitutes] an agreement to negotiate sovereign access" to the sea. In that respect, Bolivia specifies that the commitment in this "Acta Protocolizada" was given by State representatives vested with the authority to bind their State. Bolivia also contends that the terms used confirmed Chile's intention to be legally bound by the instrument. Bolivia acknowledges that the penultimate clause in the "Acta Protocolizada" excludes the formation of rights and obligations for the Parties, but submits that this clause should not be read in isolation. Bolivia maintains that, in light of the full text and context of the minutes, "the reservation refers to the modality of sovereign access rather than the agreement to negotiate such access". In Bolivia's view, Chile's statement that it is willing to seek that Bolivia "acquire an access to the sea of its own" indicates that only the specific modalities of Bolivia's sovereign access to the sea would not be binding until the conclusion of a formal agreement and that Chile had agreed to undertake the necessary negotiations for that purpose.

99. Bolivia also argues that the specific terms of the correspondence preceding the "Acta Protocolizada" confirm the intention of the Parties as reflected in the minutes. In particular, according to Bolivia, the Minister Plenipotentiary of Chile in La Paz made on 9 September 1919 a proposal indicating Chile's commitment to negotiate Bolivia's sovereign access to the Pacific Ocean (see paragraph 27 above). Bolivia recalls that in this instrument Chile accepted "to initiate new negotiations aimed at satisfying the aspirations of the friendly country, subject to Chile's triumph in the plebiscite". Bolivia observes that the terms of this proposal were reproduced almost in their entirety in the "Acta Protocolizada".

100. Moreover, Bolivia contends that the follow-up exchanges to the "Acta Protocolizada" confirm that Chile was under an obligation to negotiate with Bolivia. For instance, Bolivia recalls the letter of 19 September 1922 from the Chilean delegate to the Assembly of the League of Nations according to which Chile "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" (see paragraph 35 above). According to Bolivia, further reassurances were given in the following year through various Notes from the Chilean Government.

101. Chile focuses on the penultimate clause of the "Acta Protocolizada", according to which Bolivia's Minister for Foreign Affairs stated that no rights or obligations could be created for the States whose representatives made the declarations, and maintains that, contrary to Bolivia's position, this express statement is indicative of the Parties' intention not to establish any legal obligation. According to Chile, given that the discussions reflected in the minutes are not limited to the modalities of access to the sea, Bolivia's explanation of the penultimate clause cannot stand. Irrespective of this clause, Chile maintains that the whole text of the "Acta Protocolizada" makes it clear that no legal obligation was either created or confirmed with this instrument.

102. Chile specifies that the correspondence preceding or following the "Acta Protocolizada" does not support Bolivia's position with regard to their legally binding force. Chile submits that it is not possible to detect in the language of such correspondence an intention by both Parties to establish an obligation to negotiate.

103. With regard to subsequent exchanges, Bolivia recalls that in a memorandum of 4 December 1926 (see paragraph 44 above) Chile indicated that it "ha[d] not rejected the idea of granting a strip of territory and a port to the Bolivian nation". The Chilean Minister for Foreign Affairs, Jorge Matte, had submitted this memorandum (the so-called "Matte Memorandum") to the Secretary of State of the United States, Frank B. Kellogg, in response to his proposal, addressed to Chile and Peru, to cede Tacna and Arica to Bolivia. A copy of the memorandum had been given to Bolivia, which contends that it "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". In Bolivia's view, these exchanges amounted to "a new written agreement reaffirming Chile's commitment to negotiate with Bolivia to grant it a sovereign access to the sea". Considering that the Matte Memorandum was in written form, was issued by a State representative, recorded Chile's previous commitment and was the result of formal inter-State communications, Bolivia is of the view that it demonstrates Chile's intention to be bound.

104. Chile responds that the Matte Memorandum was addressed to the Secretary of State of the United States, and not to Bolivia. Even though it was conveyed through diplomatic channels to Bolivia, it did not amount to an offer made by Chile to Bolivia. In any event, it did not reflect any intention by Chile to bind itself. The Matte Memorandum noted that the proposal of the Secretary of State "goes much farther than the concessions which the Chilean Government has generously been able to make", more specifically the part of the proposal concerning "the definitive cession to the [R]epublic of Bolivia of the territory in dispute" between Chile and Peru. Chile specifies that the wording that is used in the memorandum does not denote a legal obligation and only shows

Chile's "willingness" to consider certain options. In Chile's view, the memorandum is not capable of generating any legal obligation.

* *

105. The Court notes that in 1920 the Parties engaged in negotiations during which Chile expressed willingness "to seek that Bolivia acquire its own access to the sea ceding to it an important part of that zone in the north of Arica and of the railway line" ("Chile está dispuesto a procurar que Bolivia adquiera una salida propia al mar, cediéndole una parte importante de esa zona al norte de Arica y de la línea del ferrocarril"). Chile also accepted "to initiate new negotiations directed at satisfying the aspiration of the friendly country, subject to the victory of Chile in the plebiscite" concerning the provinces of Tacna and Arica. Although these remarks are politically significant, they do not indicate that Chile had accepted an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. Nor does the "Acta Protocolizada" reveal that such an acceptance was expressed during the negotiations.

106. The Court recalls that in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, it had found that signed minutes of a discussion could constitute an agreement if they "enumerate[d] the commitments to which the Parties ha[d] consented" and did not "merely give an account of discussions and summarize points of agreement and disagreement" (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 121, para. 25). The Court observes that the "Acta Protocolizada" does not enumerate any commitments and does not even summarize points of agreement and disagreement. Moreover, the penultimate clause of these minutes records that the Foreign Minister of Bolivia stated that "the present declarations do not contain provisions that create rights, or obligations for the States whose representatives make them". The Chilean Minister Plenipotentiary did not contest this point. Thus, even if a statement concerning an obligation to resort to negotiations had been made by Chile, this would not have been part of an agreement between the Parties.

107. The Court observes that the exchanges that took place between the Parties after the "Acta Protocolizada" also do not indicate that there was an agreement under which Chile entered into a commitment to negotiate Bolivia's sovereign access to the Pacific Ocean. In this context, the Matte Memorandum could be considered a politically significant step. However, it was not addressed to Bolivia and did not contain any wording that could show the acceptance on the part of Chile of an obligation to negotiate or the confirmation of a previously existing obligation to do so.

B. The 1950 exchange of Notes

108. Bolivia recalls that on 1 June 1950 it submitted a Note to Chile in which it proposed that both Parties "formally enter into direct negotiations to satisfy Bolivia's fundamental need to obtain its own sovereign access to the Pacific Ocean, solving the problem of Bolivia's landlocked situation" (see paragraph 51 above). Bolivia also points out that on 20 June 1950 Chile responded by a Note of which the Parties provide divergent translations (see paragraph 52 above). According to Bolivia's translation, the Note indicated that Chile was "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". This Note moreover mentioned Chile's willingness "to study, in direct negotiations with Bolivia, the possibility of satisfying [Bolivia's] aspirations".

109. In Bolivia's view, this exchange of Notes constitutes "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". Bolivia further submits that the terms of the Notes are "clear and precise" and indicate Chile's intention to be bound to negotiate Bolivia's sovereign access to the Pacific Ocean. In Bolivia's view, the textual differences between the Notes are slight and do not demonstrate that the Parties had a different understanding of the subject-matter of the negotiations: to grant Bolivia sovereign access to the sea. The Notes, Bolivia maintains, were negotiated and drafted by the highest authorities of each State. It is also telling, in Bolivia's view, that Chile did not challenge the content of Bolivia's Note in its own Note.

110. Bolivia argues that the two Notes set forth a double agreement: one confirming past agreements, in light of the express references to previous instruments, and another resulting from the Notes themselves. Bolivia submits that the Notes cannot be seen as the combination of a proposal by Bolivia with a counter-proposal by Chile. According to Bolivia, the Notes were prepared and negotiated together and are to be seen as "an exchange of mutual commitments demonstrating a clear intention to be bound". Bolivia maintains that its Note, even though dated 1 June 1950, was delivered to Chile on 20 June 1950, the same day the Chilean Note was delivered to Bolivia. Bolivia contends that the Notes constitute a single instrument, the content of which was previously agreed upon by the Parties.

111. Finally, Bolivia maintains that the Parties' previous and subsequent conduct confirms their understanding that they were committing to a legally binding obligation to negotiate. Bolivia recalls the fact that it registered the Notes in the Department of International Treaties of its

Ministry of Foreign Affairs and maintains that both Parties referred to them, in the following years, as reflecting an agreement between them.

112. Chile argues that the Notes of June 1950 do not show the Parties' objective intention to be bound. In Chile's view, it is "self-evident" that the Parties did not conclude an international agreement. Through the exchange of Notes, the Parties did not create nor confirm any legal obligation. Chile argues that in its Note of 20 June 1950 it did not agree to the proposal in Bolivia's Note of 1 June 1950. In its Note, Chile only stated, according to its own translation, that it was "open formally to enter into a direct negotiation aimed at searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean". According to Chile, the language of its Note only denotes its political willingness to enter into negotiations. Chile also points out that the Parties did not commence negotiations following the exchange.

113. In Chile's view, the discussions that took place prior to the exchange of Notes of June 1950 do not suggest in any way that the Parties created or confirmed a legal obligation to negotiate. The same is argued about the discussions that followed the exchange of Notes.

114. With regard to subsequent exchanges, Bolivia recalls that a Chilean memorandum of 10 July 1961 (the so-called Trucco Memorandum) (see paragraph 55 above) quotes the part of the Chilean Note of 20 June 1950 which, in Bolivia's translation of the memorandum, refers to Chile's "full consent to initiate as soon as possible, direct negotiations aimed at satisfying the fundamental national need [of Bolivia] of own sovereign access to the Pacific Ocean". In Bolivia's view, this memorandum provides "clear evidence" of Chile's intention to negotiate Bolivia's sovereign access to the sea. Bolivia argues that the "denomination given to a document is not determinative of its legal effects" and that the Trucco Memorandum is not simply an internal document or an "Aide Memoire". According to Bolivia, this memorandum is an "*international* act" reflecting the agreement between the Parties to enter into direct negotiations with regard to Bolivia's sovereign access to the sea.

115. Chile states that the Trucco Memorandum, although it was handed over to Bolivia, was an internal document. It was not an official note, was not signed and only stated Chile's policy at that time. Chile maintains that the language used did not reflect any sense of legal obligation. The Trucco Memorandum, in Chile's view, did not create or confirm any legal obligation.

* *

116. The Court observes that, under Article 2, paragraph 1 *(a)*, of the Vienna Convention, a treaty may be "embodied . . . in two or more related instruments". According to customary international law as

reflected in Article 13 of the Vienna Convention, the existence of the States' consent to be bound by a treaty constituted by instruments exchanged between them requires either that "[t]he instruments provide that their exchange shall have that effect" or that "[i]t is otherwise established that those States were agreed that the exchange of instruments should have that effect". The first condition cannot be met, because nothing has been specified in the exchange of Notes about its effect. Furthermore, Bolivia has not provided the Court with adequate evidence that the alternative condition has been fulfilled.

117. The Court further observes that the exchange of Notes of 1 and 20 June 1950 does not follow the practice usually adopted when an international agreement is concluded through an exchange of related instruments. According to that practice, a State proposes in a note to another State that an agreement be concluded following a certain text and the latter State answers with a note that reproduces an identical text and indicates its acceptance of that text. Other forms of exchange of instruments may also be used to conclude an international agreement. However, the Notes exchanged between Bolivia and Chile in June 1950 do not contain the same wording nor do they reflect an identical position, in particular with regard to the crucial issue of negotiations concerning Bolivia's sovereign access to the Pacific Ocean. The exchange of Notes cannot therefore be considered an international agreement.

118. In any event, Chile's Note, whichever translation given by the Parties is used, conveys Chile's willingness to enter into direct negotiations, but one cannot infer from it Chile's acceptance of an obligation to negotiate Bolivia's sovereign access to the sea.

119. The Court observes that the Trucco Memorandum, which was not formally addressed to Bolivia but was handed over to its authorities, cannot be regarded only as an internal document. However, by repeating certain statements made in the Note of 20 June 1950, this memorandum does not create or reaffirm any obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

C. The 1975 Charaña Declaration

120. Bolivia maintains that the Joint Declaration signed at Charaña on 8 February 1975 (see paragraph 62 above) is also the legal basis of an obligation for Chile to negotiate Bolivia's sovereign access to the Pacific Ocean. In that Declaration, the Heads of State of Bolivia and Chile undertook to "continue the dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia, taking into account the mutual interests and aspirations of the Bolivian and Chilean peoples". Bolivia argues that this Declaration has the legal force of a treaty. It is of the view that, through this Joint Declaration, Bolivia and Chile reaffirmed, "in precise and unequivocal terms", their intention to negotiate Bolivia's

sovereign access to the sea. Bolivia also points out that the Joint Declaration was included in the Treaty Series of the Ministry of Foreign Affairs of Chile, thus, it argues, demonstrating the binding legal character of the instrument.

121. Bolivia further argues that the commitment comprised in the Charaña Declaration was confirmed in a number of instances that followed its adoption. Bolivia notes that the negotiations carried out after the Charaña Declaration had the object of the "cession to Bolivia of a sovereign maritime coast". On the other hand, Bolivia concedes that the compensation to be granted to Chile in exchange for Bolivia's sovereign access to the sea was not the subject of a definitive agreement. On 10 June 1977, the Ministers for Foreign Affairs of the Parties adopted a further Joint Declaration (see paragraph 68 above), which in Bolivia's view amounts to an additional commitment to negotiate its sovereign access to the Pacific Ocean. Bolivia characterizes this second declaration as another bilateral agreement between the Parties. Bolivia argues that the two declarations confirm the obligation set forth in the exchange of Notes of 1950.

122. Bolivia also mentions that the adoption of the 1975 Joint Declaration allowed the Parties "to normalize" their diplomatic ties. In Bolivia's opinion, the re-establishment of diplomatic relations depended on Chile's acceptance to undertake negotiations on sovereign access to the sea; thus "[t]he fact that Chile accepted to restore diplomatic relations necessarily implie[d]" that acceptance. Bolivia asserts that the failure of the Charaña process was attributable to Chile, but did not extinguish Chile's obligation to negotiate.

123. In Chile's view, the terms of the Charaña Declaration as well as those of other statements that followed the adoption of that instrument do not create or confirm a legal obligation to negotiate. Chile maintains that a "record of a decision to continue discussions shows no intention to create a legal obligation to negotiate". Also, the fact that Bolivia agreed to resume diplomatic relations with Chile did not depend on the creation of an obligation to negotiate. Chile notes that the publication of the declaration in its Treaty Series is not significant because this series contains a variety of documents other than treaties.

124. On 19 December 1975, Chile adopted guidelines for negotiation that envisaged the cession to Bolivia of a sovereign maritime coast in exchange for Bolivian territory (see paragraph 64 above). However, according to Chile, those guidelines did not refer to any previous obligation to negotiate or give rise to any new obligation in that regard. Chile also asserts that throughout the negotiations that followed the adoption of the 1975 Joint Declaration, it expressed its willingness to negotiate an exchange of territories, which it considered to be an essential condition. With regard to the 1977 Joint Declaration, Chile argues that this instrument contains "merely an expression of political willingness" for the Parties to negotiate with regard to Bolivia's landlocked situation.

125. Chile maintains that between 1975 and 1978 it showed willingness to negotiate in good faith with Bolivia, but was under no obligation to do so. Chile is of the view that, even if such an obligation to negotiate existed, it would have been discharged following the meaningful negotiations undertaken by the Parties in that period and that it could not, in any case, have survived the suspension by Bolivia of the diplomatic relations between the Parties.

* *

126. The Court notes that the Charaña Declaration is a document that was signed by the Presidents of Bolivia and Chile which could be characterized as a treaty if the Parties had expressed an intention to be bound by that instrument or if such an intention could be otherwise inferred. However, the overall language of the declaration rather indicates that it has the nature of a political document which stresses the "atmosphere of fraternity and cordiality" and "the spirit of solidarity" between the two States, who in the final clause decide to "normalize" their diplomatic relations. The wording of the declaration does not convey the existence or the confirmation of an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The engagement "to continue the dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia", cannot constitute a legal commitment to negotiate Bolivia's sovereign access to the sea, which is not even specifically mentioned. While the Ministers for Foreign Affairs of the Parties noted in their Joint Declaration of 10 June 1977 that "negotiations have been engaged aiming at finding an effective solution that allows Bolivia to access the Pacific Ocean freely and with sovereignty", they did not go beyond reaffirming "the need of continuing with the negotiations" and did not refer to any obligation to negotiate. Based on this evidence, an obligation for Chile to negotiate cannot be inferred from the Charaña Declaration.

127. The Court notes, however, that, subsequently, the Parties engaged in meaningful negotiations, in the course of which Chile proposed to cede to Bolivia a sovereign maritime coastline and a strip of territory north of Arica in exchange for territory. When Peru was consulted, in accordance with Article 1 of the Supplementary Protocol to the 1929 Treaty of Lima, Peru proposed to place part of Chile's coastal territory under the joint sovereignty of the three States, which Bolivia and Chile refused (see paragraph 67 above). Consequently, the negotiations came to an end.

D. The communiqués of 1986

128. Bolivia argues that an agreement resulted from two communiqués issued by both States in November 1986 as part of the "fresh approach"

(see paragraph 76 above). On 13 November 1986, the Minister for Foreign Affairs of Bolivia issued a communiqué in which he recalled the talks held between the Parties during that year and indicated that "the maritime issue of Bolivia" was to be considered at a meeting between the Parties in April 1987. The same day, the Minister for Foreign Affairs of Chile also issued a communiqué in which he stated the following:

> "We have agreed with the Minister of Foreign Affairs of Bolivia that, without prejudice to the important and fruitful talks and tasks that the Bi-National Rapprochement Commission will continue to carry out, both Foreign Ministers will meet in Montevideo at the end of April, in order to discuss matters of substance that are of interest to both Governments."

129. Bolivia argues that, even though "[t]he communiqués were formulated in different terms . . . there can be little doubt that both recorded the existence of an agreement to start formal negotiations with regard to 'matters of substance'", which matters are, in Bolivia's view, those referred to in the 1975 Joint Declaration of Charaña. Moreover, Bolivia indicates that this agreement was confirmed by the declaration of the Chilean Minister for Foreign Affairs of 21 April 1987 (see paragraph 77 above) in which he expressed his hope that a dialogue between the Parties would allow them to reach "more decisive stages" than the ones reached in previous negotiations and by a press release issued on 23 April 1987 following the meeting of both Foreign Ministers in Montevideo, Uruguay.

130. Chile contends that the communiqués of November 1986 do not record any agreement between the Parties and do not demonstrate any intention to be bound. Chile points out that, at the meeting of April 1987 in Montevideo, Bolivia did not mention any obligation to negotiate. Referring to the press release of 23 April 1987, Chile maintains that the only objective of the meeting was "to become familiar with the positions of both countries with respect to the basic issues that are of concern to the two nations".

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131. The Court recalls that in the *Aegean Sea Continental Shelf (Greece* v. *Turkey)* case, it had observed that there is "no rule of international law which might preclude a joint communiqué from constituting an international agreement" and that whether such a joint communiqué constitutes an agreement "essentially depends on the nature of the act or transaction to which the Communiqué gives expression" (*Judgment, I.C.J. Reports 1978*, p. 39, para. 96).

132. The Court notes that the two communiqués of 13 November 1986 are separate instruments, that the wording used in them is not the same and that, moreover, neither of these documents includes a reference to

Bolivia's sovereign access to the sea. In any event, the Court does not find in the two communiqués referred to by Bolivia nor in the Parties' subsequent conduct any indication that Chile accepted an obligation to negotiate the question of Bolivia's sovereign access to the Pacific Ocean.

E. The Algarve Declaration (2000)

133. Bolivia recalls that in a Joint Declaration of 22 February 2000 issued by the Ministers for Foreign Affairs of Bolivia and Chile (also called the "Algarve Declaration") (see paragraph 78 above) the Parties "resolved to 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". This joint declaration was followed by a joint communiqué of 1 September 2000 of the Presidents of the two States (see paragraph 79 above), in which the Parties confirmed their willingness to engage in a dialogue "with no exclusions". In Bolivia's view, the Algarve Declaration expresses an agreement between the Parties. Bolivia argues that "[o]nce again, both Parties indicated their agreement to entirely open-minded negotiations, 'without exclusions'".

134. Chile argues that the Algarve Declaration does not suggest that the Parties agreed to an obligation to negotiate. According to Chile, the declaration also does not refer to any previous obligation to negotiate or to sovereign access to the sea. Chile maintains that "[i]t is impossible to find in this language evidence of any intention to create any legal obligation". The Parties have used "classic diplomatic language" from which no obligation can be deduced. Chile points out that Bolivia, in a further statement made by its Minister of Foreign Affairs in 2002, indicated that the Algarve Declaration was a confirmation of Bolivia's decision "to keep that option of dialogue as a State policy". In Chile's view, this demonstrates that the declaration did not create or confirm an obligation to negotiate sovereign access to the sea.

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135. The Court cannot find in the Algarve Declaration an agreement which imposes on Chile an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. The Algarve Declaration, like the joint communiqué of 1 September 2000, only indicates the Parties' willingness to initiate a dialogue "without any exception" on a working agenda that was yet to be defined for the purpose of establishing a "climate of trust" between the Parties. Moreover, neither the Algarve Declaration nor the joint communiqué contains a reference to the issue of Bolivia's sovereign access to the sea.

F. The 13-Point Agenda (2006)

136. On 17 July 2006, the Bolivia-Chile Working Group on Bilateral Affairs issued minutes of a meeting which became known as the "13-Point Agenda" (see paragraph 80 above). These minutes listed all issues to be addressed by Bolivia and Chile in their bilateral relationship. Point 6 of the Agenda referred to the "maritime issue" ("tema marítimo"). Bolivia characterizes this Agenda as an agreement having a binding nature. In Bolivia's view, there is no doubt that the "maritime issue" covers its sovereign access to the sea. Bolivia argues that "[i]t was understood by both Parties that the 'maritime issue' was an umbrella term that included the pending issue of the sovereign access to the sea."

137. Chile acknowledges that it accepted the inclusion of the "maritime issue" in the 13-Point Agenda. However, according to Chile, nothing in this instrument points to a pre-existing obligation to negotiate on that subject-matter. Moreover, in Chile's view, the "maritime issue" is a broad topic but does not include any reference to sovereign access to the sea. Furthermore, the Agenda is "overtly diplomatic in character" and uses broad language which cannot be taken as indicative of an intention to create or confirm a legal obligation. According to Chile, it consists only of "an expression of the political will of both countries".

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138. The Court notes that the item "maritime issue" included in the 13-Point Agenda is a subject-matter that is wide enough to encompass the issue of Bolivia's sovereign access to the Pacific Ocean. The short text in the minutes of the Working Group concerning the maritime issue only states that "[b]oth delegations gave succinct reports on the discussions that they had on this issue in the past few days and agreed to leave this issue for consideration by the Vice-Ministers at their meeting". As was remarked by the Head of the Bolivian delegation to the General Assembly of the OAS, "[t]he Agenda was conceived as an expression of the political will of both countries to include the maritime issue". In the Court's view, the mere mention of the "maritime issue" does not give rise to an obligation for the Parties to negotiate generally and even less so with regard to the specific issue of Bolivia's sovereign access to the Pacific Ocean.

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139. On the basis of an examination of the arguments of the Parties and the evidence produced by them, the Court concludes, with regard to bilateral instruments invoked by Bolivia, that these instruments do not

establish an obligation on Chile to negotiate Bolivia's sovereign access to the Pacific Ocean.

2. Chile's Declarations and other Unilateral Acts

140. Bolivia submits that Chile's obligation to negotiate Bolivia's sovereign access to the Pacific Ocean is also based on a number of Chile's declarations and other unilateral acts. In Bolivia's view, "[i]t 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". Bolivia maintains that at multiple occasions in its jurisprudence the Court has taken into account unilateral acts and has recognized their autonomous character. According to Bolivia, "no subsequent acceptance or response from the other State is required" in order for such acts to establish legal obligations.

141. For determining the requirements that a unilateral declaration has to meet in order to be binding on a State, Bolivia refers to the Court's jurisprudence and to the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, adopted by the International Law Commission. According to the latter instrument, a unilateral declaration is required to be made by an authority vested with the power to bind the State, with the intention of binding that State, concerning a specific matter and formulated in a public manner. In respect of these criteria, Bolivia points out that in the present case a number of relevant declarations were made by Chile's Presidents, Ministers for Foreign Affairs and other high-ranking representatives. Bolivia further submits that the aim of the declarations was "clear and precise": namely, to negotiate with Bolivia its sovereign access to the Pacific Ocean. In Bolivia's view, through its unilateral declarations, Chile did not merely promise to negotiate, but committed itself to reaching a precise objective. Chile's declarations were also made known to and accepted by Bolivia. Bolivia argues that "[t]he jurisprudence of the Court does not support the possibility that State representatives who have made legally binding declarations on behalf of their Government may withdraw from their statements and claim that they were mere political declarations".

142. Bolivia identifies a number of declarations and other unilateral acts made by Chile that, taken individually or as a whole, give rise, in Bolivia's view, to a legal obligation on Chile to negotiate Bolivia's sovereign access to the Pacific Ocean. With regard to the period before 1950, Bolivia recalls in particular the memorandum of 9 September 1919 (see paragraph 27 above) in which Chile asserted that it was "willing to seek that Bolivia acquire its own outlet to the sea, ceding to it an important part of that area to the north of Arica and of the railway line within the territories submitted to the plebiscite stipulated in the Treaty of Ancón". Bolivia then refers to a statement made by Chile at the League of Nations

on 28 September 1921 with regard to Bolivia's landlocked situation (see paragraph 34 above). The delegate of Chile stated that "Bolivia can seek satisfaction through the medium of direct negotiations of our own arranging. Chile has never closed that door to Bolivia". Bolivia further points out that in a Note of 6 February 1923 (see paragraph 37 above), Chile indicated that it was willing to enter into direct negotiations and stated that it was open to the conclusion of "a new Pact regarding Bolivia's situation, but without modifying the Peace Treaty and without interrupting the continuity of the Chilean territory".

143. With regard to the period following 1950, Bolivia recalls that President Videla of Chile, in a statement dated 29 March 1951 (see paragraph 53 above), declared that:

> "the policy of the Chilean Government has unvaryingly been a single one: to express its willingness to give an ear to any Bolivian proposal aimed at solving its landlocked condition, provided that it is put forward directly to us and that it does not imply renouncing our traditional doctrine of respect for international treaties, which we deem essential for a peaceful coexistence between Nations".

Bolivia also gives weight to the following statement, made on 11 September 1975 by President Pinochet of Chile (see paragraph 63 above):

> "Since the Charaña meeting with the President of Bolivia, we have repeated our unchanging purpose of studying, together with that brother country, within the framework of a frank and friendly negotiation, the obstacles that limit Bolivia's development on account of its landlocked condition."

Bolivia also recalls that, following the adoption of the Charaña Declaration, Chile put forward in a Note dated 19 December 1975 its guidelines for negotiating a potential exchange of territories (see paragraph 64 above). Chile indicated that it "would be willing to negotiate with Bolivia the cession of a strip of territory north of Arica up to the Concordia Line" based on specific delimitations and that "[t]he cession . . . would be subject to a simultaneous exchange of territories, that is to say, Chile would at the same time receive in exchange for what it hands over a compensatory area at least equal to the area of land and sea ceded to Bolivia". Furthermore, Bolivia points out that in a statement of 31 October 1979 in front of the General Assembly of the Organization of American States (see paragraph 73 above), Chile declared that it "ha[d] always been willing to negotiate with Bolivia". The Chilean representative added:

> "On repeated occasions, I have indicated Chile's willingness to negotiate a solution with Bolivia to its aspiration to have free and

> sovereign access to the Pacific Ocean. The way to reach that goal is direct negotiation".

Bolivia adds that, as part of the "fresh approach", the Foreign Minister for Chile reaffirmed, in a speech of 21 April 1987 related to the meeting ongoing in Montevideo (see paragraph 77 above), "the willingness and greatest good will ("la disposición y la mejor buena fe") with which Chile comes to this meeting, with the purpose of exploring potential solutions that may, through the timeframe, bring positive and satisfactory results in the interests of countries".

144. Chile agrees with Bolivia that unilateral declarations are capable of creating legal obligations if they evidence a clear intention on the part of the author to do so. Chile affirms that "[t]he intention of the State issuing a unilateral statement is to be assessed by regard to the terms used, objectively assessed". However, according to Chile, the burden on the State seeking to prove the existence of a binding obligation based on a unilateral statement is a heavy one; the statement must be "clear and specific", and the circumstances surrounding the act, as well as subsequent reactions related to it, must be taken into account. Chile is of the view that Bolivia has failed to identify how the content of any of the unilateral statements Bolivia relies on, and the circumstances surrounding them, can be understood as having created a legal obligation.

145. Chile argues that "[a]n objective intention to be bound by international law to negotiate cannot be established by a unilateral statement of willingness to negotiate" — in this case, it requires a clear and specific statement which would provide evidence of an intention to be bound to negotiate Bolivia's sovereign access to the sea. Chile further argues that when the stakes are the highest for a State — as it submits they are in the present circumstances — the intention to be bound must be manifest. In Chile's view, the careful language that was adopted throughout its exchanges with Bolivia indicates that Chile did not have an intention to be bound. In further support of its view that no obligation to negotiate has arisen, Chile also points out that the obligation Bolivia alleges to exist in the present case could not be performed unilaterally. In Chile's words, "a commitment to negotiate entails reciprocal obligations on the part of both the putative negotiating parties".

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146. The Court recalls that it has stated in the following terms the criteria to be applied in order to decide whether a declaration by a State entails legal obligations:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of

> creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." (*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.)

The Court also asserted that, in order to determine the legal effect of a statement by a person representing the State, one must "examine its actual content as well as the circumstances in which it was made" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 28, para. 49).

147. The Court notes that Chile's declarations and other unilateral acts on which Bolivia relies are expressed, not in terms of undertaking a legal obligation, but of willingness to enter into negotiations on the issue of Bolivia's sovereign access to the Pacific Ocean. For instance, Chile declared that it was willing "to seek that Bolivia acquire its own outlet to the sea" and "to give an ear to any Bolivian proposal aimed at solving its landlocked condition" (see paragraphs 142 and 143 above). On another occasion, Chile stated its "unchanging purpose of studying, together with that brother country, within the framework of a frank and friendly negotiation, the obstacles that limit Bolivia's development on account of its landlocked condition" (see paragraph 143 above). The wording of these texts does not suggest that Chile has undertaken a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

148. With regard to the circumstances of Chile's declarations and statements, the Court further observes that there is no evidence of an intention on the part of Chile to assume an obligation to negotiate. The Court therefore concludes that an obligation to negotiate Bolivia's sovereign access to the sea cannot rest on any of Chile's unilateral acts referred to by Bolivia.

3. Acquiescence

149. Bolivia submits that Chile's obligation to negotiate Bolivia's sovereign access to the sea may also be based on Chile's acquiescence. In this context, Bolivia refers to the Court's jurisprudence as authority for the proposition that the absence of reaction by one party may amount to acquiescence when the conduct of the other party required a response

(citing *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, pp. 50-51, para. 121).

150. Bolivia refers to a statement made on 26 October 1979 that listed what it considered the agreements in force on the negotiation of its sovereign access to the sea. Bolivia also refers to the declaration made on 27 November 1984 upon signature of the United Nations Convention on the Law of the Sea ("UNCLOS"), in which negotiations with the view of restoring its sovereign access to the sea were mentioned. According to Bolivia, these statements required a response from Chile. Acquiescence to an obligation to negotiate sovereign access to the sea results from Chile's silence and from the fact that it subsequently engaged in negotiations with Bolivia.

151. Chile contends that Bolivia has not demonstrated how in the present case an obligation to negotiate could have been created by acquiescence, nor has it pointed to any relevant silence by Chile or explained how silence by Chile may be taken as tacit consent to the creation of a legal obligation. In Chile's view, the silence of a State has to be considered in light of the surrounding facts and circumstances for it to amount to consent. In Chile's words, the burden on the State alleging acquiescence is "heavy" since it "involves inferring a State's consent from its silence. That inference must be 'so probable as to be almost certain' or 'manifested clearly and without any doubt'." Chile notes that in a diplomatic context there can be no requirement incumbent on a State to answer all the statements made by counterparts in an international forum. With regard to Bolivia's statement upon its signature of UNCLOS, Chile argues that this declaration did not call for any response by Chile. Chile maintains that on no occasion can it be said that it acquiesced to be bound to negotiate Bolivia's sovereign access to the Pacific Ocean.

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152. The Court observes that "acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 305, para. 130) and that "silence may also speak, but only if the conduct of the other State calls for a response" (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 51, para. 121). The Court notes that Bolivia has not identified any declaration which required a response or reaction on the part of Chile in order to prevent an obligation from arising. In particular, the statement by Bolivia, when signing UNCLOS, that referred to "negotiations on the restoration to

Bolivia of its own sovereign outlet to the Pacific Ocean" did not imply the allegation of the existence of any obligation for Chile in that regard. Thus, acquiescence cannot be considered a legal basis of an obligation to negotiate Bolivia's sovereign access to the sea.

4. Estoppel

153. Bolivia invokes estoppel as a further legal basis on which Chile's obligation to negotiate with Bolivia may rest. In order to define estoppel, Bolivia relies on the Court's jurisprudence and on arbitral awards. Bolivia indicates that for estoppel to be established, there must be "a statement or representation made by one party to another" and reliance by that other party "to his detriment or to the advantage of the party making it" (citing *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, I.C.J. Reports 1990*, p. 118, para. 63). Citing the award in the *Chagos* arbitration, Bolivia points out that four conditions must be met for estoppel to arise:

> "*(a)* a State has made clear and consistent representations, by word, conduct, or silence; *(b)* such representations were made through an agent authorized to speak for the State with respect to the matter in question; *(c)* the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and *(d)* such reliance was legitimate, as the representation was one on which that State was entitled to rely" (*Chagos Marine Protected Area (Republic of Mauritius* v. *United Kingdom*), Award of 18 March 2015 (*International Law Reports (ILR)*, Vol. 162, p. 249, para. 438).

154. Bolivia argues that estoppel does not depend on State consent; it aims "to provide a basis for obligations *other than* the intention to be bound" (emphasis in the original).

155. Bolivia maintains that Chile, for more than a century, made a number of consistent and unambiguous declarations, statements and promises with regard to Bolivia's sovereign access to the sea and that Chile cannot now deny that it agreed to negotiate with Bolivia with a view to the latter acquiring sovereign access to the sea. According to Bolivia, these "were representations on which Bolivia was entitled to rely and did rely".

156. Chile does not contest the requirements of estoppel as set forth by the jurisprudence referred to by Bolivia. However, according to Chile,

estoppel plays a role only in situations of uncertainty. Chile argues that when it is clear that a State did not express an intent to be bound, estoppel cannot apply.

157. In the present case, Chile maintains that it is "manifest" that Chile did not have any intention of creating a legal obligation to negotiate. Moreover, Chile asserts that Bolivia did not rely on any representations made by Chile. Assuming that the requirements of estoppel would be met, Chile did not act inconsistently or in denial of the truth of any prior representation. In Chile's view, Bolivia was unable to show that "there was a clear and unequivocal statement or representation maintained by Chile over the course of more than a century that, at all times and in all circumstances, it would engage in negotiations with Bolivia on the topic of a potential grant to Bolivia of sovereign access to the sea". Moreover, Bolivia did not demonstrate how its position would have changed to its detriment, or suffered any prejudice because of its reliance on Chile's alleged representations.

* *

158. The Court recalls that the "essential elements required by estoppel" are "a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it" (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 63). When examining whether the conditions laid down in the Court's jurisprudence for an estoppel to exist were present with regard to the boundary dispute between Cameroon and Nigeria, the Court stated:

> "An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 57.)

159. The Court finds that in the present case the essential conditions required for estoppel are not fulfilled. Although there have been repeated representations by Chile of its willingness to negotiate Bolivia's sovereign access to the Pacific Ocean, such representations do not point to an obligation to negotiate. Bolivia has not demonstrated that it changed its position to its own detriment or to Chile's advantage, in reliance on Chile's

representations. Therefore, estoppel cannot provide a legal basis for Chile's obligation to negotiate Bolivia's sovereign access to the sea.

5. Legitimate Expectations

160. Bolivia claims that Chile's representations through its multiple declarations and statements over the years gave rise to "the expectation of restoring" Bolivia's sovereign access to the sea. Chile's denial of its obligation to negotiate and its refusal to engage in further negotiations with Bolivia "frustrates Bolivia's legitimate expectations". Bolivia argues that,

> "[w]hile estoppel focuses on the position of the State taking up a stance, and holds it to its commitments, the doctrine of legitimate expectations focuses on the position of States that have relied upon the views taken up by another State, and treats them as entitled to rely upon commitments made by the other State".

Bolivia also recalls that this principle has been widely applied in investment arbitration.

161. Chile is of the view that Bolivia has not demonstrated that there exists in international law a doctrine of legitimate expectations. Chile maintains that "[t]here is no rule of international law that holds a State legally responsible because the expectations of another State are not met". It argues that Bolivia attempts "to circumvent the requirement of detrimental reliance necessary to establish estoppel" because it is unable to prove that it has relied on Chile's alleged representation to its own detriment.

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162. The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained.

6. Article 2, Paragraph 3, of the Charter of the United Nations and Article 3 of the Charter of the Organization of American States

163. Bolivia also argues that a general obligation to negotiate exists in international law and is reflected in Article 2, paragraph 3, as well as in

Article 33 of the Charter of the United Nations. It maintains that this general obligation applies to any pending issue involving two or more countries. According to this provision, international disputes must be settled by peaceful means "in such a manner that peace and security *and justice* are not endangered" (emphasis in the original). In its oral pleadings, Bolivia developed this argument and contended that Article 2, paragraph 3, of the Charter reflects "a basic principle of international law" and imposes a positive obligation. In Bolivia's view, this duty to negotiate is applicable to all States. It is also applicable to all international disputes, and not only to "legal" ones or those endangering the maintenance of international peace and security. Bolivia develops a similar argument with regard to Article 3 of the Charter of the OAS. It argues that "[a]s with Article 2 (3) of the United Nations Charter . . . the obligation is a positive one: Member States 'shall' submit disputes to the peaceful procedures identified".

164. Chile recognizes that the Charter of the United Nations imposes an obligation to settle disputes via "peaceful means". However, while negotiations are one of the methods for settling disputes peacefully, they do not have to be preferred to other means of peaceful settlement. Chile points out that the term "negotiate" does not appear anywhere in Article 2, paragraph 3, of the Charter. While the Parties are free to negotiate with their neighbours, the Charter does not impose on them an obligation to do so. With regard to Bolivia's argument concerning Article 3 of the Charter of the OAS, Chile responds that this provision cannot constitute the legal basis of an obligation for Chile to negotiate with Bolivia on the issue of Bolivia's sovereign access to the Pacific Ocean.

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165. The Court recalls that, according to Article 2, paragraph 3, of the Charter of the United Nations, "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". This paragraph sets forth a general duty to settle disputes in a manner that preserves international peace and security, and justice, but there is no indication in this provision that the parties to a dispute are required to resort to a specific method of settlement, such as negotiation. Negotiation is mentioned in Article 33 of the Charter, alongside "enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements" and "other peaceful means" of the parties' choice. However, this latter provision also leaves the choice of peaceful means of settlement to the parties concerned and does not single out any specific method, includ-

ing negotiation. Thus, the parties to a dispute will often resort to negotiation, but have no obligation to do so.

166. The same approach was taken by resolution 2625 (XXV) of the General Assembly ("Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations"). Resolution 37/10 ("Manila Declaration on the Peaceful Settlement of International Disputes") also followed the same approach and proclaimed the "principle of free choice of means" for the settlement of disputes (para. 3). All this leads the Court to the conclusion that no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean arises for Chile under the provisions of the Charter on the peaceful settlement of disputes.

167. Article 3 *(i)* of the Charter of the OAS sets forth that "[c]ontroversies of an international character arising between two or more American States shall be settled by peaceful procedures". Article 24 provides that international disputes between Member States "shall be submitted to the peaceful procedures set forth" in the Charter, while Article 25 lists these "peaceful procedures" as follows: "direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time". Resort to a specific procedure such as "direct negotiation" is not an obligation under the Charter, which therefore cannot be the legal basis of an obligation to negotiate sovereign access to the Pacific Ocean between Bolivia and Chile.

7. The Resolutions of the General Assembly of the Organization of American States

168. Bolivia refers to 11 resolutions of the General Assembly of the OAS which dealt with the issue of Bolivia's sovereign access to the Pacific Ocean, arguing that they confirmed Chile's commitment to negotiate that issue (see paragraphs 71-75 above). Bolivia does not contest that resolutions adopted by the General Assembly of that Organization are not binding "as such", but maintains that they produce certain legal effects under the Charter of the OAS. Following the precept of good faith, the Parties must give due consideration to these resolutions and their content.

169. Bolivia also maintains that the Parties' conduct in relation to the drafting and adoption of General Assembly resolutions "can reflect, crystallize or generate an agreement" between them. Bolivia underlines Chile's participation in the drafting of some of these resolutions. It refers in particular to resolution No. 686, which urged Bolivia and Chile to resort to negotiations and was adopted by consensus.

170. In Chile's view, the resolutions of the General Assembly of the OAS referred to by Bolivia "neither confirmed any existing obligation nor

created any new one, and like all OAS resolutions, would have been incapable of doing so". Chile argues that resolutions of the General Assembly are in principle not binding and that the General Assembly lacks competence to impose legal obligations on the Parties. In any event, Chile notes that none of the resolutions in question mentions a pre-existing obligation for Chile to engage in negotiations with Bolivia. It observes that it voted against the adoption of most of the resolutions in question or did not participate in the vote; only on three occasions it did not oppose the consensus for adopting the resolutions, but joined declarations or explanations related to their content.

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171. The Court notes that none of the relevant resolutions of the General Assembly of the OAS indicates that Chile is under an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean. These resolutions merely recommend to Bolivia and Chile that they enter into negotiations over the issue. Also resolution AG/RES. 686, to which Bolivia calls special attention, only urges the Parties

> "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".

Moreover, as both Parties acknowledge, resolutions of the General Assembly of the OAS are not per se binding and cannot be the source of an international obligation. Chile's participation in the consensus for adopting some resolutions therefore does not imply that Chile has accepted to be bound under international law by the content of these resolutions. Thus, the Court cannot infer from the content of these resolutions nor from Chile's position with respect to their adoption that Chile has accepted an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

8. The Legal Significance of Instruments, Acts and Conduct Taken Cumulatively

172. In Bolivia's view, even if there is no instrument, act or conduct from which, if taken individually, an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean arises, all these elements may cumulatively have "decisive effect" for the existence of such an obligation. The historical continuity and cumulative effect of these elements should be

taken into account. Also, Bolivia asserts that the different rounds of negotiations were not independent from one another; "each undertaking or promise to negotiate was given as an ongoing continuation of previous undertakings".

173. Contrary to Bolivia's view, Chile maintains that an "accumulation of interactions, none of which created or confirmed a legal obligation, does not create such an obligation by accretion". An intention to become bound by international law cannot arise out of the repetition of a statement which denotes no intention to create an obligation. In Chile's words, "[w]hen it comes to founding a legal obligation, the whole is not greater than the sum of the parts"; if a series of acts taken individually are unable to create an obligation, the same is true if those acts are taken cumulatively. In Chile's view, the interactions between the Parties were "fragmented", "discontinuous" and marked by periods of inactivity and by shifting political priorities.

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174. The Court notes that Bolivia's argument of a cumulative effect of successive acts by Chile is predicated on the assumption that an obligation may arise through the cumulative effect of a series of acts even if it does not rest on a specific legal basis. However, given that the preceding analysis shows that no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean has arisen for Chile from any of the invoked legal bases taken individually, a cumulative consideration of the various bases cannot add to the overall result. It is not necessary for the Court to consider whether continuity existed in the exchanges between the Parties since that fact, if proven, would not in any event establish the existence of an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

IV. General Conclusion on the Existence of an Obligation to Negotiate Sovereign Access to the Pacific Ocean

175. In light of the historical and factual background above (see paragraphs 26-83), the Court observes that Bolivia and Chile have a long history of dialogue, exchanges and negotiations aimed at identifying an appropriate solution to the landlocked situation of Bolivia following the War of the Pacific and the 1904 Peace Treaty. The Court is however unable to conclude, on the basis of the material submitted to it, that Chile has "the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean" (Bolivia's submissions, see paragraphs 13, 14 and 15 above). Accordingly, the Court cannot accept the other final submissions presented by Bolivia,

which are premised on the existence of such an obligation (Bolivia's submissions, see paragraphs 13, 14 and 15 above).

176. Nevertheless, the Court's finding should not be understood as precluding the Parties from continuing their dialogue and exchanges, in a spirit of good neighbourliness, to address the issues relating to the landlocked situation of Bolivia, the solution to which they have both recognized to be a matter of mutual interest. With willingness on the part of the Parties, meaningful negotiations can be undertaken.

* * *

177. For these reasons,

THE COURT,

(1) By twelve votes to three,

Finds that the Republic of Chile did not undertake a legal obligation to negotiate a sovereign access to the Pacific Ocean for the Plurinational State of Bolivia;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Gevorgian; *Judge* ad hoc McRae;

AGAINST: *Judges* Robinson, Salam; *Judge* ad hoc Daudet;

(2) By twelve votes to three,

Rejects consequently the other final submissions presented by the Plurinational State of Bolivia.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Gevorgian; *Judge* ad hoc McRae;

AGAINST: *Judges* Robinson, Salam; *Judge* ad hoc Daudet.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this first day of October, two thousand and eighteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Plurinational State of Bolivia and the Government of the Republic of Chile, respectively.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe COUVREUR,
Registrar.

President YUSUF appends a declaration to the Judgment of the Court; Judges ROBINSON and SALAM append dissenting opinions to the Judgment of the Court; Judge *ad hoc* DAUDET appends a dissenting opinion to the Judgment of the Court.

(Initialled) A.A.Y.

(Initialled) Ph.C.