

INTERNATIONAL COURT OF JUSTICE

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

(BOLIVIA v. CHILE)

**PRELIMINARY OBJECTION OF THE
REPUBLIC OF CHILE**

Volume 1

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CHAPTER I INTRODUCTION

1.1. Bolivia claims that it has a right to sovereign access to the Pacific Ocean and that Chile is under an obligation to negotiate with Bolivia, to agree with Bolivia and “to grant Bolivia a fully sovereign access to the Pacific Ocean”.¹ Article VI of the 1948 American Treaty on Pacific Settlement (the *Pact of Bogotá*)² excludes from the jurisdiction of the Court matters already settled by arrangement between the parties and matters governed by agreements or treaties in force when the Pact was signed in 1948. Territorial sovereignty and the character of Bolivia’s access to the Pacific Ocean are matters that were settled by, and remain governed by, the Treaty of Peace and Amity agreed between Bolivia and Chile in 1904 (the *1904 Peace Treaty*).³ Bolivia’s claim is therefore outside the Court’s jurisdiction.

1.2. The sole foundation on which Bolivia asserts that the Court has jurisdiction to adjudicate its claim against Chile is Article XXXI of the Pact of Bogotá. Article XXXI is subject to exceptions, notably Article VI of the Pact of Bogotá, which provides that:

“The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty.”

¹ Bolivia’s Memorial, Submissions, para 500.

² American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948 (entry into force 6 May 1949), 30 *United Nations Treaty Series* 83 (the *Pact of Bogotá*), **Annex 13**.

³ Treaty of Peace and Amity between Bolivia and Chile, signed at Santiago on 20 October 1904 (the *1904 Peace Treaty*), **Annex 10**.

1.3. Bolivia makes no mention of Article VI in the short passage in its Memorial in which it asserts that the Court has jurisdiction.⁴ Article VI is however of central importance, and excludes Bolivia's claim from the consent to the Court's jurisdiction provided by the parties to the Pact of Bogotá. By force of Article VI, Chile has not consented to the Court taking jurisdiction over matters settled or governed by the 1904 Peace Treaty.

1.4. The 1904 Peace Treaty constituted a comprehensive settlement between the two States concerning the re-establishment of peaceful relations, territorial sovereignty, Bolivia's access to the Pacific Ocean, and other benefits conferred on Bolivia. The two States "re-established" their "relations of peace and friendship".⁵ Bolivia recognised Chilean sovereignty over coastal territory that had been Bolivian.⁶ The two States delimited their boundary in full.⁷ Chile granted to Bolivia in perpetuity a right of commercial free transit to the Pacific and at Chilean ports,⁸ together with the right to establish Bolivian customs posts at Chilean ports.⁹ Chile also agreed to build and pay for a railway from Arica (Chile's northernmost port) to the plateau of La Paz in Bolivia,¹⁰ to guarantee obligations incurred by Bolivia to attract investment in other railways in Bolivia,¹¹ to settle Bolivian debts to private entities associated with the coastal territory that had been Bolivian,¹² and to make a substantial cash payment to Bolivia.¹³

⁴ Bolivia's Memorial, paras 22-27.

⁵ 1904 Peace Treaty, **Annex 10**, Article I.

⁶ 1904 Peace Treaty, **Annex 10**, Article II.

⁷ 1904 Peace Treaty, **Annex 10**, Article II.

⁸ 1904 Peace Treaty, **Annex 10**, Article VI.

⁹ 1904 Peace Treaty, **Annex 10**, Article VII.

¹⁰ 1904 Peace Treaty, **Annex 10**, Article III.

¹¹ 1904 Peace Treaty, **Annex 10**, Article III.

¹² 1904 Peace Treaty, **Annex 10**, Article V.

¹³ 1904 Peace Treaty, **Annex 10**, Article IV.

1.5. Bolivia seeks to avoid the significance of the 1904 Peace Treaty by emphasizing the Treaty on Transfer of Territory of 1895 (the *1895 Treaty*)¹⁴ as a source of its alleged right to sovereign access to the Pacific. Bolivia entirely omits to inform the Court that, by agreement of the two States in an 1896 exchange of notes, the 1895 Treaty is “wholly without effect”.¹⁵ That the 1895 Treaty is wholly without effect is thus a matter settled and governed by agreement between the two States in their 1896 exchange. By force of Article VI of the Pact of Bogotá, that matter is also outside the jurisdiction of the Court.

1.6. Bolivia asks the Court to order Chile to negotiate with Bolivia until the two States reach an agreement granting Bolivia sovereign access to the Pacific Ocean. Since sovereignty over territory and the character of Bolivia’s access to the sea were matters settled by the 1904 Treaty and that continue to be governed by it, Article VI of the Pact of Bogotá excludes Bolivia’s claim from the jurisdiction of the Court.

* * *

1.7. Chile respectfully submits this preliminary objection to Bolivia’s claim pursuant to the provisions of Article 79, paragraph 1 of the Rules of Court. Since Chile’s objection relates to whether the subject matter of Bolivia’s claim comes within the Court’s jurisdiction, Chile seeks a decision on its objection at this preliminary stage. In accordance with Article 79, paragraphs 4 and 7 of the Rules of Court, this preliminary objection contains a statement of facts and law

¹⁴ Treaty on Transfer of Territory between Bolivia and Chile, signed at Santiago on 18 May 1895 (the *1895 Treaty*), **Annex 3**.

¹⁵ Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 117, 29 April 1896, **Annex 5**; Note from Adolfo Guerrero, Minister of Foreign Affairs of Chile, to Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 521, 29 April 1896, **Annex 6**; and Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 118, 30 April 1896, **Annex 7**.

“confined to those matters that are relevant to the objection”. Bolivia’s Memorial contains numerous incorrect allegations concerning the substance of its claim, but Chile does not address them in this preliminary objection.

1.8. This preliminary objection is comprised of five chapters. After this introductory chapter, Bolivia’s claim is analysed in more detail in **Chapter II**. **Chapter III** explains the relevant provisions of the Pact of Bogotá and demonstrates that Chile has limited its consent to the Court’s jurisdiction to exclude matters settled or governed by the 1904 Peace Treaty. **Chapter IV** addresses attempts by Bolivia to avoid the settlement reached in the 1904 Peace Treaty, notably by relying on the 1895 Treaty and on bilateral exchanges after 1904. **Chapter V** contains a brief summary of the reasoning developed in this preliminary objection, leading to Chile’s formal submission requesting the Court to adjudge and declare that Bolivia’s claim is not within its jurisdiction.

1.9. This preliminary objection is accompanied by the 77 annexes referred to in the footnotes and a list of those annexes. The 13 core annexes are compiled in chronological order in the latter part of this Volume 1. The remainder are compiled in chronological order in Volume 2 (Annexes 14 – 46) and Volume 3 (Annexes 47 – 77).

CHAPTER II BOLIVIA'S CLAIM

2.1. Bolivia's claim in this proceeding is a reformulation of its claim for revision or nullification of the 1904 Peace Treaty in order to obtain sovereign access to the Pacific Ocean. Bolivia pursued that claim in 1920, when it requested "revision" of the 1904 Peace Treaty from the League of Nations.¹⁶ The League rejected that request as being outside its competence.¹⁷ In 2004, in its *Blue Book: The Maritime Claim of Bolivia*, published by the Office of the President, Bolivia asserted that it "was forced to accept the terms of a draft treaty imposed by Chile", the final version of which was the 1904 Peace Treaty.¹⁸ The introduction to this Presidential publication identifies "the basis of our claim" as

¹⁶ Letter from the Delegates of Bolivia to the League of Nations to James Eric Drummond, Secretary-General of the League of Nations, 1 November 1920, **Annex 37**. See also Chile's response: Letter from the Delegates of Chile to the League of Nations to the President of the Assembly of the League of Nations, No 14, 19 December 1920, **Annex 38**.

¹⁷ League of Nations, Report of the Commission of Jurists on the Complaints of Peru and Bolivia, 21 September 1921, **Annex 39**. See also Note from Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Luis Izquierdo, Minister of Foreign Affairs of Chile, 12 February 1923, **Annex 40**; Note from Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Luis Izquierdo, Minister of Foreign Affairs of Chile, 15 February 1923, **Annex 41**; Note from Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Luis Izquierdo, Minister of Foreign Affairs of Chile, 27 January 1923, **Annex 47 to Bolivia's Memorial**; and Note from Luis Izquierdo, Minister of Foreign Affairs of Chile, to Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 20, 6 February 1923, **Annex 48 to Bolivia's Memorial**.

¹⁸ Ministry of Foreign Affairs of Bolivia, *The Blue Book: The Maritime Claim of Bolivia* (Directorate of Information of the Presidency of the Republic of Bolivia, May 2004), **Annex 61**, pages not numbered, under the heading "Friendship and Peace Treaty signed between Bolivia and Chile (1904)". See also Statement by Mr Bedregal, Minister of Foreign Affairs of Bolivia, at the Fourth Session of the General Committee of the Organization of American States, 12 November 1987, **Annex 57**; Statement by Mr Bedregal, Minister of Foreign Affairs of Bolivia, at the Third Session of the General Committee of the Organization of American States, 16 November 1988, **Annex 58**; and Statement by Mr Iturralde, Minister of Foreign Affairs of Bolivia, at the Fourth Session of the General Committee of the Organization of American States, 16 November 1989, **Annex 59**. See further Ministry of Foreign Affairs of Bolivia, *The Book of the Sea* (La Paz, 2014), **Annex 75**.

the War of the Pacific and adds that “125 years later, we continue to uphold our maritime claim”.¹⁹ Although Bolivia has now sought to portray its claim as one concerning an obligation to negotiate, it is an obligation to negotiate on and agree to precisely the same result that Bolivia sought in 1920: revision of the 1904 Peace Treaty.

2.2. The claim that Bolivia now makes before the Court is predicated on an alleged “right to sovereign access to the Pacific Ocean”.²⁰ To give effect to that alleged right, Bolivia requests 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”.²¹ Bolivia further requests the Court to order Chile to perform this obligation and so “grant Bolivia a fully sovereign access to the Pacific Ocean.”²²

2.3. Bolivia has confirmed that it has brought the present case to vindicate its longstanding claim to revise or nullify the 1904 Peace Treaty. Bolivia has recently stated that its “maritime claim pending at The Hague prevails over the 1904 Treaty which, in any event, it condemned as unfair, forced, and broken.”²³ In 2009, Bolivia enacted a new Constitution that, by its Article 267 and Ninth Transitional Provision, imposed a duty on the Government to “denounce and, if necessary, renegotiate” treaties that are contrary to Bolivia’s asserted “right over

¹⁹ Ministry of Foreign Affairs of Bolivia, *The Blue Book: The Maritime Claim of Bolivia* (Directorate of Information of the Presidency of the Republic of Bolivia, May 2004), **Annex 61**, pages not numbered, Introduction. See also Official Bolivian Press Release, “Morales calls on Obama to show Chile how treaties may be revised and territories returned”, Bolivian Information Agency, 30 June 2014, **Annex 76** (recording that President Morales asked US President Obama “to teach the President of Chile, Michelle Bachelet, how treaties may be revised and territories returned, when justice so demands”).

²⁰ Bolivia’s Memorial, paras 20, 35, 94, 338, 497 and 498.

²¹ Bolivia’s Memorial, Submissions, para 500(a); see also para 28(a).

²² Bolivia’s Memorial, Submissions, para 500(c); see also para 28(c).

²³ Official Bolivian Press Release, “Morales calls on Obama to show Chile how treaties may be revised and territories returned”, Bolivian Information Agency, 30 June 2014, **Annex 76**.

the territory giving access to the Pacific Ocean and its maritime space.”²⁴ Subsequently the Bolivian Senate confirmed that this duty could be fulfilled by challenging before international tribunals treaties that are contrary to Bolivia’s “right”,²⁵ and the Bolivian Constitutional Tribunal confirmed that these provisions are consistent with Bolivian Constitutional law and that they impose a “duty” on the executive “to denounce or, alternatively, to challenge ... before international tribunals” international treaties contrary to the Constitutional right to territory giving access to the Pacific Ocean.²⁶ The Supreme Resolution of the President of Bolivia appointing Bolivia’s Agent in this proceeding makes clear that this case has been brought to vindicate the “right” set out in Article 267 of Bolivia’s Constitution,²⁷ apparently in fulfilment of the executive’s “duty ... to challenge” before international tribunals treaties inconsistent with Bolivia’s right of sovereign access to the Pacific.²⁸

2.4. The only way for Bolivia to be granted the sovereign access to the Pacific that it claims would be through revision of the settlement reached in 1904 concerning territorial sovereignty and the character of Bolivia’s access to the sea.

²⁴ Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **Annex 62**, Article 267 and Ninth Transitional Provision.

²⁵ Bolivian Law on Normative Application – Statement of Reasons, 6 February 2013, **Annex 71**.

²⁶ Constitutional Tribunal of Bolivia, Plurinational Constitutional Declaration No 0003/2013, made in Sucre on 25 April 2013, **Annex 73**, section III.11.

²⁷ Bolivian Supreme Resolution 09385, 3 April 2013, attached to the Letter from David Choquehuanca, Minister of Foreign Affairs of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 24 April 2013, **Annex 72**, first paragraph.

²⁸ Bolivia’s letter to the Court of 8 July 2011, in which Bolivia first reformulated its claim as being that Chile is under an obligation to negotiate, also uses the same language as Article 267 of the 2009 Constitution, asserting Bolivia’s “unwaivable and imprescriptible right to a sovereign access to the Pacific Ocean”, and foreshadows that Bolivia will take action to vindicate that historical right (“when it deems it appropriate [Bolivia] will make use of the actions to defend it [*sic*] interests within the framework of international law”): Letter from David Choquehuanca, Minister of Foreign Affairs of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 8 July 2011, **Annex 65**, para 13.

Whether formulated as a direct claim for treaty revision or an obligation to negotiate and agree on the same result, those are matters excluded from the Court's jurisdiction by Article VI of the Pact of Bogotá.

CHAPTER III
THE PACT OF BOGOTÁ AND THE 1904 PEACE TREATY EXCLUDE
BOLIVIA’S CLAIM FROM THE COURT’S JURISDICTION

Section 1. THE PACT OF BOGOTÁ PROVIDES NO CONSENT TO
JURISDICTION OVER BOLIVIA’S CLAIM

A. The Text of the Pact of Bogotá

3.1. The sole basis on which Bolivia seeks to invoke the jurisdiction of the Court is the Pact of Bogotá.²⁹ The specific procedure invoked by Bolivia is that found in Article XXXI of the Pact, which is as follows:

“In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

- a) The interpretation of a treaty;
- b) Any question of international law;
- c) The existence of any fact which, if established, would constitute the breach of an international obligation;
- d) The nature or extent of the reparation to be made for the breach of an international obligation.”

Bolivia relies on paragraphs (b), (c) and (d) of Article XXXI, but not on paragraph (a).³⁰

²⁹ Pact of Bogotá, **Annex 13**.

³⁰ Bolivia’s Memorial, para 22.

3.2. Bolivia makes no mention in its Memorial of Article VI of the Pact of Bogotá, which is one of the “conditions”³¹ on the consent of the parties to the Pact’s dispute resolution procedures. It provides that:

“The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty.”

3.3. This provision has two limbs. Each of them independently excludes Bolivia’s claim from the jurisdiction of the Court. In the first limb the States parties excluded from the dispute settlement procedures of the Pact “matters already settled by arrangement between the parties”. In the second limb they also excluded “matters” that “are governed by agreements or treaties” in force in April 1948. These two limbs are separated by the disjunctive “or”. In accordance with the ordinary meaning of Article VI, where either limb applies, the relevant “matters” are excluded from the consent to the jurisdiction of the Court.

3.4. As discussed further in **Section 3** below, the relevant “matters” are territorial sovereignty and the character of Bolivia’s access to the Pacific Ocean. Those are matters “settled by arrangement” in the 1904 Peace Treaty. The settlement reached was that Bolivia’s territorial sovereignty would be limited by the boundary fully delimited in Article II of the 1904 Peace Treaty and that Bolivia has the rights of access to the Pacific Ocean granted in Articles III, VI and VII of the 1904 Peace Treaty. They are also matters governed by the 1904 Peace Treaty, which was in force on the date of the conclusion of the Pact of Bogotá in 1948. Under either limb these matters fall within the scope of Article VI of the Pact of Bogotá and therefore fall outside the jurisdiction conferred on the Court by the parties to the Pact.

³¹ Pact of Bogotá, **Annex 13**, Article II.

3.5. As the Court has observed, the “clear purpose” of Article VI:

“was to preclude the possibility of using those procedures, and in particular judicial remedies, in order to reopen such matters as were settled between the parties to the Pact, because they had been the object of an international judicial decision or a treaty. When ratifying the Pact, States envisaged bringing within its procedures matters not yet so settled.”³²

3.6. In Article XXXIII the parties to the Pact were explicit that: “If the parties fail to agree as to whether the Court has jurisdiction over the controversy, the Court itself shall first decide that question.” Chile accordingly submits this jurisdictional objection at this preliminary stage.

B. The *Travaux Préparatoires* of Article VI of the Pact of Bogotá

3.7. The *travaux préparatoires* of Article VI of the Pact confirm its ordinary meaning. The Pact of Bogotá was approved at the Ninth International Conference of American States, held in Bogotá from 30 March 1948 to 2 May 1948. The Court has observed that the *travaux préparatoires* of the Pact must “be resorted to only with caution, as not all the stages of the drafting of the texts at the Bogotá Conference were the subject of detailed records.”³³ They are nonetheless sufficiently informative that the Court went on to rely upon them,³⁴ and they confirm what the States parties wished to prevent by including Article VI.

³² *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p 858, para 77.

³³ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p 85, para 37.

³⁴ See *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, pp 85-86, paras 37-38.

3.8. The *travaux* indicate that after a first reading of Article VI in the Third Committee of the Conference, the delegate of Ecuador asked “if it would be possible to find a formula to temper the categorical nature of the article in question.”³⁵ The delegate of Peru, who had drafted the article, responded, stating that “it would be very dangerous to tone down the wording.”³⁶ This was because:

“First of all, it would be quite difficult to tone it down; second, it would open the door to provoking a dispute, which is precisely what we want to avoid. I think that an American system of peace must not only resolve disputes, but also keep them from being provoked, because provoking disputes is precisely one of the ways to threaten peace.”³⁷

The delegate of Peru made clear that Article VI was designed to avoid “inviting litigation” aimed at provoking the unsettling of matters already settled.³⁸

3.9. The delegate of Chile intervened to observe that Chile “fully supports” the comments made by the delegate of Peru and that Chile was prepared to vote in favour of the Article without amendment.³⁹

3.10. The delegate of Cuba then observed that the “first part of the article says: ‘The aforesaid procedures, furthermore, may not be applied to matters already settled’.”⁴⁰ He asked: “If they have already been settled, what is the

³⁵ *Travaux préparatoires* of the Pact of Bogotá, *Ninth International Conference of American States*, held at Bogotá from 30 March – 2 May 1948, Records and Documents (1953) (*Travaux préparatoires of the Pact of Bogotá*), **Annex 12**, Vol IV, p 134.

³⁶ *Travaux préparatoires* of the Pact of Bogotá, **Annex 12**, Vol IV, p 135.

³⁷ *Travaux préparatoires* of the Pact of Bogotá, **Annex 12**, Vol IV, p 135.

³⁸ *Travaux préparatoires* of the Pact of Bogotá, **Annex 12**, Vol IV, p 135.

³⁹ *Travaux préparatoires* of the Pact of Bogotá, **Annex 12**, Vol IV, p 136.

⁴⁰ *Travaux préparatoires* of the Pact of Bogotá, **Annex 12**, Vol IV, p 136.

problem?”⁴¹ The delegate of Peru answered: “The danger is that the matter could be re-opened, or that there could be an attempt to re-open it.”⁴² Bolivia never suggested that it understood Article VI to have any other meaning, and precisely because of the clear meaning of Article VI, Bolivia entered the reservation to it described below in **Section 2**.

3.11. The text of Article VI was approved by the Third Committee without any substantive amendment to Peru’s proposal, was sent to the Committee on Co-ordination where there was no further discussion of its substance, and then to the Drafting Committee in which no substantive amendment was made.⁴³ The Pact of Bogotá was then referred to the Plenary and approved in full without additional discussion.⁴⁴

* * *

3.12. As follows both from the ordinary meaning of its text and from its *travaux préparatoires*, in adopting Article VI of the Pact of Bogotá the States parties categorically excluded from the jurisdiction of the Court any matters (i) already settled by arrangement between them or (ii) governed by agreements or treaties in force in 1948.

⁴¹ *Travaux préparatoires* of the Pact of Bogotá, **Annex 12**, Vol IV, p 136.

⁴² *Travaux préparatoires* of the Pact of Bogotá, **Annex 12**, Vol IV, p 136.

⁴³ See *Travaux préparatoires* of the Pact of Bogotá, *Ninth International Conference of American States*, held at Bogotá from 30 March – 2 May 1948, Records and Documents (1953), Vol II, pp 435-591. See also Separate Opinion of Judge Oda, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p 123, para 13. The only relevant change following the Third Committee was the renumbering of the article in question to become Article VI: *Travaux préparatoires* of the Pact of Bogotá, **Annex 12**, Vol II, p 538.

⁴⁴ *Travaux préparatoires* of the Pact of Bogotá, **Annex 12**, Vol I, p 234. See also Separate Opinion of Judge Oda, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p 123, para 13.

Section 2. BOLIVIA'S RESERVATION TO ARTICLE VI OF THE PACT OF BOGOTÁ

3.13. Bolivia has always been aware that Article VI excludes from the dispute resolution procedures of the Pact of Bogotá its claim to sovereign access to the sea. Bolivia entered a reservation to Article VI in an attempt to expand the scope of the dispute resolution procedures of the Pact. When that prevented the Pact from entering into force between Bolivia and Chile, Bolivia withdrew its reservation and reformulated its claim to allege an obligation to negotiate and to agree on sovereign access to the sea. Bolivia's reformulated claim also comes within the scope of Article VI. This reformulated claim concerns the same matters as the claim directly for revision of the 1904 Treaty: territorial sovereignty and the character of Bolivia's access to the sea.

3.14. Upon signing the Pact in 1948, Bolivia entered the following reservation:

“The Delegation of Bolivia makes a reservation with regard to Article VI, inasmuch as it considers that pacific procedures may also be applied to controversies arising from matters settled by arrangement between the Parties, when the said arrangement affects the vital interests of a State.”⁴⁵

3.15. Through this reservation, Bolivia sought to make the Pact's dispute resolution procedures available for matters affecting Bolivia's “vital interests” even if they were already settled, or governed by an agreement or treaty in force prior to 1948. In 1985 the General Secretariat of the Organization of American States conducted “a study on the procedures for peaceful settlement of disputes set forth in the OAS Charter”.⁴⁶ This was mandated by the Member States of the

⁴⁵ Pact of Bogotá, **Annex 13**, p 108.

⁴⁶ Study prepared by the General Secretariat of the Organization of American States – Part II: American Treaty on Pacific Settlement, 9 April 1985, **Annex 56**, p 29.

Organization of American States in a resolution of the General Assembly.⁴⁷ As part of that study, the General Secretariat, which serves as the depository of ratifications and reservations under the Pact of Bogotá,⁴⁸ stated the following concerning Bolivia's reservation:

“Since Article VI of the Pact considers those agreements, treaties, awards or decisions prior to the conclusion of the Pact to be final and therefore excludes from its purview any matters to which they are addressed, the reservation is basically tantamount to stripping those instruments of their legal efficacy by opening up the possibility that disputes already settled can be revived.”⁴⁹

3.16. The Pact of Bogotá entered into force for Chile when it deposited its instrument of ratification with the Organization of American States in 1974.⁵⁰ Although Bolivia signed the Pact and entered its reservation concerning Article VI in 1948, Bolivia did not deposit its instrument of ratification until 9 June 2011.⁵¹ When it did so, Bolivia confirmed the same reservation, in the same words, as it had made upon signature more than sixty years earlier.⁵² The next

⁴⁷ Study prepared by the General Secretariat of the Organization of American States – Part II: American Treaty on Pacific Settlement, 9 April 1985, **Annex 56**, p 29.

⁴⁸ Charter of the Organization of American States (as amended), signed at Bogotá on 30 April 1948 (entry into force 13 December 1951), Article 112(f).

⁴⁹ Study prepared by the General Secretariat of the Organization of American States – Part II: American Treaty on Pacific Settlement, 9 April 1985, **Annex 56**, p 42. See also Chilean National Congress Chamber Debate, *Background of Decree No 526 – American Treaty on Pacific Settlement* (1967), **Annex 49**, pp 17-18.

⁵⁰ Act of Deposit of the Instrument Containing the Ratification by the Chilean Government of the American Treaty on Pacific Settlement, 15 April 1974, **Annex 51**.

⁵¹ See Organization of American States, Signatories and Ratifications, A-42: American Treaty on Pacific Settlement, **Annex 77**; and Letter from Luis Toro Utillano, Principal Legal Officer of the Department of International Law of the Organization of American States, to States signatory to the American Treaty on Pacific Settlement, OEA/2.2/36/11, 9 June 2011, enclosing Bolivia's Instrument of Ratification, **Annex 63**.

⁵² See Organization of American States, Signatories and Ratifications, A-42: American Treaty on Pacific Settlement, **Annex 77**; and Letter from Luis Toro Utillano,

day, Chile objected to Bolivia's reservation and indicated that "this objection prevents the entry into force" of the Pact as between Chile and Bolivia.⁵³

3.17. On 21 October 2011, Bolivia responded by issuing an *Aclaración*, asserting that notwithstanding Chile's objection, the Pact "is in force" as between Chile and Bolivia.⁵⁴ Bolivia argued that its reservation "only aims at extending" the obligations in the Pact, and for this reason, "does not imply any commitment for the Parties to the Pact, who do not expressly accept it."⁵⁵ Bolivia contended that since its reservation purported to add an obligation to a treaty, rather than to restrict its obligations, if Chile did not accept that addition, then the Pact entered into force as between Bolivia and Chile without that addition. Chile responded to Bolivia's *Aclaración*, confirming that "the reservation made by Bolivia to Article VI of the Pact of Bogotá and the objection made by Chile ... prevent the entry into force of this Treaty between the two States."⁵⁶

3.18. On 10 April 2013, Bolivia withdrew its reservation to the Pact of Bogotá,⁵⁷ bringing it into force as between Bolivia and Chile. Two weeks later it filed its Application in the present case.⁵⁸

Principal Legal Officer of the Department of International Law of the Organization of American States, to States signatory to the American Treaty on Pacific Settlement, OEA/2.2/36/11, 9 June 2011, enclosing Bolivia's Instrument of Ratification, **Annex 63**.

⁵³ Objection by Chile to the reservation made by Bolivia at the time it ratified the American Treaty on Pacific Settlement, 10 June 2011, **Annex 64**.

⁵⁴ Letter from David Choquehuanca, Minister of Foreign Affairs of Bolivia, to the General Secretariat of the Organization of American States, 21 October 2011, **Annex 66**.

⁵⁵ Letter from David Choquehuanca, Minister of Foreign Affairs of Bolivia, to the General Secretariat of the Organization of American States, 21 October 2011, **Annex 66**.

⁵⁶ Letter from the Chilean Ministry of Foreign Affairs to the General Secretariat of the Organization of American States, No 389, 12 December 2011, **Annex 68**.

⁵⁷ Bolivian Instrument of Withdrawal of Reservation to the Pact of Bogotá, 10 April 2013, **Annex 115 to Bolivia's Memorial**.

⁵⁸ Bolivia's Application Instituting Proceedings, 24 April 2013.

3.19. Bolivia has sought alternative ways to pursue its longstanding objective of revising the 1904 Peace Treaty. Its reservation to the Pact of Bogotá was one, but it led to the Pact not entering into force as between Bolivia and Chile. Bolivia then withdrew its reservation to Article VI and now reformulates its claim in a different guise: as a claim that Chile is under an obligation to negotiate and to agree on Bolivia gaining sovereign access to the Pacific Ocean through territory to be ceded to Bolivia by Chile.⁵⁹ Whatever the guise, Bolivia's claim concerns territorial sovereignty and the character of Bolivia's access to the Pacific Ocean. Those are matters settled and governed by the 1904 Peace Treaty and thus, by force of Article VI of the Pact of Bogotá, are outside the jurisdiction of the Court.

Section 3. BOLIVIA'S CLAIM CONCERNS MATTERS SETTLED AND GOVERNED BY THE 1904 PEACE TREATY

3.20. In the 1904 Peace Treaty:

- (a) Bolivia recognised Chile's sovereignty over coastal territory that had previously been Bolivian and the two States delimited the entire boundary between them (see **subsection A**); and
- (b) Chile and Bolivia established a special regime for Bolivia to have access to the Pacific Ocean, including a perpetual right of commercial transit, together with facilitation of that transit through the construction of a railway at Chile's cost and the establishment of Bolivian customs agencies at Chilean ports (see **subsection B**).

⁵⁹ Letter from David Choquehuanca, Minister of Foreign Affairs of Bolivia, to Philippe Couvreur, Registrar of the International Court of Justice, 8 July 2011, **Annex 65**.

3.21. Bolivia says that: “Sovereign access to the sea was not addressed in the 1904 Treaty.”⁶⁰ That is incorrect. The 1904 Peace Treaty addressed both territorial sovereignty and the character of Bolivia’s access to the sea. Its terms left no prior Bolivian claim to sovereign access to the sea pending, and it established a special regime for Bolivian access to the sea over Chilean territory.

3.22. The basic chronology of events leading to the 1904 Peace Treaty was as follows:

- (a) In 1884, Bolivia and Chile signed a Truce Pact to “declare the end of the state of war”⁶¹ between the two States and which, in Article 8, was expressed as being designed to “prepare and facilitate the establishment of a strong and stable peace between the two Republics”. The Truce Pact established that Chile would “continue to govern” coastal territory that had previously been Bolivian⁶² and it explicitly envisaged the subsequent conclusion of a “definitive treaty of peace”.⁶³ The delimitation effected by the 1884 Truce Pact is depicted in **Figure 1**.

⁶⁰ Bolivia’s Memorial, para 10.

⁶¹ Truce Pact between Bolivia and Chile, signed at Valparaíso on 4 April 1884 (the *1884 Truce Pact*), **Annex 2**, Article 1.

⁶² 1884 Truce Pact, **Annex 2**, Article 2.

⁶³ 1884 Truce Pact, **Annex 2**, Preamble; see also Article 8.

Figure 1



For illustrative purposes only

- (b) In May 1895 the two States signed a Treaty of Peace and Amity.⁶⁴ With it they signed the 1895 Treaty on Transfer of Territory⁶⁵ (defined above as the 1895 Treaty) and the 1895 Treaty of Commerce.⁶⁶ These three treaties (the *1895 Treaties*) were accompanied by four protocols⁶⁷ and the two States agreed in an exchange of notes in 1896 that a failure by the Congresses of both States to approve the latter two of those protocols would make all of the 1895 Treaties “wholly without effect”.⁶⁸ Congressional approval was never forthcoming. The 1895 Treaties thus never entered into force, as discussed further at paragraphs 4.2-4.8 below.
- (c) It being established that the 1895 Treaties were wholly without effect, in 1904 the two States concluded the “definitive treaty of peace” envisaged in the 1884 Truce Pact. In its Preamble, the 1904 Peace Treaty noted that it was concluded “[i]n pursuance of the purpose expressed in Article 8 of the Truce Pact of April 4, 1884” and, in its

⁶⁴ Treaty of Peace and Amity between the Republics of Chile and Bolivia, signed at Santiago on 18 May 1895, **Annex 99 to Bolivia’s Memorial**.

⁶⁵ 1895 Treaty, **Annex 3**.

⁶⁶ Treaty of Commerce between the Republics of Chile and Bolivia, signed at Santiago on 18 May 1895, **Annex 15**.

⁶⁷ Protocol on the Scope of the Treaty on Transfer of Territory between Bolivia and Chile, signed at Santiago on 28 May 1895, **Annex 17**; Protocol on Debts between Bolivia and Chile, signed at Santiago on 28 May 1895, **Annex 16**; Protocol of 9 December 1895 on the scope of the obligations agreed upon in the treaties of 18 May between Bolivia and Chile, signed at Sucre on 9 December 1895 (the *December 1895 Protocol*), **Annex 4**; and Explanatory Protocol of the Protocol of 9 December 1895 between Bolivia and Chile, signed at Santiago on 30 April 1896 (the *1896 Protocol*), **Annex 8**.

⁶⁸ Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 117, 29 April 1896, **Annex 5**; Note from Adolfo Guerrero, Minister of Foreign Affairs of Chile, to Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 521, 29 April 1896, **Annex 6**; and Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 118, 30 April 1896, **Annex 7**.

Article I, the 1904 Peace Treaty ended the regime established by the 1884 Truce Pact, referring to “the regime established by the [1884] Truce Pact being thereby terminated.”⁶⁹ Bolivia accepts that the 1904 Peace Treaty brought “to an end the regime established by the Truce Pact”.⁷⁰

3.23. In presenting the 1904 Peace Treaty to the Bolivian Congress on 2 February 1905, the Chairman of the Congress referred to the “laborious, lengthy and difficult negotiations that resulted in the said arrangement, which encompasses all of our issues.”⁷¹ The word “arrangement”, “*arreglo*” in Spanish, is precisely the same word used in the English and Spanish versions of Article VI of the Pact of Bogotá. As the Chairman of the Bolivian Congress made clear in 1905, the 1904 Peace Treaty was an arrangement that was the product of detailed negotiations and settled all the issues outstanding between Bolivia and Chile. That included territorial sovereignty and the character of Bolivia’s access to the sea.⁷² In responding to the Chairman of the Congress, the

⁶⁹ 1904 Peace Treaty, **Annex 10**, Preamble and Article I.

⁷⁰ Bolivia’s Memorial, para 92.

⁷¹ Bolivia, 13th Closing Session of the Honourable National Congress, 2 February 1905 (La Paz, 1905), **Annex 30**, p 119. The Spanish original is: “*Negociación laboriosa, larga y accidentada, que ha acabado con dicho arreglo, que comprende todas nuestras cuestiones.*”

⁷² For Bolivia’s claim to sovereign access to the Pacific before the settlement reached in the 1904 Peace Treaty, see Despatch from George H Bridgman, Legation of the United States in Bolivia, to John Hay, Secretary of State of the United States, No 214, 2 July 1900, enclosing a memorandum from the Minister of Foreign Affairs of Bolivia dated 30 June 1900, **Annex 26**; and Note from Eliodoro Villazón, Minister of Foreign Affairs of Bolivia, to Abraham König, Minister Plenipotentiary of Chile in Bolivia, No 25, 15 October 1900, **Annex 29**. Also see Chile’s approach to this claim in Note from Abraham König, Minister Plenipotentiary of Chile in Bolivia, to Eliodoro Villazón, Minister of Foreign Affairs of Bolivia, 13 August 1900, **Annex 27**.

President of Bolivia specifically referred in Congress to the “clear and finally determined borders” settled in the 1904 arrangement.⁷³

A. Territorial Sovereignty is a matter settled and governed by the 1904 Peace Treaty

3.24. In their 1904 Peace Treaty, which was signed twenty years after the war had ended, and which entered into force on 10 March 1905,⁷⁴ Bolivia and Chile delimited the entirety of their boundary. That included the boundary between Bolivia and, on the Chilean side, from South to North, (i) the coastal territory that had been Bolivian over which Bolivia recognised Chilean sovereignty, (ii) the province of Tarapacá that Peru had already ceded to Chile, and (iii) the provinces of Tacna and Arica, which were both under Chilean control in 1904.⁷⁵

3.25. In Article II of their 1904 Peace Treaty, Bolivia and Chile delimited their entire present day boundary, settling between them sovereignty on either side of that boundary. The boundary is described in Article II from South to North by reference to 96 points.⁷⁶ This may be seen in **Figure 2**.

⁷³ Bolivia, 13th Closing Session of the Honourable National Congress, 2 February 1905 (La Paz, 1905), **Annex 30**, p 123.

⁷⁴ Act of Exchange of Instruments of Ratification for the 1904 Treaty of Peace and Amity between Bolivia and Chile, 10 March 1905, **Annex 31**.

⁷⁵ On the subsequent agreement between Chile and Peru concerning Tacna and Arica, see paragraphs 4.14-4.16 below and the Treaty between Chile and Peru for the Settlement of the Dispute Regarding Tacna and Arica, signed at Lima on 3 June 1929 (entry into force 28 July 1929), 94 *League of Nations Treaty Series* 401 (the *Treaty of Lima*), **Annex 11**.

⁷⁶ 1904 Peace Treaty, **Annex 10**, Article II.

Figure 2



For illustrative purposes only

3.26. Also in Article II, Bolivia recognised Chile as being sovereign over coastal territory that had been Bolivian:

“By the present Treaty, the territories occupied by Chile by virtue of article 2 of the Truce Pact of April 4, 1884, are recognized as belonging absolutely and in perpetuity to Chile.”⁷⁷

This recognition was unconditional, and was not subject to any purported right of Bolivia later to obtain sovereign access to the sea. Both States recognised Chile’s sovereignty over that territory “absolutely and in perpetuity”.

3.27. In 1883, Peru had ceded to Chile “in perpetuity and unconditionally the territory of the littoral province of Tarapacá”, bounded on the north by “the ravine and river Camarones; on the south, the ravine and river Loa; on the east, the Republic of Bolivia; and on the west, the Pacific Ocean.”⁷⁸ Thus at the time of the 1904 Peace Treaty, Tarapacá was definitively under the sovereignty of Chile, with Bolivia to its East.

3.28. Although sovereignty over Tarapacá had been settled, the definitive status of the provinces of Tacna and Arica remained open as between Chile and Peru in 1904. In the 1883 Treaty of Peace between Chile and Peru, those two States agreed that Tacna and Arica “shall continue in the possession of Chile and subject to Chilean laws and authorities for a period of ten years, from the date of the ratification of the present Treaty of Peace.”⁷⁹ They also agreed that after the term of ten years, the question whether Tacna and Arica would “remain definitively under the dominion and sovereignty of Chile or continue to form part

⁷⁷ 1904 Peace Treaty, **Annex 10**, Article II.

⁷⁸ Treaty of Peace of Ancón between Chile and Peru, signed at Lima on 20 October 1883 (the *Treaty of Ancón*), **Annex 1**, Article 2.

⁷⁹ Treaty of Ancón, **Annex 1**, Article 3.

of Peruvian territory” would be decided by plebiscite.⁸⁰ Whilst as between Chile and Peru, the question of sovereignty over the provinces of Tacna and Arica remained open in 1904, Chile controlled both of them, with Bolivia to the East.

3.29. Pursuant to the 1904 Peace Treaty, Bolivia received a substantial monetary payment from Chile. The two States agreed in Article IV that Chile would pay Bolivia three hundred thousand pounds sterling in cash, in two equal payments, the first within six months of exchange of ratifications and the second within a year thereafter.⁸¹ Together with this cash payment, in Article V of the 1904 Peace Treaty Chile assumed financial responsibility for final settlement of claims by individuals and companies against Bolivia, which principally concerned loans and contracts related to territory that had been Bolivian.⁸²

3.30. The 1904 Peace Treaty is subject to the fundamental rule of *pacta sunt servanda*. It “is binding upon the parties to it and must be performed by them in good faith”.⁸³ Stability of boundaries is a core principle of international law.⁸⁴ As the Court said in the *Case concerning the Temple of Preah Vihear*: “In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality.”⁸⁵ It is precisely this stability and finality that

⁸⁰ Treaty of Ancón, **Annex 1**, Article 3.

⁸¹ 1904 Peace Treaty, **Annex 10**, Article IV.

⁸² 1904 Peace Treaty, **Annex 10**, Article V. See also Note from Eliodoro Villazón, Minister of Foreign Affairs of Bolivia, to Abraham König, Minister Plenipotentiary of Chile in Bolivia, No 25, 15 October 1900, **Annex 29**, pp 344, 349 and 361, referring to Chile assuming financial responsibility for “liabilities affecting the littoral”.

⁸³ Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969 (entry into force 27 January 1980), 1155 *United Nations Treaty Series* 331, Article 26.

⁸⁴ See for example Vienna Convention on the Law of Treaties, signed at Vienna on 23 May 1969 (entry into force 27 January 1980), 1155 *United Nations Treaty Series* 331, Article 62(2)(a).

⁸⁵ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 July 1962, *I.C.J. Reports* 1962, p 34.

the States parties to the Pact of Bogotá ensured by excluding settled matters from the jurisdiction of the Court in Article VI.

3.31. The territorial settlement in the 1904 Peace Treaty was agreed in absolute terms. No earlier Bolivian claim to sovereign access to the Pacific survived it. The 1904 Peace Treaty between Bolivia and Chile has continued to govern their boundary, territorial sovereignty on either side of that boundary, and Bolivia's access to the Pacific Ocean across Chilean territory, for more than a century.

B. The Character of Bolivia's Access to the Sea is a matter settled and governed by the 1904 Peace Treaty

3.32. An integral part of the overall peace settlement agreed between Bolivia and Chile in 1904 was that Bolivia would have access to the sea over Chilean territory.

3.33. Article VI of the 1904 Peace Treaty provided that Chile would accord "in favour of Bolivia in perpetuity the fullest and most unrestricted right of commercial transit in its territory and its Pacific ports."⁸⁶ It also provided that the two States would "agree, in special acts, upon the method suitable for securing, without prejudice to their respective fiscal interests", Bolivia's unrestricted right of commercial transit.⁸⁷ Bolivia's access to the sea in accordance with the 1904 Peace Treaty has been facilitated through a number of subsequent bilateral agreements, as well as in Chilean law and practice.⁸⁸

⁸⁶ 1904 Peace Treaty, **Annex 10**, Article VI.

⁸⁷ 1904 Peace Treaty, **Annex 10**, Article VI.

⁸⁸ The two States affirmed Bolivia's right of free transit for cargo and passengers in the Convention on Trade between Chile and Bolivia, signed at Santiago on 6 August 1912, **Annex 34**, Article I; and in the Convention on Transit between Bolivia and Chile, signed at Santiago on 16 August 1937, **Annex 44**, Article I. All goods in transit through Chile originating in or bound for Bolivia are subject to the

3.34. Article VII of the 1904 Peace Treaty provided that Bolivia “shall have the right to establish customs agencies in the [Chilean] ports which it may designate for its commerce. For the present it indicates ... those of Antofagasta and Arica.”⁸⁹ In accordance with this provision, Bolivia has continuously maintained its own customs authorities in the Chilean ports of Arica and Antofagasta.⁹⁰

3.35. To facilitate Bolivia’s access to the sea, the 1904 Peace Treaty also provided for the construction of a railway between the port of Arica and the plateau of La Paz, exclusively at Chile’s expense.⁹¹ It is depicted on **Figure 3**. This railway was completed in May 1913.⁹² Fifteen years after its completion,

exclusive jurisdiction and competence of the Bolivian customs authorities: Declaration of Arica by the Ministers of Foreign Affairs of Bolivia and Chile, signed at Arica on 25 January 1953, **Annex 46**, Article 1. Cargo in transit to or from Bolivia is exempt from all taxes in Chile, including for ancillary services; Chile has granted to Bolivia substantial tariff preferences; and Bolivia enjoys preferential rights relating to the storage of cargo and for ancillary services in Chilean ports: see Documents relating to the preferential treatment given to Bolivia in Chilean ports and in transit across Chilean territory, **Annex 45**; and Service Manual for the Port of Arica, 1 December 2011, **Annex 67**, Articles 75 and 89(b). Chile has granted several concessions to Bolivia for the construction and operation of an oil pipeline from the Bolivian city of Sica Sica to Arica, at no cost to Bolivia: see Agreements between Bolivia and Chile and Chilean Decrees relating to the Sica Sica – Arica Oil Pipeline, 1957-1992, **Annex 47**. A significant proportion of the cargo passing through Chilean ports is destined for or originates in Bolivia, in exercise of Bolivia’s right of commercial transit under the 1904 Peace Treaty: see Empresa Portuaria Arica, Arica Port, Strategic Plan 2011-2015, updated July 2013, **Annex 74**, pp 8-12; Empresa Portuaria Arica, Port of Arica, 2012 Annual Report, **Annex 69**, pp 58, 62; and Empresa Portuaria Iquique, Port of Iquique, 2012 Annual Report, **Annex 70**, pp 25, 27.

⁸⁹ 1904 Peace Treaty, **Annex 10**, Article VII.

⁹⁰ See Bolivian Supreme Decree No 24434 of 12 December 1996, **Annex 60**, section 4; and Bolivian Supreme Decree No 8866 declaring that the management of customs in Chilean ports is the responsibility of the Autonomous Administration of Customs Warehouses, 1969, **Annex 50**, Preamble and Article 1.

⁹¹ 1904 Peace Treaty, **Annex 10**, Article III.

⁹² Act of the Inauguration of the Railroad from Arica to the Plateau of La Paz, signed at Arica on 13 May 1913, **Annex 36**; and Act Fixing the Date of Transfer of the Bolivian Section of the Railroad to the Republic of Bolivia, signed at Arica on 13 May 1913, **Annex 35**.

the section of the railway in Bolivian territory was to be vested in Bolivia.⁹³ Accordingly, in 1928 Chile transferred the Bolivian section of the railway to the Government of Bolivia, free of any charge.⁹⁴

3.36. The construction of the railway was of particular importance to Bolivian access to the sea.⁹⁵ Before Chile constructed it, including in the time when Bolivia had coastal territory, by Bolivia's own admission it had "to seek other routes of transit, concluding treaties and granting concessions of all kinds", due to desert-like conditions in the region.⁹⁶

3.37. In addition to constructing at its sole charge the entirety of the railway from Arica to the plateau of La Paz, in Article III of the 1904 Peace Treaty Chile also agreed to guarantee obligations incurred by Bolivia to attract investment in other railways in Bolivia.⁹⁷

⁹³ 1904 Peace Treaty, **Annex 10**, Article III.

⁹⁴ Act of Transfer of the Railroad from Arica to the Plateau of La Paz – Bolivian Section between Bolivia and Chile, signed at Viacha on 13 May 1928, **Annex 43**. The handover was anticipated by the Protocol Regarding the Transfer of the Bolivian Section of the Railroad from Arica to La Paz between Bolivia and Chile, signed at Santiago on 2 February 1928, **Annex 42**.

⁹⁵ See Bolivia, Opening Session of Congress, 6 August 1910 (La Paz, 1911), **Annex 33**, p 6 ("The works on the Arica railway ... will ultimately provide our country with the most important means of communication with the Pacific, which will expand our industries and foreign trade").

⁹⁶ Note from Eliodoro Villazón, Minister of Foreign Affairs of Bolivia, to Abraham König, Minister Plenipotentiary of Chile in Bolivia, No 25, 15 October 1900, **Annex 29**, p 376.

⁹⁷ 1904 Peace Treaty, **Annex 10**, Article III.

Figure 3



For illustrative purposes only

3.38. Under Article XII of the 1904 Peace Treaty: “All questions which may arise with reference to the interpretation or execution” of that treaty shall be submitted to arbitration before the Permanent Court of Arbitration.⁹⁸ Any claims concerning the interpretation or execution of the 1904 Peace Treaty would thus also be outside the jurisdiction of the Court because they would be subject to its own dispute resolution provision.

* * *

3.39. In the 1904 Peace Treaty Bolivia and Chile re-established peaceful relations. Bolivia recognised Chile as being sovereign over coastal territory that had been Bolivian and agreed to a boundary which apportioned no coastal territory to it, while Bolivia received (a) the broadest right of free transit in perpetuity over not only its former territory but over the whole of Chile’s territory; together with (b) a railway constructed at Chile’s expense to facilitate Bolivia’s access to the sea; (c) a substantial cash payment from Chile to Bolivia; (d) a financial settlement by Chile of claims against Bolivia related to the ceded territory; and (e) Chile acting as guarantor for obligations incurred by Bolivia relating to investment in other railways in Bolivia. The comprehensive nature of the matters settled and governed by the 1904 Peace Treaty led the President of Bolivia to refer in Congress to the “clear and finally determined borders” that were settled in that arrangement,⁹⁹ and the Chairman of the Bolivian Congress to describe more generally the “laborious, lengthy and difficult negotiations that resulted in the said arrangement, which encompasses all of our issues.”¹⁰⁰ Now

⁹⁸ 1904 Peace Treaty, **Annex 10**, Article XII, as amended by the Protocol that Designates an Arbitrator between Bolivia and Chile, signed at Santiago on 16 April 1907, **Annex 32**.

⁹⁹ Bolivia, 13th Closing Session of the Honourable National Congress, 2 February 1905 (La Paz, 1905), **Annex 30**, p 123.

¹⁰⁰ Bolivia, 13th Closing Session of the Honourable National Congress, 2 February 1905 (La Paz, 1905), **Annex 30**, p 119. The Spanish original is: “*Negociación laboriosa, larga y accidentada, que ha acabado con dicho arreglo, que comprende todas nuestras cuestiones.*” (Emphasis added.)

seeking to reopen the territorial settlement to which it agreed in 1904, Bolivia says in its Memorial that it is “a State temporarily deprived of access to the sea as a result of war”.¹⁰¹ Matters of territorial sovereignty and the character of Bolivia’s access to the sea were settled by arrangement (“*arreglo*”) in the 1904 Peace Treaty, and they remain governed by that Treaty today. Article VI of the Pact of Bogotá excludes those matters from the jurisdiction of the Court.

¹⁰¹ Bolivia’s Memorial, para 396.

CHAPTER IV

BOLIVIA’S ATTEMPTS TO CIRCUMVENT THE 1904 PEACE TREATY CANNOT ESTABLISH JURISDICTION

4.1. Bolivia uses a number of devices to attempt to circumvent the settlement reached in 1904. First, it relies on the 1895 Treaty on Transfer of Territory (the *1895 Treaty*), without anywhere acknowledging that by agreement of the parties that Treaty is wholly without effect. Second, it relies on diplomatic exchanges after the 1904 Peace Treaty, which concerned the same matters settled and governed by that Treaty. This Chapter briefly addresses these arguments for the purpose of demonstrating that they cannot create consent to jurisdiction over matters that have been excluded from the Court’s jurisdiction by Article VI of the Pact of Bogotá. Finally, the Chapter explains that Article VI of the Pact of Bogotá also applies to the settlement concerning sovereignty over the provinces of Tacna and Arica reached by Chile and Peru in their 1929 Treaty of Lima.

Section 1. BOLIVIA’S CLAIM RELIES ON A MATTER SETTLED AND GOVERNED BY THE 1896 EXCHANGE OF NOTES

4.2. Bolivia relies on the 1895 Treaty throughout its Memorial as a foundation for its alleged right to sovereign access to the Pacific,¹⁰² and as giving rise to a “legal duty for Chile to negotiate the realisation of Bolivia’s sovereign access to the sea”.¹⁰³

4.3. Bolivia argues that in the 1895 Treaty “the Parties agreed that Bolivia’s *enclosure* was temporary and that it retained a right of sovereign access to the sea.”¹⁰⁴ Bolivia alleges that: “The 1895 Transfer Treaty thus expressed the parties’ agreement that Bolivia should have a sovereign access to the sea.”¹⁰⁵

¹⁰² See for example Bolivia’s Memorial, paras 9, 36, 76, 115, 131, 145, 228, 311, 338, 340, 368, 388, 410, 411 and 497.

¹⁰³ Bolivia’s Memorial, para 411.

¹⁰⁴ Bolivia’s Memorial, para 36 (emphasis in the original).

¹⁰⁵ Bolivia’s Memorial, para 76.

Bolivia asserts that in the 1895 Treaty “Chile explicitly bound itself” and that the two States “created an international obligation for Chile ‘to transfer’ a pre-defined area of territory, materializing a sovereign access to the sea for Bolivia.”¹⁰⁶ Bolivia refers to protocols subsequent to the 1895 Treaty and describes their effect as being “similar”, “*mutatis mutandis*” to the correction that followed the Maroua Declaration in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* which “treated the Declaration as valid and applicable”.¹⁰⁷ Bolivia claims that the instruments of ratification of the 1895 Treaty “were duly exchanged, without any qualifications or conditions attached”¹⁰⁸ and that the 1895 Treaty was “legally binding”.¹⁰⁹

4.4. Bolivia omits to inform the Court that the 1895 Treaty never entered into force. On the day they exchanged instruments of ratification for the 1895 Treaties, Bolivia and Chile recorded in an exchange of notes their “perfect agreement” that the 1895 Treaties would be “wholly without effect” absent approval by the Congress of each State of a protocol of 9 December 1895 (the *December 1895 Protocol*) and a clarification of that protocol contained in a further protocol of 30 April 1896 (the *1896 Protocol*). This exchange of notes was subsequently published in the *British and Foreign State Papers*.¹¹⁰

4.5. On 29 April 1896, Chile sent a note to Bolivia stating:

“as was expressed in our last conference, the failure by either of the Congresses to approve of the Protocol of 9 December or the clarification we made to it would imply a disagreement upon a fundamental basis of the

¹⁰⁶ Bolivia’s Memorial, para 340.

¹⁰⁷ Bolivia’s Memorial, para 341, citing *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Merits, Judgment, I.C.J. Reports 2002*, p 431, para 267.

¹⁰⁸ Bolivia’s Memorial, para 343.

¹⁰⁹ Bolivia’s Memorial, para 145.

¹¹⁰ (1895-1896) 88 *British & Foreign State Papers* 1332-1333.

May agreements which would make them wholly without effect.”¹¹¹

In its response the next day, 30 April 1896, Bolivia expressed “perfect agreement” with Chile’s statement.¹¹² Bolivia reiterated this agreement as follows:

“it shall remain established that the failure by either of the Congresses to approve the Protocol of 9 December or the clarification we made to it would imply a disagreement upon a fundamental basis of the May agreements which would make them wholly without effect.”¹¹³

4.6. On the same day that Bolivia sent this note, both States signed the 1896 Protocol, which contained the “clarification” to which the exchange of notes referred.¹¹⁴ Also on that same day, Bolivia and Chile exchanged instruments of ratification of the 1895 Treaties.¹¹⁵ Although these instruments of ratification were exchanged, the Parties agreed on an additional step without which they would not be bound by the 1895 Treaties. That was Congressional approval of the December 1895 Protocol and the clarification contained in the 1896 Protocol.

¹¹¹ Note from Adolfo Guerrero, Minister of Foreign Affairs of Chile, to Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 521, 29 April 1896, **Annex 6**.

¹¹² Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 118, 30 April 1896, **Annex 7**.

¹¹³ Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, No 118, 30 April 1896, **Annex 7**.

¹¹⁴ 1896 Protocol, **Annex 8**.

¹¹⁵ Protocol of Exchange of Ratifications of Instruments signed between the Republics of Bolivia and Chile, 30 April 1896, **Annex 112 to Bolivia’s Memorial**.

4.7. Bolivia's Congress entered a reservation to the 1896 Protocol on the very point that had led to Chile insisting on that protocol,¹¹⁶ and Chile's Congress declined to approve either of the two protocols to which the exchange of notes referred.¹¹⁷ The approval of the two Congresses of the December 1895 Protocol and the clarification contained in the 1896 Protocol required for the two States to be bound by the 1895 Treaty was never forthcoming, and so they were never bound by it.

4.8. By their 1896 exchange of notes, Chile and Bolivia settled by agreement between them that the 1895 Treaty is "wholly without effect." The matter of whether the 1895 Treaty confers any right on any party is governed by the 1896 exchange of notes. Article VI of the Pact of Bogotá places outside the Court's jurisdiction Bolivia's attempt to unsettle the agreement reached between the two States in the exchange of notes of 1896. The 1895 Treaty being agreed to be wholly without effect, Bolivia and Chile then unconditionally settled the matters of territorial sovereignty and the character of Bolivia's access to the sea in their 1904 Peace Treaty.

¹¹⁶ Bolivia's Reservation to the 1896 Explanatory Protocol of the Protocol of 9 December 1895 between Bolivia and Chile, 7 November 1896, **Annex 9**.

¹¹⁷ See Letter from the Ministry of Foreign Affairs of Chile to Manuel Salinas, Extraordinary Envoy and Minister Plenipotentiary of Chile in Bolivia, 15 June 1897, **Annex 25**. For further context, see Letter from Juan Matta, Minister Plenipotentiary of Chile in Bolivia, to the Minister of Foreign Affairs of Chile, 18 June 1895, **Annex 18**; Chamber of Deputies of Chile, Extraordinary Secret Session No 33 of 16 January 1896, **Annex 22**; Chamber of Deputies of Chile, Extraordinary Secret Session No 34 of 17 January 1896, **Annex 23**; Agreement between Bolivia and Chile to Postpone the Exchange of Instruments of Ratification for the Treaties signed on 18 May 1895 until 31 December 1895, signed at Santiago on 6 November 1895, **Annex 19**; Agreement between Bolivia and Chile to Postpone the Exchange of Instruments of Ratification for the Treaties signed on 18 May 1895 until 15 January 1896, signed at Santiago on 31 December 1895, **Annex 20**; Agreement between Bolivia and Chile to Postpone the Exchange of Instruments of Ratification for the Treaties signed on 18 May 1895 until 30 January 1896, signed at Santiago on 15 January 1896, **Annex 21**; and Agreement between Bolivia and Chile to Postpone the Exchange of Instruments of Ratification for the Treaties signed on 18 May 1895 until 30 April 1896, signed at Santiago on 30 January 1896, **Annex 24**. See also Report of Eliodoro Villazón, Minister of Foreign Affairs of Bolivia, to the Bolivian Congress, 20 August 1900, **Annex 28**, pp 22-24.

Section 2. BOLIVIA'S INVOCATION OF POST-1904 EXCHANGES DOES NOT ESTABLISH JURISDICTION

4.9. Bolivia's invocation of exchanges and other instruments after the 1904 Peace Treaty cannot overcome the jurisdictional bar to Bolivia's case presented by Article VI of the Pact of Bogotá. They concerned the same matters as the 1904 Peace Treaty: territorial sovereignty and the character of Bolivia's access to the sea. Those are matters settled and governed by the 1904 Peace Treaty and so outside the Court's subject-matter jurisdiction.

4.10. As Bolivia observes in its Memorial, at particular points in history and in particular political circumstances, Chile has expressed willingness to consider Bolivia's political aspiration to gain sovereign access to the Pacific Ocean. The principal examples of this were the negotiations following the 1975 Act of Charaña,¹¹⁸ and the 1950 exchange of notes.¹¹⁹ Bolivia notes in its Memorial that Chile stated that it considered its participation in the Charaña process not to

¹¹⁸ Joint Declaration of Charaña between Bolivia and Chile, 8 February 1975, **Annex 111 to Bolivia's Memorial**; Aide-Mémoire from the Embassy of Bolivia in Chile to the Ministry of Foreign Affairs of Chile, 25 August 1975, **Annex 174 to Bolivia's Memorial**; Note from Guillermo Gutiérrez Vea Murguía, Extraordinary and Plenipotentiary Ambassador of Bolivia in Chile, to D Patricio Carvajal, Minister of Foreign Affairs of Chile, No 681/108/75, 16 December 1975, **Annex 71 to Bolivia's Memorial**; Note from Patricio Carvajal Prado, Minister of Foreign Affairs of Chile, to Guillermo Gutiérrez Vea Murguía, Extraordinary and Plenipotentiary Ambassador of Bolivia in Chile, No 686, 19 December 1975, **Annex 52**; Official Communiqué of the Peruvian Ministry of Foreign Affairs, No 30-76, 18 November 1976, **Annex 155 to Bolivia's Memorial**; Memorandum from the Ministry of Foreign Affairs of Chile in response to the proposal made on 18 November 1976 by Peru, 26 November 1976, **Annex 26 to Bolivia's Memorial**; and Joint Declaration of the Ministers of Foreign Affairs of Bolivia and Chile, Santiago, 10 June 1977, **Annex 165 to Bolivia's Memorial**.

¹¹⁹ Note from Alberto Ostría Gutiérrez, Ambassador of Bolivia to Chile, to Horacio Walker Larraín, Minister of Foreign Affairs of Chile, No 529/21, 1 June 1950; and Note from Horacio Walker Larraín, Minister of Foreign Affairs of Chile, to Alberto Ostría Gutiérrez, Ambassador of Bolivia to Chile, No 9, 20 June 1950, **Annex 109 to Bolivia's Memorial**.

envisage “any innovation to the provisions of” the 1904 Peace Treaty,¹²⁰ and that in the 1950 exchange of notes Chile expressed its willingness “to study the matter of Bolivia’s sovereign access to the sea in direct negotiations with Bolivia” in conjunction with “safeguarding the legal situation established by” the 1904 Peace Treaty.¹²¹

4.11. In the context of Bolivia’s claim for revision or nullity of the 1904 Peace Treaty, in participating in these exchanges Chile insisted that its willingness to study the matter of sovereign access to the sea for Bolivia in no way diminished the ongoing validity of the 1904 Treaty, which settled and governs the matters of territorial sovereignty and the character of Bolivia’s access to the sea.

4.12. They are matters concerning which Chile has by Article VI of the Pact of Bogotá not consented to the jurisdiction of the Court. This is made plain by another of the post-1904 documents on which Bolivia relies in its Memorial, namely, the Memorandum sent by Chile to Bolivia on 10 July 1961:

“Chile has always been willing, along with preserving the legal situation established in the Treaty of Peace of 1904, to examine in direct negotiations with Bolivia the possibility of satisfying the aspirations of the latter and the interests of Chile. Chile will always reject resorting, on Bolivia’s end, to organizations which are not competent to resolve an issue settled by the Treaty,

¹²⁰ Bolivia’s Memorial, paras 150 and 483, citing Note from Patricio Carvajal Prado, Minister of Foreign Affairs of Chile, to Guillermo Gutiérrez Vea Murguía, Extraordinary and Plenipotentiary Ambassador of Bolivia in Chile, No 686, 19 December 1975, **Annex 52**.

¹²¹ Bolivia’s Memorial, para 362, citing Note from Horacio Walker Larraín, Minister of Foreign Affairs of Chile, to Alberto Ostria Gutiérrez, Ambassador of Bolivia to Chile, No 9, 20 June 1950, **Annex 109 to Bolivia’s Memorial**.

which could only be amended by direct agreement of the parties.”¹²² (Emphasis added.)

4.13. The bilateral negotiations having failed to produce the result that Bolivia sought, Bolivia now asks the Court to insert itself into the Parties’ bilateral relationship by ordering Chile to negotiate and agree with Bolivia, and “to grant Bolivia” Chilean territory so as to convert Bolivia’s free access to the Pacific to sovereign access. In doing so, Bolivia asks the Court to take jurisdiction over matters settled and governed by the 1904 Peace Treaty and to circumvent Article VI of the Pact of Bogotá.

Section 3. THE SETTLEMENT OF SOVEREIGNTY OVER TACNA AND ARICA UNDER THE 1929 TREATY OF LIMA

4.14. Sovereignty over the province of Arica was settled between Chile and Peru in their 1929 Treaty of Lima.¹²³ The boundary between the province of Arica and Bolivia had already been settled between Bolivia and Chile in their 1904 Peace Treaty, as illustrated in **Figure 2** above. By force of Article VI of the Pact of Bogotá all of Bolivia, Chile and Peru have accordingly excluded from the Court’s jurisdiction the matter of territorial sovereignty in that province.

4.15. As shown in **Figure 4**, in the 1929 Treaty of Lima, Chile and Peru agreed that Peru was sovereign over the province of Tacna, and Chile over the province of Arica, and they delimited the boundary between them.¹²⁴ Part of that settlement was an agreement between Chile and Peru that Peru would not cede any part of Tacna to any third State without the prior agreement of Chile, and Chile would not cede any part of the formerly Peruvian province of Arica to any

¹²² Memorandum from the Embassy of Chile in Bolivia to the Bolivian Ministry of Foreign Affairs, 10 July 1961, **Annex 48**. See also Statement by Mr Schweitzer, Minister of Foreign Affairs of Chile, at the Fourth Session of the General Committee of the General Assembly of the Organization of American States, 18 November 1983, **Annex 55**.

¹²³ Treaty of Lima, **Annex 11**.

¹²⁴ Treaty of Lima, **Annex 11**, Article 2.

Figure 4



For illustrative purposes only

third State without the prior agreement of Peru. That was agreed in a Supplementary Protocol to the Treaty of Lima, signed on the same day as the Treaty and agreed to form “an integral part” of that Treaty.¹²⁵ The Supplementary Protocol provided in Article 1 that:

“The Governments of Chile and Peru shall not, without previous agreement between them, cede to any third Power the whole or part of the territories which, in conformity with 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.”¹²⁶

Bolivia states in its Memorial that this Supplementary Protocol “resulted in the creation of a new condition (the agreement of Peru), compliance with which was out of the control of Bolivia and Chile. Peru’s consent would have to be obtained in the future whenever Chile proposed to grant Bolivia a sovereign access to the sea.”¹²⁷

¹²⁵ Supplementary Protocol to the Treaty of Lima between Chile and Peru, signed at Lima on 3 June 1929 (entry into force 28 July 1929), 94 *League of Nations Treaty Series* 401, **Annex 11**, Article 3.

¹²⁶ Supplementary Protocol to the Treaty of Lima between Chile and Peru, signed at Lima on 3 June 1929 (entry into force 28 July 1929), 94 *League of Nations Treaty Series* 401, **Annex 11**, Article 1.

¹²⁷ Bolivia’s Memorial, para 419. On Peru not having provided consent to a proposal that Chile made in the past, see Note from Patricio Carvajal Prado, Minister of Foreign Affairs of Chile, to Guillermo Gutiérrez Vea Murguía, Extraordinary and Plenipotentiary Ambassador of Bolivia in Chile, No 686, 19 December 1975, **Annex 52**; Message of Bolivian President Banzer announcing that Chile’s Reply (19 December 1975) constitutes a globally acceptable basis for negotiations, 21 December 1975, **Annex 53**; Communiqué from the Bolivian Ministry of Foreign Affairs on the Charaña Negotiations, 5 January 1976, **Annex 54**; Official Communiqué of the Peruvian Ministry of Foreign Affairs, No 30-76, 18 November 1976, **Annex 155 to Bolivia’s Memorial**; Memorandum from the Ministry of Foreign Affairs of Chile in response to the proposal made on 18 November 1976 by Peru, 26 November 1976, **Annex 26 to Bolivia’s Memorial**;

4.16. Since any discontinuity in Chile's territory would be obviously unacceptable,¹²⁸ sovereign access to the Pacific Ocean through the province of Arica is the object of Bolivia's claim.¹²⁹ Article VI of the Pact of Bogotá excludes from the Court's jurisdiction Bolivia's request that the Court order Chile to negotiate with Bolivia to "reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean"¹³⁰ and "perform the said obligation ... to grant Bolivia a fully sovereign access to the Pacific Ocean".¹³¹ This is not only because of the 1904 Peace Treaty between Bolivia and Chile, but also because of the terms of the settlement reached between Chile and Peru in their 1929 Treaty of Lima concerning sovereignty over the province of Arica.

and Official Press Release of the Minister of Foreign Affairs of Bolivia, 17 March 1978, **Annex 147 to Bolivia's Memorial**.

¹²⁸ See for example Protocol to Seek an Arrangement to Put an End to the War of the Pacific, 13 February 1884, **Annex 14**; Note from Luis Izquierdo, Minister of Foreign Affairs of Chile, to Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 20, 6 February 1923, **Annex 48 to Bolivia's Memorial**; Note from Luis Izquierdo, Minister of Foreign Affairs of Chile, to Ricardo Jaimes Freyre, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, No 435, 22 February 1923, **Annex 50 to Bolivia's Memorial**; and Note from Patricio Carvajal Prado, Minister of Foreign Affairs of Chile, to Guillermo Gutiérrez Vea Murguía, Extraordinary and Plenipotentiary Ambassador of Bolivia in Chile, No 686, 19 December 1975, **Annex 52**, para 4(e).

¹²⁹ See Bolivia's Memorial, para 419.

¹³⁰ Bolivia's Memorial, para 500(a).

¹³¹ Bolivia's Memorial, para 500(c).

CHAPTER V SUMMARY AND SUBMISSION

5.1. Chile's preliminary objection is in summary as follows:

- (a) Bolivia claims that it has a right to sovereign access to the Pacific Ocean and requests the Court to order Chile to negotiate and agree with Bolivia, and to grant it such sovereign access.
- (b) The 1904 Peace Treaty between Bolivia and Chile settled and governs matters of territorial sovereignty and the character of Bolivia's access to the Pacific Ocean.
- (c) Article VI of the Pact of Bogotá excludes Bolivia's claim from the jurisdiction of the Court because it concerns matters settled and governed by the 1904 Peace Treaty.
- (d) Article VI of the Pact of Bogotá also excludes from the jurisdiction of the Court Bolivia's attempt to rely on the 1895 Treaty as a source of its alleged right to sovereign access to the Pacific Ocean. The 1896 exchange of notes governs the effect of the 1895 Treaty, and by force of that exchange it is settled that the 1895 Treaty is "wholly without effect".

5.2. For the reasons explained in the preceding Chapters, Chile respectfully requests the Court to ADJUDGE and DECLARE that:

The claim brought by Bolivia against Chile is not within the jurisdiction of the Court.

Felipe Bulnes S.
Agent of the Republic of Chile
15 July 2014