

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

HEARING ON CHILE'S PRELIMINARY OBJECTION

First Round Submissions

Agent's Opening Speech

H.E. Ambassador Felipe Bulnes

4 May 2015

I. INTRODUCTION

1. Mr. President, Members of the Court, it is my honour to appear before you as the Agent of Chile. Chile is a vibrant democracy, respectful of the rule of law and fully committed to the promotion of human rights and to policies designed to improve social inclusion and eradicate poverty. In its interactions with other States, Chile aspires not only to a relationship of peace, but to one of integration and cooperation, and this is especially the case with its neighbours. Indeed Chile has been central to almost every Latin American integration initiative.
2. Respect for treaties is fundamental to Chile's foreign policy, since they constitute the foundation of stability and peace between nations. Chile requests the same respect for treaties from its partners, as a basic commitment of international law.
3. Chile's Preliminary Objection in this case has been made necessary by Bolivia's attempt to circumvent the Treaty of Peace and Amity concluded between our two countries in 1904, and to avoid the limits on the Court's jurisdiction under the Pact of Bogotá. In the 1904 Peace Treaty, Bolivia and Chile agreed on the allocation of sovereignty over territory between them, and on the character of Bolivia's access to the Pacific Ocean. They agreed that Bolivia would have "in perpetuity the fullest

and most unrestricted right of commercial transit”,¹ through Chilean territory and its Pacific ports. Bolivia now asks the Court to order Chile to negotiate and to agree with Bolivia to grant it coastal territory over which Chile is the undisputed sovereign, in order to change the character of Bolivia’s access to the Pacific from non-sovereign to sovereign.

4. Yet, Article VI of the Pact of Bogotá excludes from the Court’s jurisdiction any matter already settled by arrangement when the Pact was concluded in 1948, or governed by a treaty in force in that year. Whether Bolivia has a right to sovereign access to the Pacific is a matter that was settled in, and governed by, the 1904 Peace Treaty. That matter is therefore outside the Court’s jurisdiction under the Pact. The whole of Bolivia’s case concerns that same matter, and the Court should at this preliminary stage rule that it has no jurisdiction.
5. These points will be developed in the speeches that will follow mine, but against the background of this brief summary of our case, Chile wishes to emphasize that the principles before you in this case are of interest not only to Chile, but to the entire international community. Bolivia is challenging the stability of borders and territorial sovereignty solemnly agreed in a peace treaty concluded 111 years ago. That Peace Treaty is in force today and it still underpins the daily relations between Chile and Bolivia.

II. BOLIVIA’S CLAIM IN CONTEXT

6. Mr. President, Members of the Court, allow me to underline the true character of Bolivia’s claim. Bolivia’s claim before you is no more than a repackaging of its longstanding aspiration to revise the territorial settlement contained in the 1904 Peace Treaty. What Bolivia seeks from the Court is a declaration that Chile is under an obligation to negotiate and to agree with Bolivia to grant it sovereign access to

¹ Treaty of Peace and Amity between Bolivia and Chile, signed at Santiago on 20 October 1904 (the *1904 Peace Treaty*), **Tab 1 of Judges’ Folder**, pp. 5, 12 and 19, Article VI.

the Pacific.² There is no conceivable basis on which this request can be reconciled with the allocation of sovereignty and the character of Bolivia's access to the Pacific Ocean agreed in the 1904 Peace Treaty. Bolivia's case is therefore excluded by Article VI of the Pact of Bogotá.

7. Bolivia's effort to re-open the peace settlement reached in 1904 goes back to 1920. That was the first occasion on which Bolivia explicitly sought revision of the 1904 Peace Treaty – at that stage, from the League of Nations.³ The League of Nations rejected that request as falling outside its competence.⁴
8. Bolivia then attempted, on at least four separate occasions, to secure support for a general power to avoid or revise treaties, its focus on the 1904 Peace Treaty being clear. So, in 1928, Bolivia made two reservations at the time it signed the Havana Convention on the Law of Treaties that sought to expand the circumstances in which a treaty would cease to apply or would expire.⁵ Then in 1945, during a meeting of the Second Commission of the San Francisco Conference, the Bolivian delegate spoke in favour of a power of revision of treaties.⁶ In 1950, Bolivia also tried to create a wide power to revise treaties in a declaration that it made at the time it ratified the Charter of the Organization of American States.⁷ In 1968, during the

² Bolivia's Application, Submissions, para. 32(a) and (c); Bolivia's Memorial, Submissions, para. 500(a) and (c); see also para. 28(a) and (c).

³ 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 to Chile's Preliminary Objection**, Vol 2, pp. 578 and 579.

⁴ League of Nations, Report of the Commission of Jurists on the Complaints of Peru and Bolivia, 21 September 1921, **Annex 39 to Chile's Preliminary Objection**, Vol 2, pp. 591 and 593.

⁵ Havana Convention on the Law of Treaties, signed at La Havana on 20 February 1928, Articles 14 and 15 and Bolivia's reservations made upon signature, OAS, *Law and Treaty Series*, No 34, **Document 10 of Chile's collection of readily available documents**, pp. 92-101.

⁶ Statement by Mr. Andrade, Ambassador of Bolivia to the United States and Acting Chairman of the Bolivian Delegation, at the Fourth Meeting of the Second Commission of the General Assembly of the United Nations Conference on International Organization (San Francisco Conference), 22 June 1945, UN document No 1151/II/17, **Document 17 of Chile's collection of readily available documents**, pp. 165-166: "We believe that in drawing up the Charter, we should make it possible to review any case of injustice whether deriving from a treaty or not."

⁷ Bolivia's Declaration made upon ratification of the Charter of the Organization of American States, signed at Bogotá on 30 April 1948, OAS, *Law and Treaty Series*, Nos 1-C and 61, **Document 18 of Chile's collection of readily available documents**, p. 193.

Vienna Conference on the Law of Treaties, Bolivia again set out its case for the modification of treaties.⁸

9. Bolivia directed its efforts not only at the 1904 Peace Treaty, but also at the jurisdictional exclusion contained in Article VI of the Pact of Bogotá. The reservation that Bolivia made on signature of the Pact in 1948 is highly material to this case, and is now on your screens. It provided that:

“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.”⁹

10. Bolivia failed to ratify the Pact for a further 63 years, until 2011.¹⁰ When it did so, it restated exactly the same reservation.¹¹ This reservation was an attempt to bring within the Court’s jurisdiction Bolivian efforts to modify the settlement reached in

⁸ Statement by Mr. Kempff Mercado, Ambassador of Bolivia, at the Sixty-Third Meeting of the First Session of the United Nations Conference on the Law of Treaties, 10 May 1968, **Document 19 of Chile’s collection of readily available documents**, p. 202, paras. 45-46: “Bolivia considered it an essential condition for the continuity of treaties that the possibility of peaceful modification should not be excluded; that rule must apply both to treaties establishing boundaries and to peace treaties which were manifestly unjust, and which belonged to a period when war was considered legal. Consequently his delegation totally disagreed with the provisions of paragraph 2 (a) of article 59 [the provision concerning fundamental changes of circumstances], which were not based on valid legal grounds.”

⁹ American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948 (entry into force 6 May 1949) (the *Pact of Bogotá*), **Tab 3 of Judges’ Folder**, pp. 24, 54 and 55.

¹⁰ See Organization of American States, Signatories and Ratifications, A-42: American Treaty on Pacific Settlement, **Annex 77 to Chile’s Preliminary Objection**, Vol 3, p. 1101; 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 to Chile’s Preliminary Objection**, Vol 3, pp. 934 and 935.

¹¹ See Organization of American States, Signatories and Ratifications, A-42: American Treaty on Pacific Settlement, **Annex 77 to Chile’s Preliminary Objection**, Vol 3, p. 1101; 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 to Chile’s Preliminary Objection**, Vol 3, pp. 934 and 935.

the 1904 Peace Treaty. Chile therefore immediately objected to it, preventing the entry into force of the Pact as between our two countries.¹²

11. So as to bring the Pact into force between Bolivia and Chile, Bolivia withdrew its reservation to Article VI on 10 April 2013¹³ and, two weeks later, submitted to the Court its Application in this case. Article VI is in full force between Bolivia and Chile, as it is between all of the High Contracting Parties of the Pact. The device Bolivia chose to attempt to avoid the obvious jurisdictional exclusion of its case was to package it as one concerning an obligation to negotiate.
12. This historical sequence demonstrates an enduring policy on Bolivia's part to challenge the settlement contained in the 1904 Peace Treaty, and an enduring appreciation on Bolivia's part that Article VI of the Pact prevented it from doing so before the Court. Bolivia entered its reservation to the Pact precisely because it understood that Article VI excluded the Court's jurisdiction over any attempt to change what was settled in, and governed by, the 1904 Peace Treaty.

III. BOLIVIA SEEKS A JUDICIALLY COMPELLED TRANSFER OF CHILEAN SOVEREIGN TERRITORY

13. Mr. President, Members of the Court, I wish to emphasize that with Article VI in force, the device Bolivia adopted to seek to avoid the obvious jurisdictional exclusion of its claim was to plead an obligation to negotiate. That is just the latest manifestation of Bolivia's long-standing aspiration to revise the territorial settlement agreed in the 1904 Peace Treaty. Bolivia seeks a declaration from the Court that Chile is under an obligation not only to negotiate, but as a result of negotiations "to grant Bolivia a fully sovereign access to the Pacific Ocean".¹⁴ This would impose upon Chile an obligation to cede to Bolivia a portion of territory over

¹² 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 to Chile's Preliminary Objection**, Vol 3, pp. 940 and 941.

¹³ Bolivian Instrument of Withdrawal of Reservation to the Pact of Bogotá, 10 April 2013, **Annex 115 to Bolivia's Memorial**, Vol III, Part IV.

¹⁴ Bolivia's Application, Submissions, para. 32(c); Bolivia's Memorial, Submissions, para. 500(c); see also para. 28(c).

which Chile is the undisputed sovereign. That Bolivia seeks to use the Court to advance such a request is completely unacceptable to Chile.

14. Although Bolivia dresses up its case as one concerning an obligation to negotiate that it says has nothing to do with the 1904 Peace Treaty, its true nature cannot be hidden. According to Bolivia, only how much territory and where it lies along the Chilean coast would remain to be negotiated. In its pleadings, Bolivia describes the outcome of the “negotiation” that it asks the Court to order as “predetermined”.¹⁵ That predetermined result that Bolivia asks you to order would clearly require a change to the allocation of sovereignty, and to the character of Bolivia’s access to the Pacific Ocean, agreed in the 1904 Peace Treaty.

IV. BOLIVIA SEEKS TO UNSETTLE A MATTER SETTLED IN AND GOVERNED BY THE 1904 PEACE TREATY

15. Mr. President, Members of the Court, Bolivia is asking the Court to ignore the purpose of Article VI of the Pact of Bogotá. Bolivia is asking the Court to close its eyes to the fact that its case goes to the heart of the 1904 Peace Treaty. The truth of the matter is: that the 1904 Peace Treaty pre-dates the Pact of Bogotá of 1948; that the 1904 Peace Treaty was in force in 1948 and remains in force today; and that the 1904 Peace Treaty clearly settled and governed Bolivia’s access to the Pacific Ocean, establishing that Bolivia’s rights of access are not sovereign.
16. Bolivia barely refers to the 1904 Peace Treaty in the almost 200 pages of its Memorial. Mr. President, a peace treaty does not disappear just because a State decides not to mention it. Bolivia reviews at length its relationship with Chile from the early 19th century to the present day, but devotes only two paragraphs to the content of the Peace Treaty that has been the foundation of their relationship for 111 years.¹⁶ This settled territorial dispensation cannot be brought within the Court’s jurisdiction by pleading an obligation to negotiate, and referring to exchanges that preceded and followed the Peace Treaty, but ignoring the Peace Treaty itself.

¹⁵ Bolivia’s Memorial, para. 404.

¹⁶ Bolivia’s Memorial, paras. 10 and 92.

17. The Court has no jurisdiction over matters settled by arrangement or governed by treaty in 1948, and whether Bolivia has a right of sovereign access to the Pacific is the archetype of such matters. If that matter is within the Court’s jurisdiction, then the list of historical issues in Latin America that could be re-opened before you is long indeed. The High Contracting Parties to the Pact of Bogotá did not and do not consent to that, and Bolivia’s reservation shows that it took the same view until two weeks before it seized the Court. Article VI of the Pact of Bogotá leaves any matter settled or governed by the 1904 Peace Treaty, including any subsequent negotiations concerning that same matter, within the exclusive jurisdiction of all of the States concerned.
18. Mr. President, Members of the Court, before you, Bolivia insists that its case does not concern the 1904 Peace Treaty. In contrast, Bolivia has been clear elsewhere that what it seeks is a renegotiation of that Treaty. Before the Organization of American States in 2012, less than twelve months before commencing this case, the Honourable Foreign Minister of Bolivia announced, and I quote, that “Bolivia requests the Government of the Republic of Chile to renegotiate the 1904 Treaty.”¹⁷ This, he said, was in order to comply “with the Bolivian right to a sovereign outlet on the Pacific Ocean”.¹⁸ Bolivia could not have been more clear, and it could not be more clear now, that what Bolivia seeks from the Court is an order compelling Chile to agree to change what was settled in the 1904 Peace Treaty.
19. Further evidence of how Bolivia’s case should be characterized is found in Bolivia’s 2009 Constitution. It purports to declare Bolivia’s, I quote, “unwaivable and imprescriptible right over the territory giving access to the Pacific Ocean and its maritime space.”¹⁹ It also provided that by the end of 2013 the Executive

¹⁷ Statement by H.E. Mr. Choquehuanca, Minister of Foreign Affairs of Bolivia, at the Fourth Session of the General Assembly of the Organization of the American States, 5 June 2012, **Tab 34 of Judges’ Folder**, pp. 17 and 18.

¹⁸ Statement by H.E. Mr. Choquehuanca, Minister of Foreign Affairs of Bolivia, at the Fourth Session of the General Assembly of the Organization of the American States, 5 June 2012, **Tab 34 of Judges’ Folder**, pp. 17 and 18.

¹⁹ Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **Annex 62 to Chile’s Preliminary Objection**, Vol 3, p. 926, Article 267.

Government had to “denounce” or “renegotiate” treaties contrary to the Constitution.²⁰ Bolivia’s Congress then passed a law stating that the Constitutional obligation to denounce such treaties could be fulfilled by the “challenge of such treaties before international tribunals”.²¹ That law was passed in February 2013, and two months later Bolivia seised the Court, precisely to challenge the settlement reached in the 1904 Peace Treaty. That is exactly what the parties to the Pact of Bogotá intended to prevent by including Article VI.

V. CONCLUSION

20. Mr. President, Members of the Court, if pleading an obligation to negotiate is found to be enough to avoid Article VI of the Pact, then the careful limits established by the Pact for dispute settlement in Latin America will be destroyed. The Pact established a framework for the peaceful settlement of disputes, but subject to the important limit that the High Contracting Parties expressly did not consent to the Court having jurisdiction over any matters already settled by arrangement or governed by treaty in 1948. The parties to the Pact entrusted the Court with the role of guardian of this limit, and Chile respectfully requests the Court to protect the Pact from Bolivia’s attempt to circumvent that limit. Chile did not, and does not, consent to the Court having jurisdiction in this case. Chile thus requests the Court to find that Bolivia’s claim is not within its jurisdiction, and to do so without entertaining any further pleadings on the merits.
21. I conclude by indicating the scheme of Chile’s presentations to come, which will develop the points that I have outlined.
 - (a) Next, Professor Pinto will address the purpose and interpretation of Article VI of the Pact of Bogotá.
 - (b) Sir Daniel Bethlehem will then address the 1904 Peace Treaty.

²⁰ Political Constitution of the Plurinational State of Bolivia, 7 February 2009, **Annex 62 to Chile’s Preliminary Objection**, Vol 3, p. 929, Ninth Transitional Provision.

²¹ Bolivian Law on Normative Application – Statement of Reasons, 6 February 2013, **Annex 71 to Chile’s Preliminary Objection**, Vol 3, p. 1003.

- (c) On those foundations, Mr. Wordsworth will apply Article VI of the Pact of Bogotá to Bolivia's claim.
 - (d) To conclude Chile's first round submissions, Professor Dupuy will confirm that our jurisdictional objection has a preliminary character and should be upheld by the Court at this stage.
22. Mr. President, Members of the Court, I thank you for your attention and I invite you to call upon Professor Pinto.