INTERNATIONAL COURT OF JUSTICE

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

WRITTEN STATEMENT OF THE PLURINATIONAL STATE OF BOLIVIA ON THE PRELIMINARY OBJECTION TO JURISDICTION FILED BY CHILE

7 NOVEMBER 2014

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I. Introduction

Overview

1. On 24 April 2013 the Plurinational State of Bolivia ("Bolivia") filed in the Registry of the Court an application instituting proceedings against the Republic of Chile ("Chile") concerning a dispute in relation to "*Chile's obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean"* ("the Application")[1]. The dispute concerns both the existence of that obligation and its breach by Chile. Bolivia invoked in its Application Article XXXI of the American Treaty on Pacific Settlement (the Pact of Bogotá) as the basis for the Court's jurisdiction.

2. Bolivia filed its Memorial on 15 April 2014, within the time limits fixed by the Court's Order of 18 June 2013. It requested the Court to adjudge and declare that:

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

[1] See Bolivia's Application, para. 1.

3. The Memorial clearly stated that on multiple occasions Chile affirmed its undertaking to negotiate a sovereign access to the sea and affirmed itself the strict independence of such an obligation from the matters already settled by the 1904 Treaty of Peace and Friendship between Bolivia and Chile ("the 1904 Treaty")[2]. The Memorial clearly settled also that the 1904 Treaty did not address the matter of Bolivia's sovereign access to the sea.

4. On 15 July 2014 Chile, pursuant to Article 79 (1) of the Rules of Court, submitted a preliminary objection to the Court asking it to declare that: "*The claim brought by Bolivia against Chile is not within the jurisdiction of the Court*"[3] ("the objection"). Chile claims that the 1904 Treaty settled and governs matters of territorial sovereignty and the character of Bolivia's access to the Pacific Ocean, and asserts that Article VI of the Pact of Bogotá ("the Pact") excludes Bolivia's claim from the jurisdiction of the Court on the premise that Bolivia's claim concerns matters settled and governed by the 1904 Treaty.

5. By Order dated 15 July 2014 the President of the Court fixed the time limit (14 November 2014) for the filing by Bolivia of a written statement of its observations and submissions on the objection. Bolivia hereby files this written statement within the time limit established by the Court.

6. Bolivia respectfully submits that Chile's objection should be rejected and that the Court should adjudge and declare that the claim brought by Bolivia is within its jurisdiction.

[2] See Bolivia's Memorial, paras. 10, 93, 150 (b), 345, 351.
[3] See Chile's Preliminary Objection para. 5.2.

7. Chile wholly disregards the facts set out in Bolivia's Application and Memorial. The matter of sovereign access to the sea was not settled by the 1904 Treaty, as stated by the multiple agreements and series of unilateral declarations over the following decades recognizing that the obligation to negotiate such access was a matter *independent* of the 1904 Treaty. Furthermore, while disregarding these facts, Chile seeks a judgment at this preliminary stage that there is no obligation to negotiate sovereign access independent of the 1904 Treaty, which would plainly determine the dispute on the merits.

8. The objection not only delays the due course of proceedings with unjustified arguments but also challenges the procedural economy recommended by the Court[4]. The annexes filed by Chile comprise a reproduction of some documents already presented by Bolivia[5], other already disclosed, easily accessible[6] or without relation to the case[7].

9. Because Chile has deliberately decided to merge its arguments on jurisdiction with the merits of the case, Bolivia will by necessity address issues in this Written Statement that have already been elaborated in its Memorial.

10. In responding to Chile's objections, Bolivia notes the recent statements by the President and the Minister of Foreign Affairs of Chile that "*[i]f the Bolivian government estimated that it should take the maritime issue to The Hague, then*

[4] See Rules of Court, Art.79.7; Practice Direction III.
[5] See Chile's Preliminary Objection, Annexes 1 to 4 and 8, 10, 17, 27, 29, 48, 52.
[6] See Chile's Preliminary Objection, Annex 61.
[7] See Chile's Preliminary Objection, Annexes related to the implementation of the 1904 Treaty: 45 (A) to (G), 46, 47 (A) to (G), 50, 60, 67, 69, 70 and 74.

that is the place to see" and that *"[i]f Bolivia decides to file the issue of its maritime aspiration in The Hague, we will have to deal with this subject in The Hague*"[8] Bolivia regrets that instead of expediting these proceedings in order to settle a long-standing dispute between the parties, Chile has opted instead to close all possible avenues, both at diplomatic and jurisdictional levels and to make a manifestly unfounded objection to the Court's jurisdiction.

Outline of Bolivia's written statement

11. Bolivia's written statement is divided into seven sections. Following the present introduction, the second section sets out the applicable law of a preliminary objection. The third section summarizes Chile's objection to jurisdiction. The fourth section clarifies the true nature and subject matter of Bolivia's claim, and demonstrates that Chile's objection is manifestly unfounded. The fifth section explains why Article VI of the Pact is not applicable to the present case. The sixth section discusses the inapplicability of the 1929 Treaty of Lima to Bolivia. Finally, section seven sets out the conclusions, and requests the Court to adjudge and declare that the claim brought by Bolivia against Chile falls within its jurisdiction.

[8] Statement of the Foreign Affairs Ministry: "si Bolivia decide radicar el tema de su aspiración marítima en La Haya, nosotros tendremos que tratar ese tema en La Haya" see: http://www.estrategia.cl/detalle_noticia.php?cod=93627 and Statemen of the President of Chile: "Si el gobierno Boliviano estimó que debía llevar el tema del mar a La Haya, es el lugar para verlo" see: http://www.eluniverso.com/noticias/2014/03/16/nota/2383191/michelle-bachelet-dice-que-haya-es-lugar-analizar-tema-maritimo

II. Applicable law

12. Rule 79 of the Rules of Court provides that, after consideration of the respondent's objection to the jurisdiction of the Court, "*the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character*"[9]. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings. This procedure is intended to facilitate efficiency in the administration of justice and to serve the interests of judicial economy.

13. In considering the nature of the objection, the Court must first identify the subject-matter of the dispute with reference to the terms of the application and the applicant's submissions[10].

III. The nature and object of Chile's Objection

14. The parties are in agreement that the Pact is in force between them[11]. The only ground invoked by Chile in support of its objection to the Court's jurisdiction is Article VI of the Pact which provides as follows:

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[9] See Rules of Court 79 (9).
[10] See *Fisheries Jurisdiction* (*Spain* v *Canada*) *ICJ Reports 1998* paras. 29-35, and dissenting opinion of Judge Vereshchetin, para. 4. See also dissenting opinion of Vice-President Al-Khasawneh in *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 832 at para. 13.
[11] See Chile's Preliminary Objection, para. 3.18. It has been in force between Chile and Bolivia since 10 April 2013.

> "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"[12].

15. Chile maintains that Article VI has two limbs either of which "*independently excludes Bolivia's claim from the jurisdiction of the Court*". It contends that the first limb excludes "*matters already settled by arrangement between the parties*", whereas the second limb excludes "*matters*" that "*are governed by agreements or treaties*" in force on April 1948[13].

16. Chile claims that in this case the relevant matters in dispute are *"territorial sovereignty and the character of Bolivia's access to the Pacific Ocean"*, and that these were "*settled by arrangement*" in the 1904 Treaty or otherwise "*governed by the 1904 Peace Treaty, which was in force on the date of the conclusion of the Pact of Bogotá*"[14].

17. In particular, Chile maintains that "*Since sovereignty over territory and the character of Bolivia's access to the sea were matters settled by the 1904 Treaty*

[12] Spanish Text: "*Tampoco podrán aplicarse dichos procedimientos a los asuntos ya resueltos por arreglo de las partes, o por laudo arbitral o por sentencia de un tribunal internacional, o que se hallen regidos por acuerdos o tratados en vigencia en la fecha de la celebración del presente Pacto*". French Text: "*Ces procédures ne pourront non plus s'appliquer ni aux questions déjà réglées au moyen d'une entente entre les parties, ou d'une décision arbitrale ou d'une décision d'un tribunal international, ni à celles régies par des accords ou traités en vigueur à la date de la signature du présent Pacte*". Portuguese text: "*Não se poderão, igualmente, aplicar os processos supracitados aos assuntos já resolvidos por entendimentos entre as partes, ou por laudo arbitral, ou por sentença de um tribunal internacional, ou que estejam regulados por acôrdos ou tratados, em vigor, na data da assinatura do presente Tratado*".

[13] See Chile's Preliminary Objection, para. 3.3.

[14] See Chile's Preliminary Objection, para. 3.4.

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"[15]*.*

18. Thus, Chile's basic assertion is that: "*Bolivia's claim in this proceeding is a reformulation of its claim for revision or nullification of the 1904 Peace Treaty…"*[16] and that "*[w]hether 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*"[17].

19. In the following sections, Bolivia demonstrates that the Objection has no merit, ignores substantial evidence and does not correspond to the truth.

IV. Chile's objection is manifestly unfounded

Chile misconstrues the subject matter of the dispute

20. As set out above, the subject matter of the dispute must be identified with reference to the terms of the Application and the Memorial; Bolivia's Application must therefore be read and interpreted in its own terms.

21. The subject-matter of this dispute is the existence and violation of the obligation to negotiate a sovereign access to the Pacific Ocean agreed upon by Chile. As stated in Bolivia's Memorial of 15 April 2014: "*The present dispute*

[15] See Chile's Preliminary Objection, para. 1.6.
[16] See Chile's Preliminary Objection, para. 2.1.
[17] See Chile's Preliminary Objection, para. 2.4.

concerns the non-compliance by Chile with its obligation to negotiate in good faith a sovereign access for Bolivia to the Pacific Ocean, and its repudiation of that obligation"[18].

22. Bolivia claims that this obligation exists on the basis that Chile agreed to negotiate a sovereign access to the Pacific Ocean independently of the 1904 Treaty, and that Chile has breached that obligation[19]. Bolivia's claim is therefore based on a question of international law (Article XXXI, b) which relates to the existence and breach of an international obligation undertaken by Chile by way of agreements and declarations independent of the 1904 Treaty, to negotiate with Bolivia a sovereign access to the sea (Article XXXI, c), and to the best way to repair this breach (Article XXXI, d).

23. Chile disputes both the existence of the obligation and its breach; for example, in Note Verbale No. 745/183 of 8 November 2011, the Ministry of Foreign Affairs of Chile in reference to the letter submitted by Bolivia to the Registrar of the International Court of Justice in the Maritime Dispute Peru v. Chile, has stated that "[*n]one of the background information mentioned in the letter of 8 July 2011 support the interference of any recognition of an obligation to negotiate sovereign access to the sea, or of an alleged right of sovereign access to the sea, as the Plurinational State of Bolivia pretends to suggest*"[20].

[18] See Bolivia's Memorial, para. 3.

[19] See Bolivia's Application and Memorial. Bolivia made clear that the present dispute concerns the existence and breach of an obligation to negotiate sovereign access to the sea, not the 1904 Treaty (see in particular Application, paras. 1, 4 and 32).

[20] See Bolivia's Memorial, Vol. II, Part I, Annex 82, p. 332. In *East Timor*, the ICJ pointed out that "*for the purpose of verifying the existence of a legal dispute in the present case, it is not relevant [to determine what is] the 'real dispute' […] [The Applicant] has, rightly or wrongly, formulated complaints of fact and law against [the Defendant] which the latter has denied. By virtue of this*

24. Neither in the Application nor in the Memorial of Bolivia is there any trace of a dispute concerning the revision or nullification of the 1904 Treaty. There is nothing in Bolivia's Application whereby it supports or suggests that Bolivia is "*seeking to reopen the territorial settlement to which it agreed in 1904*"[21] or requiring that the Court, either directly or implicitly, declare an obligation of Chile to revise against its will the 1904 Treaty with Bolivia.

25. Bolivia is aware that international law does not permit the revision of a territorial treaty without the agreement of both parties. However, it takes seriously the fact that Chile, on so many occasions has repeated that it will negotiate with Bolivia independently of the 1904 Treaty. That is why Bolivia has brought this claim, requesting that the Court declare that Chile has an obligation to negotiate in good faith which, in accordance with international law, it must perform in good faith.

26. Chile is therefore plainly wrong in arguing that the present dispute is about the revision or nullification of the 1904 Treaty and in confusing the Court. A claim to the effect that Chile agreed to negotiate a sovereign access to the Ocean *independently* of the 1904 Treaty and that it has breached that obligation (which is the actual claim of Bolivia) is not at all the same thing as a claim that the 1904 Treaty is void and needs to be annulled or revised (which is what Chile alleges Bolivia's claim to be).

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denial, there is a legal dispute". (ICJ, *East Timor (Portugal v. Australia),* 30 June 1995, *ICJ Reports 1995*, p. 100, para. 22.) In the present case, Bolivia has asserted that there is an obligation to negotiate a sovereign access to the sea which has been breached by Chile and Chile has denied the existence of this obligation.

[21] See Chile's Preliminary Objection, para. 3.39.

27. Contrary to the misleading assertions of Chile, Bolivia's claim is not to *challenge* the principle *pacta sunt servanda* or to threaten the stability of boundaries by arguing that the 1904 Treaty is void; nor is the object of Bolivia's claim "*to avoid the settlement reached in the 1904 Treaty*"[22]. If the object of Bolivia's claim is to ask for the application of the principle *pacta sunt servanda* this is with regards to other agreements than the 1904 Treaty, those agreements resulting of the undertaking of Chile to negotiate a sovereign access of Bolivia to the sea.

28. Indeed, since 1904, Chile itself has repeatedly considered that the 1904 Treaty, and the obligation to negotiate a sovereign access of Bolivia to the sea which arose subsequently through bilateral agreements and unilateral acts as demonstrated in Bolivia's Memorial[23], were *distinct and independent* issues. Both parties therefore agreed that the question of sovereign access was not settled between them under the terms of the 1904 Treaty.

29. By way of example, after 1904, in the Memorandum of the Chilean Legation in Bolivia of 9 September 1919, Chile stated that: "*Independently of the stipulations of the 1904 Treaty of Peace, Chile accepts to engage into new negotiation to fulfill the longing of the friendly country*..."[24]. Similarly, by Act of 10 January 1920, Chile

[22] See Chile's Preliminary Objection, para. 1.8. See the recent statement (24 September 2014) of President Morales before the General Assembly of the United Nations where he stated that "*Our Application does not seek to alter the international order of limits and borders, neither threatens international treatises as the Chilean Government pretends to portrait. On the contrary, Bolivia invokes international law guidelines to solve in concert and in good faith its sovereign access to the Pacific Ocean".* See: www.un.org/en/ga/69/meetings/gadebate/24sept/bolivia.shtml
[23] See Bolivia's Memorial, paras. 335-387.
[24] See Bolivia's Memorial, Annex 19.

stated that: "*Independent of the situation definitely settled by the provisions of the Treaty of Peace and Friendship of 1904, Chile accepts opening new negotiations aimed at fulfilling the aspiration of its friend and neighbor...*" [25] In both these documents, Chile acknowledges that Bolivia's full and sovereign access to the Pacific Ocean is a matter "independent" of the Treaty.

30. After the entry into force of the Pact in June 1950, the Ambassador of Bolivia in Chile reiterated the Bolivian demand for a sovereign access to the sea[26] and the Chilean Minister of Foreign Affairs answered: "…*it follows that the Government of Chile, along with safeguarding the legal situation established by the Treaty of Peace of 1904, has been willing to study, in direct negotiations with Bolivia, the possibility of satisfying the aspirations of Your Excellency's Government and the interests of Chile*"[27].

31. Similarly, in the Memorandum of July 1961[28] reiterating the engagements of 1950, it is further confirmed that: "*Chile has always been willing, along with preserving the legal situation established by the Treaty of Peace of 1904, to examine directly with Bolivia the possibility of satisfying the aspirations of the latter and the interests of Chile*"[29].

32. In connection with the 1975 Charaña meeting between the two Presidents of Chile and Bolivia, on 19 December 1975 Chile's Foreign Minister, Patricio Carvajal, confirmed his Government's intention "*to negotiate with Bolivia a*

[25] See Bolivia's Memorial, Annex 101.
[26] See Bolivia's Memorial, para. 358.
[27] See Bolivia's Memorial, para. 129 and Annex 109 B.
[28] This memorandum was from the Chilean Ambassador in La Paz, Mr. Manuel Trucco.
[29] See Bolivia's Memorial, para. 136 and Annex 24.

sovereign maritime coast linked to the Bolivian territory through an equally sovereign land strip"[30] accompanied by a precise geographical description of the territory that Chile intended to give up to Bolivia. This Chilean proposal clarified "*…that would take into account the interests of both countries without containing any innovation to the stipulations of the Treaty of Peace, Friendship and Commerce signed between Chile and Bolivia on 20 October 1904"*[31].

33. This is of a critical importance because the geographical offer of Chile in the Charaña process is clearly introduced as distinct from the questions settled by the 1904 Treaty[32]. Thus the independence of the 1904 Treaty with regard to a new agreement giving Bolivia a sovereign access to the sea is, once more, confirmed by Chile itself. Moreover, the Chilean note of 19 December 1975, when proposing a corridor to the sea for Bolivia, asserted that this proposal should be accepted by Bolivia as a definitive solution, thus acknowledging the existence of a pending issue in that date[33].

34. This series of prior declarations by Chile shows the artificiality of its assertion now that "*[t]he only way for Bolivia to be granted the sovereign access to the Pacific that it claims would be through the revision of the settlement reached in 1904 concerning territorial sovereignty and the character of Bolivia's access to the sea*" [34]. This assertion contradicts Chile's own previous agreements and declarations.

[30] See Bolivia's Memorial, Annex 73.
[31] See Bolivia's Memorial, para. 150 and Annex 73.
[32] See Bolivia's Memorial, Figure VI, p.65.
[33] See Bolivia's Memorial para. 151 and Annex 73.
[34] See Chile's Preliminary Objection, para. 2.4.

35. Chile's own objection admits that whether in the 1950 Exchange of Notes or in the Charaña process, it "*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*"[35]. It also mentions the Memorandum of 10 July 1961 reiterating that: "*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*"[36].

36. Chile's *volte face* on this issue is further confirmed by its *Rejoinder* in the *Peru-Chile case* where it expressly referred to the "*then-envisaged Bolivian corridor to the sea to be ceded by Chile*"[37]. It also referred to *"the negotiations conducted between Chile and Bolivia in 1975-1976, in respect to a project of exchange of territories that, if the negotiations had reached its target, would have granted Bolivia a land corridor located between Peru and Chile, giving Bolivia access to the sea"*[38]. Chile's argument now is clearly inconsistent with its long-standing position prior to Bolivia's initiation of proceedings before the Court.

37. Moreover, in 1975, as the Court itself put in Peru v. Chile, *"Chile entered into negotiations with Bolivia regarding a proposed exchange of territory that would provide Bolivia with a 'corridor to the sea' and an adjacent maritime zone"*[39]. The Chilean proposal was expressed with the greatest clarity and confirmed that the

[35] See Chile's Preliminary Objection, para. 4.11.
[36] See Chile's Preliminary Objection, para. 4.12.
[37] See in particular paragraph 1.43, page 28, also p.92-96; paragraphs 3.16 to 3.18, p. 140-142 and paragraphs 3.25 to 3.28, p. 144-146, available at http://www.icj-cij.org/docket/files/137/17192.pdf
[38] See Maritime Dispute (Perú v. Chile), Rejoinder of Chile, para. 3.16.
[39] See Maritime Dispute (Peru v. Chile) Judgment para 131-133. Available at http://www.icj-cij.org/docket/files/137/17930.pdf

search for a solution to the problem of a sovereign access to the sea for Bolivia is independent from the 1904 Treaty.

Determination of the merits

38. Chile invokes Article VI of the Pact to escape the Court's jurisdiction, arguing that the matter has been settled, or that it is governed, by the 1904 Treaty. This is a very artificial objection to jurisdiction. Chile's real argument is not that the matter has been settled or is governed by the 1904 Treaty; it is that the various documents invoked by Bolivia did not form an agreement, independent of the 1904 Treaty, to negotiate a sovereign access to the sea. In other words, by this device, Chile focuses on the 1904 Treaty, and ignores the subsequent multiple agreements and declarations on sovereign access to the sea, as if they either did not exist or were of no legal consequence whatsoever.

39. Resolution of the dispute does not depend on the 1904 Treaty, however, but on conduct of the parties thereafter which materialized an agreement to grant Bolivia a sovereign access to the sea independently of the 1904 Treaty.

40. The Chilean objection is merely a reaffirmation of the dispute between Chile and Bolivia over the existence of an agreement to negotiate a sovereign access to the sea.

41. Accordingly, Bolivia respectfully submits that Chile’s objection is wholly without merit because it ignores the substantial evidence Bolivia has submitted that

an obligation existed independent of the 1904 Treaty and because it does not correspond to the object of the dispute submitted to the Court by Bolivia.

V. Chile's objection does not fall within Article VI of the Pact of Bogota

42. The text of Article VI of the Pact of Bogota is set out at paragraph above. The relevant limitation on jurisdiction concerns "*matters*" that are already "*settled by arrangement*" between the parties *"or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty"*.

43. Article VI of the Pact is not applicable in the present case because:

a. The object of Bolivia's claim is not the revision or nullification of the 1904 Treaty; the present dispute concerns the existence and breach of an obligation to negotiate sovereign access to the sea, a matter not settled or governed by the 1904 Treaty;

b. The 1904 Treaty did not (and could not) prevent any subsequent agreement of the Parties on a matter not settled by its terms, and a dispute concerning the existence of and compliance with such a new agreement can be adjudicated by the Court under the Pact; and

c. Chile consistently admitted that the negotiation of the Bolivia's sovereign access to the Pacific Ocean is independent of the 1904 Treaty.

44. Before addressing each of these elements in turn below, the proper interpretation of Article VI is first considered.

Interpretation of Article VI

45. It is clear from the terms of Article VI of the Pact, which refers to the jurisdiction of the Court as well as other procedures envisaged by the Pact that its purpose was to avoid its use to reopen previously settled disputes. This is confirmed by the *travaux préparatoires*[40].

46. Chile agrees that the "*clear purpose*" of Article VI was to preclude the possibility of using the dispute settlement procedures of the Pact 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"*[41]*.* It is an accurate depiction of the legal meaning of Article VI of the Pact.

47. Chile also seeks to ascribe a broad meaning to the terms "*matters already settled*" and "*matters governed*" by Article VI. Those words do not convey the extensive meaning Chile ascribes to them. Those words convey a precise legal meaning which corresponds to the existence of a dispute on a specific issue. The

[40] See Chile's Preliminary Objection, Annex 12.

[41] See Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 858, para. 77; Chile's Preliminary Objection, para. 3.5. In this case, the Court considered that the invoked 1928 Treaty was in force in 1948 and had settled the question of the sovereignty on the islands of San Andrés, Providencia and Santa Catalina, but not on the others islands and keys composing the Archipelago and other maritime features, nor the course of the maritime boundary, dismissing in these cases the application of Article VI of the Pact and affirming its jurisdiction, founded on Article XXXI of the Pact (paras. 83-120). It is also interesting to note that in transmitting to the Congress the Pact to request its approval in order to proceed to its ratification, the President of Chile urged the Congress to move on "*since the next Inter-American Conference in Rio de Janeiro will be appraised of two proposals to replace the Pact of Bogotá, none of which includes, as does Article VI of the Pact, any provision to prevent the review of treaties in force…*" (Chamber of Deputies of Chile, Session 42 of 12 May 1965, pp. 3266-3267). It confirms the ordinary meaning to be given to Article VI.

Spanish text refers to "*asuntos resueltos por arreglos…o regidos por acuerdos o tratados*", not to "*asuntos resueltos por… o materias regidas por*". The French text uses the term "*questions*". The Portuguese text uses the term "*assuntos*". It is worth noting in that regard that in many instances, including in the context of application of the Pact of Bogota, the ICJ equated the word "*question*" with the word "*dispute*", both in French and English. This is in harmony with the Statute of the Court which, in its English version, consistently uses the word "*matters*" to mean a dispute (i.e. a disagreement on a point of law or fact) that is to be settled[42].

48. The terms "*settled*" and "*governed by*" in Article VI were considered by the Court in the case of the *Territorial and Maritime Dispute between Nicaragua and Colombia*[43]. It concluded that in the circumstances of that case "*there is no difference in legal effect, for the purpose of applying Article VI of the Pact, between a given matter being 'settled' by the 1928 Treaty and being 'governed' by that Treaty"* and for that reason *"the Court will hereafter use the word 'settled'"*[44]. There is nothing in the *travaux préparatoires*[45] indicating a difference in meaning between these two terms.

[42] See Articles 24(3), 36(1), 36(6) and 37 of the Statute of the Court.
[43] See *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 832.
[44] See *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 832, para. 39. In this case the Court proceeded to assess whether each aspect of the dispute has been "settled" or not by a 1928 Treaty and it confirmed its jurisdiction over the matters not settled according its interpretation of the Treaty. The fact that a treaty "concerns a matter" (in that case, sovereignty over islands) is not sufficient to trigger the application of Article VI of the Pact.
[45] The Court warned more than twenty-five years ago, that "not all stages of the drafting of the texts of the Bogotá Conference were the subject of detailed records" (*Border and Transborder Armed Actions. Jurisdiction and Admissibility (Nicaragua v Honduras), I.C.J. Reports 1988,* p. 86, para. 37.

49. In any event, it is clear that in the circumstances of this case there is no substantive difference between the application of the two limbs. The key point is that the 1904 Treaty has not settled the question of Bolivia's sovereign access to the sea or the existence of an obligation to negotiate in this regard. In presenting its objection, Chile itself has not, in fact, distinguished between the application of the two limbs[46].

The object of Bolivia's claim is not the revision or nullification of the 1904 Treaty

50. Chile misrepresents Bolivia's claim to suit its interpretation of Article VI of the Pact, and Bolivia emphatically rejects the characterization of its claim before the Court as seeking revision or nullification of the 1904 Treaty and, thus a matter falling within the ambit of Article VI of the Pact. In the Application, Bolivia clearly distinguished its claim with any matter arising out of the 1904 Treaty. In its Application, Bolivia stated that: *"Without prejudice of the jurisdiction of this Court in the present case, Bolivia reserves the right to request a arbitral tribunal be established in accordance with the obligation under Article XII of the Treaty of Peace and Friendship concluded with Chile on 20 October 1904 and the Protocol of 16 April 1907, in the case of any claims arising of the said Treaty"*[47].

51. It is telling in that respect that between 1947 and 1950, not only during the drafting of the Pact but also subsequent to the signing of the Pact, Bolivia and Chile specifically agreed to hold negotiations on Bolivia's sovereign access to the

[46] See Chile's Preliminary Objection, paras. 3.8 - 3.10 and 3.15.
[47] See Bolivia's Application, para. 34.

sea[48]. This confirms that neither Bolivia nor Chile were of the view that the 1904 Treaty had already "settled" this matter or that Article VI of the Pact applied thereto.

52. In further support of its attempt to invoke Article VI as a bar to the Court's jurisdiction, Chile draws an untenable link between the present case and the Bolivian Constitution of 2009[49], draws inapposite conclusions from the withdrawal of Bolivia's 'reservation' to article VI of the Pact[50], and misrepresents completely Bolivia's position on the relevance of the 1895 Transfer Treaty[51]. It also disregards the agreements and declarations made after the 1904 Treaty in which it assumed the obligation to negotiate the sovereign access of Bolivia to the Pacific Ocean[52]. These contentions are addressed below in turn.

The Constitution of 2009

53. Chile's submissions based on the Bolivian Constitution of 2009 are irrelevant. Bolivia's claim pre-dates this Constitution, and so the idea that Bolivia's Application would be the result of a constitutional prescription is self-evidently without merit.

54. Nothing in the 2009 Constitution; in any decision or declaration of the Bolivian Constitutional Court or in the entire Bolivian legal system mandates the revision or

[48] See Bolivia's Memorial, paras. 124 - 126.
[49] See Chile's Preliminary Objection, para. 2.3 and annexes 62, 71 and 73.
[50] See Chile's Preliminary Objection, paras. 3.13 - 3.19.
[51] See Chile's Preliminary Objection, paras. 4.2 - 4.8.
[52] See Chile's Preliminary Objection, paras. 4.9 - 4.13.

annulment of the 1904 Treaty, which in any event is irrelevant to the distinct and independent international agreements to negotiate sovereign access to the Pacific Ocean.

55. Bolivia does not ask the Court to force Chile to renegotiate or revise the 1904 Treaty. Bolivia asks for the implementation of the agreements entered into by Chile and Bolivia to negotiate a sovereign access to the sea.

Withdrawal of the reservation to Article VI

56. As to the reservation to Article VI of the Pact filed by Bolivia: it was withdrawn. Following its withdrawal the Pact clearly entered into force between Bolivia and Chile, and Chile is bound to accept the provisions of the Pact in its relations with Bolivia[53].

57. Any further comments regarding Bolivia's withdrawn reservation are futile given the object of Bolivia's claim; if any motives are to be ascribed to Bolivia in withdrawing its reservation to Article VI, it must be that Bolivia intended to place before the Court a dispute that was clearly *not* about the revision of the 1904 Treaty.

[53] See Vienna Convention on the Law of Treaties of May 23, 1969, Article 22; Pact of Bogotá, Article LIV, Chile's Preliminary Objection of Chile, para. 3.18.

The 1895 Treaty

58. Regarding the 1895 Transfer Treaty, Chile wholly misrepresents Bolivia's position. Chile alleges that "*Bolivia seeks to avoid the significance of the 1904 Peace Treaty by emphasizing the Treaty on Transfer of Territory of 1895 (the 1895 Treaty) as a source of its alleged right to sovereign access to the Pacific*", adding that "*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'*"[54]. Bolivia, it is further alleged, *"relies on the 1895 Treaty throughout its Memorial as a foundation for its alleged right to sovereign access to the Pacific*"[55]. According to Chile, Bolivia maintains that *"The 1895 Transfer Treaty thus expressed the parties' agreement that Bolivia should have a sovereign access to the sea"*[56], but it "*omits to inform the Court that the 1895 Treaty never entered into force*"[57]. Chile asserts furthermore that none of the other treaties subscribed on the same date were ever enforced[58].

59. This is patently a misrepresentation of the facts set out in Bolivia's Memorial for the following reasons.

60. First, Bolivia correctly set out the status of the 1895 Treaty in its Memorial. It pointed out that the 1895 Transfer Treaty was ratified[59] and published by Chile[60], but Bolivia expressly acknowledged that "*the 1895 treaty regime was an*

[54] See Chile's Preliminary Objection, para. 1.5.
[55] See Chile's Preliminary Objection, para. 4.2.
[56] See Chile's Preliminary Objection, para. 4.3.
[57] See Chile's Preliminary Objection, para. 4.4.
[58] See Chile's Preliminary Objection, paras. 4.5 - 4.8.
[59] See Bolivia's Memorial, para. 342.
[60] See Bolivia's Memorial, paras. 88 and 344.

'indivisible whole'"[61] and that the exchange of the instruments of ratification of some of the protocols "*did not take place*"[62]. The 1896 Exchange of Notes, which Chile emphasizes, led to the drafting of the 30 April 1896 Protocol, which was annexed to Bolivia's Memorial in full[63]. In addition, the Notes exchanged in 1950, which Bolivia also annexed to its Memorial, expressly referred to the 1895 Treaty[64], stating that it was "*entered into with Bolivia*, *though not ratified by the respective Legislative Power*s" [65]. Chile's objection thus plainly ignores the contents of Bolivia's Memorial.

61. Second, Chile misconstrues Bolivia's reference to the 1895 Transfer Treaty, and suggests that it had been given a relevance that is clearly inconsistent with how that instrument is presented in Bolivia's Memorial. In its Memorial, Bolivia mentions the 1895 Treaty as an antecedent [66] which, as a matter of fact, is undeniable. The 1895 Transfer Treaty shows that even before 1904 the Parties distinguished between two matters as illustrated by the signing of two separate treaties: namely i) the cession of the occupied Bolivian department *Litoral* to Chile (the peace treaty); and ii) Bolivia's sovereign access to the sea through other territories to the north (the transfer treaty). Moreover, through the 1895 Transfer Treaty, Chile recognized in a formal way Bolivia's imperative need of a free and natural access to the sea.

[61] See Bolivia's Memorial, para. 88.
[62] See Bolivia's Memorial, para. 85.
[63] See Bolivia's Memorial, Annex 106.
[64] See Bolivia's Memorial, paras. 367, 368.
[65] See Bolivia's Memorial, Annex 109 A.
[66] See Bolivia's Memorial, paras. 338 - 345.

62. Irrespective of the status of the 1895 Treaty, it created a precedent that continued to shape the subsequent agreements and unilateral commitments to negotiate sovereign access, especially from 1950 onwards. In particular, it is significant that the 1950 Exchange of Notes between the parties expressly mentioned the 1895 Treaty, demonstrating its continuing relevance irrespective of its formal status[67].

The subsequent agreements and declarations

63. In its Application and Memorial, Bolivia has extensively documented the specific agreements and repeated declarations by Chilean representatives consenting to negotiate Bolivia's sovereign access to the sea without compromising the respect due to the 1904 Treaty as a legally-binding instrument[68]. These agreements and declarations reflect the core of Chile's obligation to negotiate a sovereign access to the Pacific Ocean with Bolivia.

64. The significance and juridical scope of those instruments will be discussed in the merits phase. For present purposes, it is sufficient to observe that they provide irrefutable proof that: 1) sovereign access to the sea was not settled by any treaty or arrangement before the entry into force of the Pact; and 2) there is a clear separation between the obligation to negotiate the Bolivian sovereign access to the Pacific Ocean and matters settled under the 1904 Treaty, a separation that *Chile's* representatives insisted on repeatedly.

[67] See Bolivia's Memorial, paras. 364 - 369 and Annexes 109 A and B.
[68] See Bolivia's Memorial, Chapter I and correlatives Annexes. See also Bolivia's Application paras. 15 – 24.

65. Chile states that it will "*briefly*" concern itself with the diplomatic exchanges subsequent to the 1904 Treaty "*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*". According to Chile, the diplomatic exchanges after the 1904 Treaty concern "*the same matters settled and governed by that Treaty*" and they are one of the "*devices to attempt to circumvent the settlement reached in 1904*"[69].

66. Chile's briefness in this matter is surprising, given its ample digressions on several issues that are not relevant and this strategy only reflects the weakness of its objection[70]. Chile barely mentions the 1950 Exchange of Notes, in which Chile confirmed[71] that it "*is willing to formally enter into direct negotiations aimed at finding a formula that will make it possible to give to Bolivia a sovereign access to the Pacific Ocean of its own*"[72], or the Chilean note of 19 December 1975, which confirmed that Chile "*would be willing to negotiate with Bolivia over the cession of a strip of territory in the North of Arica up to Linea de la Concordia*"[73]. When summarizing its objection in the last paragraph of its presentation[74], Chile omits to grapple with the plethora of instruments adopted after 1904, insisting instead on focusing on the 1895 Transfer Treaty[75].

67. Furthermore, Chile fails to advance any explanation as to how it can now assert that Bolivia's claim threatens the 1904 Treaty, after Chile has itself affirmed the

[69] See Chile's Preliminary Objection, para. 4.1.
[70] See Chile's Preliminary Objection, paras. 4.9 - 4.13.
[71] See Chile's Preliminary Objection, paras. 4.10 and 4.11.
[72] See Bolivia's Memorial, Annex 109.
[73] See Bolivia's Memorial, para. 150 and Annex 73.
[74] See Chile's Preliminary Objection, para. 5.1.
[75] See Chile's Preliminary Objection, para. 5.1, *d.*

contrary so many times and has actually engaged in negotiations on the sovereign access to the sea, entering into the aforementioned agreements in 1950 and 1975.

68. It is in any case clearly illogical to claim that an older treaty could have settled matters that are the subject-matter of *subsequent* and independent agreements and declarations, and so prevent recourse to the Pact of Bogotá for disputes concerning these subsequent agreements and declarations. The 1904 Treaty could not settle or govern the agreement reached, for instance, in 1950 to negotiate a sovereign access of Bolivia to the Pacific Ocean. The 1904 Treaty did not settle the question of the existence and the breach of subsequent agreements concluded by Bolivia and Chile to negotiate a sovereign access to the sea.

Chile's obligation to negotiate the sovereign access of Bolivia is independent of the 1904 Treaty

69. To argue, as Chile does, that the Court has no jurisdiction in the present case because the matters were settled *forever* through the 1904 Treaty misses the obvious point. As is explained above, the basis of the Bolivian claim (which was rejected by Chile in 2011 and constitutes the object of the present dispute) is precisely that *independently of the 1904 Treaty* Chile agreed to negotiate to grant Bolivia a sovereign access to the Pacific Ocean. It is because this issue was not 'settled' by the 1904 Treaty that both Parties agreed afterwards on negotiations to grant Bolivia such a sovereign access to the Ocean.

VI. The 1929 Treaty of Lima

70. Once the Court declares that there is an obligation to negotiate a sovereign access to the sea, the negotiations will determine, through the agreement of the Parties, the precise terms for Bolivia's sovereign access to the Pacific Ocean. Bolivia has scrupulously abstained from setting or suggesting the exact terms in the present proceedings[76], and it is irrelevant then that Chile insists that Bolivia is making a territorial claim on Arica. What is even more unacceptable is Chile's invocation against Bolivia[77] of the 1929 Treaty and its Complementary Protocol concluded between Chile and Peru, given that said Protocol reflected Chile's purpose to circumvent its promises to Bolivia concerning sovereign access to the sea across Tacna/Arica and given that it is in relation to Bolivia *res inter alios acta*.

71. Chile, without any convincing explanation, in three paragraphs remarks that "*Article VI of the Pact of Bogota 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*"[78].

72. It appears that Chile is trying to establish a link between the 1929 Lima Treaty and Bolivia's possible access to the sea by the province of Arica which, Chile

[76] See Bolivia's Memorial: "…*Bolivia asks the Court to order the Parties to resume negotiations in good faith on such (sovereign) access (of Bolivia to the Pacific Ocean), as they have agreed to do on many occasions since the nineteenth century. The two States themselves will negotiate the exact terms of that sovereign access" (para. 3). "As stated in the opening paragraphs of this Memorial, Bolivia does not ask the Court to define the precise scope or modalities of the right to sovereign access to the sea*…" (para. 497)."…*Bolivia asks the Court to decide that the Parties must resume negotiations in good faith upon a means of implementing Bolivia's right to a sovereign access to the Pacific. The two States themselves will then negotiate the precise terms of Bolivia's sovereign access, taking into account in good faith the proposals already made*" (para. 498).

[77] See Chile's Preliminary Objection, paras. 4.14 and 4.16.

[78] See Chile's Preliminary Objection., para. 4.1.

contends, "*is the object of Bolivian claim*"[79]. Chile argues that Article VI of the Pact of Bogota would also exclude from the Court's jurisdiction any initiative to modify the 1929 Treaty between Chile and Peru.

73. The references to the 1929 Treaty between Chile and Peru are completely out of place. The issue is the Court's jurisdiction over a dispute between Bolivia and Chile. The Court is requested to decide that Chile has an obligation towards Bolivia to negotiate a sovereign access for the latter to the Pacific Ocean. The 1929 Treaty is not applicable in the present case since it is *res inter alias acta* for Bolivia. Indeed, it is an odd proposition that the Court has no jurisdiction on a dispute between Bolivia and Chile because a treaty to which Bolivia is not a party has settled or governs the dispute within the meaning of Article VI.

74. The 1929 Treaty and its protocol's only relevance is that it confirms that Bolivian sovereign access to the sea is an issue independent of the 1904 Treaty, which did not and could not have settled or governed this matter. That is evident given that: *i)* the 1904 Treaty only concerned the cession of occupied Bolivian Department of Litoral; *ii)* the 1904 Treaty did not and could not address occupied Peruvian territories to the North (Tacna/Arica) in so far their status was still unsettled; *iii)* Bolivian sovereign access to the Pacific Ocean in relation to formerly Peruvian territories ceded to Chile was offered by Chile on many occasions before and after the 1904 Treaty; and *iv)* the supplementary protocol of the 1929 Treaty specifically contemplated the possibility that Chile might cede in the future a part

[79] See Chile's Preliminary Objection, para. 4.16.

of the former Peruvian territories to a third State (obviously, Bolivia), like when it happened in the Charaña negotiations of 1975 - 1976[80].

75. Far from excluding the Court's jurisdiction on the case, Chile's invocation of the 1929 Treaty of Lima demonstrates that it remained an outstanding issue at the time that the status of Tacna/Arica was settled between Chile and Peru, and that the question of sovereign access was not settled at that time as between Bolivia and Chile.

VII. Conclusions and submissions

76. Chile's objection is wholly without merit. It mischaracterizes Bolivia's claim. Bolivia does not seek a revision or nullification of the 1904 Treaty. Bolivia only asks for Chile's compliance with the obligation to negotiate a sovereign access to the sea, deriving from agreements and unilateral declarations repeatedly made by Chile, emphasizing that the issue is *independent* of the 1904 Treaty. Chile is requested to respond to the Bolivian claim as that claim has been submitted to the Court.

77. Chile itself has repeatedly declared that the issue of Bolivia's access to the sea is completely independent of the 1904 Treaty and Bolivia's request concerning the obligation to negotiate a sovereign access to the Pacific Ocean is also independent from the 1904 Treaty. This precludes the application of Article VI of the Pact of Bogota as an obstacle to the Court's jurisdiction.

[80] See Bolivia's Memorial, Annex 107.

78. Bolivia does not ask the Court to challenge the *pacta sunt servanda* principle. To the contrary, it asks the Court to give effect to this principle by adjudicating that on many occasions and independently of the 1904 Treaty, Chile and Bolivia agreed to negotiate a sovereign access to the sea.

79. Until Chile repudiated its obligation in 2011, it was clear throughout the course of decades of negotiations that sovereign access to the sea was a matter that remained to be settled between the Parties. Article VI of the Pact does not apply to matters that were never settled between the Parties, and therefore does not preclude the jurisdiction of the Court in this case. The Court must therefore reject the objection to its jurisdiction raised by Chile invoking Article VI of the Pact.

80. The Pact is intended to achieve the peaceful and final solution of disputes, and it should not be interpreted to exclude disputes that do not concern the revision of treaties or challenges to *res judicata*. As observed by the Court, it was "*quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement*"[81]. That is exactly what Bolivia seeks in initiating these proceedings, and Chile's untenable attempts to exclude the jurisdiction of the Court are inconsistent with object and purposes of the Pact to provide for the judicial settlement of outstanding the disputes between OAS Member States.

[81] See *Border and Transborder Armed Actions, Jurisdiction and Admissibility (Nicaragua v Honduras) I.C.J. Reports 1988,* p. 90, para. 46.

81. Accordingly, Bolivia respectfully asks the Court:

a) To reject the objection to its jurisdiction submitted by Chile;

b) To adjudge and declare that the claim brought by Bolivia enters within its jurisdiction.

7 November 2014

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Agent of the Plurinational State of Bolivia