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A Case Ill Suited for Judgment: Constructing 'A Sovereign Access to the Sea' in the Atacama Desert

Christopher R. Rossi

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A Case Ill Suited for Judgment: Constructing ‘A Sovereign Access to the Sea’ in the Atacama Desert

Christopher R. Rossi*

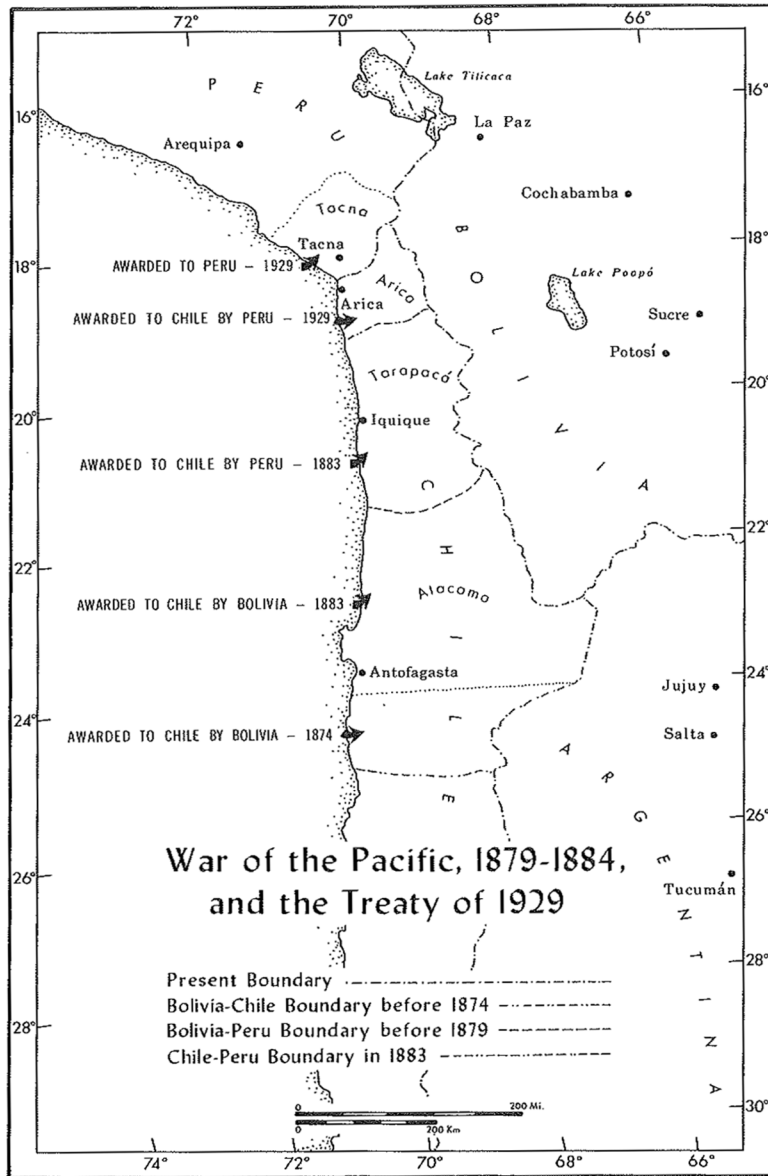
In 2015, the International Court of Justice ruled that Bolivia’s claim against Chile could proceed to the merit stage, setting up this Article’s discussion of perhaps the most intractable border dispute in South American history – Bolivia’s attempt to reclaim from Chile a ‘sovereign access to the Pacific Ocean’. This Article investigates the international law and deeply commingled regional history pertaining to the Atacama Desert region, the hyperarid yet resource-rich region through which Bolivia seeks to secure its long-lost access to the sea. Investigating the factual circumstances (effectivités), the post-colonial international legal principle of uti possidetis, territorial temptations arising from resource discoveries, and the duty to negotiate based on a pactum de contrahendo, a pactum de negotiando, or unilateral declarations, this Article concludes this case is less suited for adjudicative settlement than resolution by the principal three parties involved in the region – Bolivia, Chile, and Peru – primarily because the parties have, over the course of this protracted dispute, constructed intersubjective modalities for a shared sovereignty arrangement fa-

* Christopher R. Rossi, Ph.D. and M.A., Johns Hopkins (Paul H. Nitze School of Advanced International Studies); LL.M., University of London; J.D., University of Iowa; B.A., Washington University (St. Louis). The author thanks John E. Bergstrom of the University of Iowa College of Law library, Alexandra McCallen of the Navy Department Library, Naval History and Heritage Command, Washington Navy Yard, D.C., Claudio Hidalgo-Wohlleben, and Wuyan Wang for research assistance.

cilitated by sub-regional economic growth relations. A regional reconstruction of sovereignty in the northern Atacama region presents the better prospect for resolution than is possible through the limited outcomes presented by formal third party dispute settlement.

Key words: *pactum de contrahendo*, *pactum de negotiando*, condominium, sovereignty, War of the Pacific, constructivism

I.	INTRODUCTION.....	31
II.	A DUTY TO NEGOTIATE <i>WHAT?</i> JUDGE OWADA’S QUESTION	40
	<i>A. Chile’s View</i>	40
	<i>B. Bolivia’s View</i>	42
	<i>C. The ICJ’s View</i>	43
III.	DISTINCTIONS WITH DIFFERENCES: THE DUTY TO NEGOTIATE SOVEREIGNTY AND THE DUTY TO SHARE SOVEREIGNTY	44
	<i>A. Pacta de Contrahendo and Negotiando and Unilateral Declarations</i>	44
	<i>B. Problems with Pacta Contrahendo and Negotiando: Articulating and Enforcing an Operational Standard</i>	47
	<i>C. Unilateral Declarations Distinguished from the Pacta</i>	50
IV.	ORIGINS OF THE DISPUTE	51
	<i>A. The Broader Issue: The Legacy of Spanish Imperial Rule in the Americas</i>	51
	i. The end of empire.....	53
	ii. The application of <i>uti possidetes</i>	54
	<i>B. The More Immediate Cause: The War of the Pacific</i>	55
	i. A contributing factor: Bolivia’s late-stage development.....	57
	ii. The condominium agreement of 1866.....	58
	iii. Condominium rescinded.....	63
	iv. The ten cents tax	64
	v. Chile’s geo-strategic concern	64
	<i>C. Aftermath and the Failed Plebiscite</i>	66
V.	BOLIVIA’S APPEAL TO ACCUMULATIVE EVIDENCE AND JUDGE GREENWOOD’S QUESTION.....	73
VI.	CONCLUSION.....	80



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I. INTRODUCTION

On April 24, 2013, Bolivia instituted proceedings against Chile before the International Court of Justice (ICJ) concerning Chile's obligation to negotiate an agreement granting landlocked Bolivia full sovereign access to the Pacific Ocean.¹ The claim highlights the legal status of the Atacama Desert,² one of the world's driest and most forbidding places.³

The Atacama Desert once served as Bolivia's sovereign corridor to the ocean.⁴ It also once prompted a major international conflict in nineteenth century South America, the War of the Pacific, which

¹ Application Instituting Proceedings on the Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), 2013 I.C.J. No. 153, ¶ 1 at 10 (Apr. 24, 2013), <http://www.icj-cij.org/docket/files/153/17338.pdf> [hereinafter Application to Negotiate Access]; Bolivia Institutes Proceedings Against Chile with Regard to a Dispute Concerning the Obligation of Chile to Negotiate the "Sovereign Access of Bolivia to the Pacific Ocean," I.C.J. (Apr. 24, 2013), <http://www.icj-cij.org/docket/files/153/17340.pdf> (unofficial press release).

² See generally Application to Negotiate Access, *supra* note 1. The northern tier of the Atacama Desert is near the border of Chile and Peru, stretching nearly 1000km (600 miles) south, covering a landmass about the size of New York State (140,000km squared or 54,000 square miles). Randy Russell, *Atacama Desert*, WINDOWS TO THE UNIVERSE, http://www.windows2universe.org/earth/atacama_desert.html (last modified Oct. 27, 2008). The region generally is described as consisting of the territorial stretch along the Pacific coast of South America from about latitude 19 ° South to 25° South. See also BRUCE W. FARCAU, THE TEN CENTS WAR: CHILE, PERU, AND BOLIVIA IN THE WAR OF THE PACIFIC, 1879-1884, 5 (2000) [hereinafter FARCAU, THE TEN CENTS WAR].

³ See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 5 (describing its terrain as "some of the least hospitable on earth"); Tibor J. Dunai, Gabriel A. González López & Joaquim Juez-Larré, *Oligocene-Miocene Age of Aridity in the Atacama Desert Revealed by Exposing Dating of Erosion-sensitive Landforms*, 33 GEOLOGY 321, 321-24 (2015) (noting the Atacama Desert's status as a major hyperarid desert "represents an extreme habitat for life on Earth and serves as an analogue for dry conditions on Mars"); *Deserts of the World*, THE 7 CONTINENTS OF THE WORLD, <http://www.whatarethe7continents.com/deserts-of-the-world/#atacama-desert> (last visited Sept. 2, 2016) (attributing hyperaridity of the Atacama Desert (receiving 0.04 inches (1mm) of water per year) to its situation between the moisture blocking Andes and Chilean Coastal mountain ranges); *South America: Chile*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ci.html> (last modified Aug. 25, 2016) (describing it as the driest desert in the world).

⁴ Application to Negotiate Access, *supra* note 1, at 12, ¶ 9.

cost Bolivia sovereignty over its coastline.⁵ On September 24, 2015, the ICJ dismissed Chile's preliminary objection to the Court's jurisdiction,⁶ ruling a 1904 Peace Treaty,⁷ following an armistice of 1884,⁸ did not bar proceeding to the merits.⁹

This Article assesses the prospect for a shared sovereignty or coparcener solution to the dispute in light of this case. When two or more states exercise joint sovereignty over territory, these types of arrangements – also called condominium arrangements – are established.¹⁰ They require a mutuality of interest and shared decision-making, a kind of ownership that allows for divisible sovereignty,

⁵ See FARCAU, *THE TEN CENTS WAR*, *supra* note 2, at 11; see also WILLIAM F. SATER, *CHILE AND THE WAR OF THE PACIFIC* 2 (1986) (noting the War of the Pacific “constituted one of the more significant military and naval encounters of the late nineteenth century”).

⁶ See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, 2015 I.C.J. No. 153, 20, ¶ 54 (Sept. 24), <http://www.icj-cij.org/docket/files/153/18746.pdf> [hereinafter *Obligation to Negotiate Access, Preliminary Objection*].

⁷ *Treaty of Peace and Amity between Bolivia and Chile (the 1904 Peace Treaty)* art. I, Bol.-Chile, Oct. 20, 1904, <http://www.icj-cij.org/docket/files/153/18616.pdf> (*translated in* *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection of the Republic of Chile, 2014 I.C.J., Annex 10 (July 15)) [hereinafter *1904 Peace Treaty*].

⁸ *Truce Pact between Bolivia and Chile (the 1884 Truce Pact)*, Bol-Chile, Apr. 4, 1884, <http://www.icj-cij.org/docket/files/153/18616.pdf> (*translated in* *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection of the Republic of Chile, 2015 I.C.J., Annex 2 (July 15)) [hereinafter *1884 Truce Pact*]. Peru, a co-belligerent and ally of Bolivia, signed a peace treaty (as opposed to an armistice) with Chile the year before. See *Treaty of Peace of Ancón, Chile -Peru, Oct. 20 1883*, <http://www.icj-cij.org/docket/files/153/18616.pdf> (*reprinted in* *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection of the Republic of Chile, 2014 I.C.J., Annex 1 (July 15)) [hereinafter *Treaty of Ancón*]. Bolivia and Chile replaced the armistice – the 1884 Truce Pact – and formally ended the war by concluding the 1904 Peace Treaty, although Bolivia later denounced it. *1904 Peace Treaty*, *supra* note 7, at art. I.

⁹ See *Obligation to Negotiate Access, Preliminary Objection*, *supra* note 6, at 19, ¶ 50 (“In the Court’s view, . . . the matters in dispute are matters [not] settled by . . . treaties in force on the date of the conclusion of [the Pact of Bogotá, which established the Court’s jurisdiction]”).

¹⁰ 1 L. OPPENHEIM, *OPPENHEIM’S INTERNATIONAL LAW* § 171 (1) (Hersch Lauterpacht ed., 8th ed. 1955).

but not without pre-determined respect for ground rules of co-ownership.¹¹ Chile and Bolivia once fruitlessly attempted a condominium arrangement in the Atacama;¹² and Chile also proffered territorial exchanges to allow Bolivia sovereign access to the sea.¹³ Both prospects may resurface in judicial considerations, should the ICJ render a judgment on the merits, but the Court's consideration of the latter prospect is less likely to affect its judgment. Chile proffered Peru's territory,¹⁴ then territory captured from Peru,¹⁵ making Chile's donative intent unlike O. Henry's parable of mutual sacrifice, *The Gift of the Magi*.¹⁶ Chile's donative intent has never factored into the equation for a condominium solution in the Atacama;¹⁷ and Bolivia's internal misrule compounded by the abject re-

¹¹ See generally Joel H. Samuels, *Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution*, 29 MICH. J. INT'L L. 727 (2008).

¹² RONALD BRUCE ST JOHN, BOUNDARIES, TRADE, AND SEAPORTS: POWER POLITICS IN THE ATACAMA DESERT 7 (Program in Latin American Studies Occasional Paper Series No. 28 1992) [hereinafter ST JOHN, BOUNDARIES, TRADE, AND SEAPORTS].

¹³ *Id.* at 8.

¹⁴ See generally *infra* text accompanying note, 17, 211-13.

¹⁵ According to historian, Bruce Farcau:

"Successive governments in La Paz have consistently demanded access to the sea, and the Chileans have offered a corridor along the current Chile-Peru border that would answer that demand as well as provide a buffer against a still-hostile and well-armed Peru. However, the Peruvians insist that the land involved in such a deal would have been formerly Peruvian territory and that, if Chile wants to give it to anyone, it should return it to Peru, implying that Bolivia will remain landlocked unless Chile chooses to return all the land it took from Peru first, which seems unlikely."

BRUCE FARCAU, *War of the Pacific (1879-1883)*, in 3 THE ENCYCLOPEDIA OF WAR at 1628 (Gordon Martel ed. 2012). The strip of territory proffered by Chile in exchange is the eighteen kilometer band of the Luta Valley, situated between the Arica-La Paz railway and the border of Chile and Peru.

¹⁶ See O. HENRY, THE GIFT OF THE MAGI (with illustrations by Lisbeth Swerger, Picture Book Studio, 1982) (involving Della's sale of her brown cascade of hair to purchase for Jim a platinum fob chain; and Jim's sale of his heirloom gold watch for a bejeweled set of tortoise shell combs for Della).

¹⁷ As an example, Chile proposed a Bolivian corridor north of Arica (involving territory formerly belonging to Peru and possibly including the sale of the Arica-La Paz railway) but offset by territorial compensation from Bolivia "roughly equivalent to the area ceded." Dennis R. Gordon, *The Question of the*

alities of its geo-strategic checkmate have complicated its own attempts to negotiate a solution with either Chile or Peru. Bolivia long ago recognized that Chile held the padlock and Peru held the key to Bolivia's post-War of the Pacific quest to regain a blue water port.¹⁸ Nevertheless, Bolivia has revisited bilateral attempts to pick the lock. In 1910, Peru parried an informal Bolivian query about both Peru and Chile renouncing interests in the Tacna and Arica provinces in favor of granting Bolivia a corridor to the sea.¹⁹ Secret talks between Bolivia and Chile, which combined the coastal access issue with a contentious riparian dispute over a proposed diversion of water from the Lauca River,²⁰ collapsed in 1971 when Bolivia's government was overthrown.²¹ A mid-1970s Brazilian proposal to grant Bolivia a corridor to the sea through Arica failed because Peruvian popular opinion opposed ceding to Bolivia territory 'rightfully' belonging to Peru.²² Linking Chilean territorial concessions to a Bolivian offer of liquefied natural gas backfired and contributed to 60 deaths and the demise of Bolivian President Carlos Mesa's regime in 2005.²³ Chile and Bolivia picked up discussions again in 2006 as

Pacific: Current Perspectives on a Long-Standing Dispute, 141 WORLD AFFAIRS INST. 321, 325 (1979).

¹⁸ See *id.* at 324 (quoting Bolivian General Carlos Alcoreza Milgarejo).

¹⁹ See ST JOHN, BOUNDARIES, TRADE, AND SEAPORTS, *supra* note 12, at 22.

²⁰ Arica's status as a possible bargaining chip was complicated during the 1960s by control over the waters of the Lauca River, a 140-mile long river originating in the Chilean Andes feeding into Bolivia's Lake Coipasa. Lake Coipasa served as a water source for towns on the Bolivian *Altiplano*, igniting a dispute when Chile diverted water to irrigate valleys feeding Arica. See Robert D. Tomasek, *The Chilean-Bolivian Lauca River Dispute and the O.A.S.*, 9 J. OF INTER-AM. STUD. 351-66 (1967). It has been suggested that Chile's interest in contemplating a trade-off solution (i.e., exchanging formerly Peruvian territory north of Arica for a Bolivian concession of roughly equal territory) was "specifically aimed at securing exclusive and unassailable access to the Rio Lauca." Gordon, *supra* note 17, at 328. The riparian dispute caused a rupture in diplomatic relations in 1962. *Id.* at 324.

²¹ See ST. JOHN, BOUNDARIES, TRADE, AND SEAPORTS, *supra* note 12, at 27.

²² *Id.*

²³ See Leslie Wehner, *From Rivalry to Mutual Trust: The Othering Process between Bolivia and Chile*, 135 GERMAN INSTITUTE OF GLOBAL & AREA STUDIES 1, 6 (May 2010), http://giga.hamburg/en/system/files/publications/wp135_wehner.pdf (working paper) (discussing the failure of the *gas por mar* initiative).

part of a now-stalled ‘13-point’ agenda to improve bilateral relations.²⁴ Chile’s former President Sebastian Piñera scuttled a plan in 2010 to establish a non-sovereign coastal enclave for Bolivia in Chile’s northern region of Tarapacá, contending that migratory, free transit, and administrative and infrastructure privileges would functionally divide Chilean territory in two.²⁵ In response, Bolivian President Evo Morales, and his Peruvian counterpart, Alan García Pérez, signed a deal granting Bolivia a 99-year extension to a free-trade zone concession on a three-mile stretch of shoreline near Peru’s southern port of Ilo — a gesture of symbolic rather than economic significance.²⁶ Discussions about changing the territorial status of the northern tier of the Atacama Desert involve historical claims of the three Andean states, making bilateral solutions difficult because they upset a tenuous balance of power and sow seeds of suspicion. Any solution farther south involving the Atacama’s midsection would cleave Chile in two — a partition it vows will not occur.²⁷

²⁴ Agenda point six contains the Bolivian maritime claim to establish a sovereign access to the Pacific Ocean. The 13-point agenda includes: (1) Mutual Confidence Building Measures; (2) Border Integration; (3) Freedom of Movement; (4) Physical Integration; (5) Economic Cooperation; (6) Access to the Sea; (7) the Silala River issue and Water Resources; (8) Poverty Alleviation; (9) Security and Defense; (10) Cooperation against Drug Trafficking; (11) Education, Science, and Technology improvements; (12) Culture; and (13) Energy Issues. *Id.* at 7 n.2.

²⁵ See *Chile Outlines Conditions for a Possible Bolivian Access to the Pacific*, MERCOPRESS (Dec. 7, 2010), <http://en.mercopress.com/2010/12/07/chile-outline-s-conditions-for-a-possible-bolivian-access-to-the-pacific> [hereinafter *Chile Outlines Conditions*] (The foundation for the accord (known as Boliviamar) dated to bilateral discussions commencing in 1992); Tess Bennett, *Bolivia’s Long Diplomatic Road to the Coast*, THE ARGENTINA INDEPENDENT (Sept. 25, 2013), <http://www.argentinaindependent.com/currentaffairs/bolivias-long-diplomatic-road-to-the-coast/>.

²⁶ *Who Will Gain as Bolivia Wins Support in an Age-old Border Dispute?*, KNOWLEDGE@WHARTON (Jan. 12, 2011), <http://knowledge.wharton.upenn.edu/article/who-will-gain-as-bolivia-wins-support-in-an-age-old-border-dispute/> (The economic significance of the agreement has been questioned because the port at Ilo is too far north and lacking in trade links that can accommodate Bolivian commercial needs. Bolivia has had access to the free trade zone at Ilo since 1992 but has done little if anything to develop it).

²⁷ *Chile Outlines Conditions*, *supra* note 25 (citing Chilean Foreign Minister Alfredo Moreno’s pledge never to divide the country in two over Bolivia’s sea access quest).

A condominium arrangement, therefore, has some appeal. An examination of this idea within this context enhances perspectives on shared sovereignty solutions generally, recalls specific problems involving the doctrine of the *pactum de contrahendo* (an agreement to negotiate a future agreement)²⁸ – specifically problems of proof and enforceability– reinforces the limited value of factual circumstances (*effectivités*) used to untangle competing historical narratives, and provides an important prospect for a solution other than the problematic *status quo* and historically still-born efforts to arrive at a bilateral solution within a trilateral context.

International law’s track record on shared sovereignty arrangements is not good.²⁹ Such solutions are thought practical only where a cooperative spirit prevails, in which case simpler solutions might better be pursued.³⁰ Condominium arrangements in international

²⁸ See ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 27, 29 (2nd ed., 1961) (applying the concept to the good faith obligation to negotiate “in the future with a view to the conclusion of a treaty” but differentiating it from a duty to conclude a treaty); see generally Ulrich Beyerlin, *Pactum de Contrahendo und Pactum de Negotiando im Völkerrecht?* 36 *ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES RECHT UND VÖLKERRECHT* [ZaöRV] 442-43 (1976) [hereinafter Beyerlin, *Pactum de Contrahendo und Pactum de Negotiando im Völkerrecht?*]; Ulrich Beyerlin, *Pactum de Contrahendo, Pactum de Negotiando*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 854-58 (Rudolf Bernhardt ed., 1984); Martin A. Rogoff, *The Obligation to Negotiate in International Law: Rules and Realities*, 16 *MICH. J. INT’L L.* 141, 170-71 (1994).

²⁹ See Christopher R. Rossi, *Jura Novit Curia? Condominium in the Gulf of Fonseca and the “Local Illusion” of a Pluri-State Bay*, 37 *HOUS. J. INT’L L.* 793, 798-800 (2015) (noting historical problems with condominium arrangements).

³⁰ 1 *INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 370 (Elihu Lauterpacht ed. 1970).

law are not common,³¹ nor compelling,³² but they are not inconceivable.³³ Such a solution in the Atacama Desert dispute seems pragmatic, even workable, although history reveals a cautionary tale: truculent relations characterize Bolivian-Chilean and indeed regional relations.³⁴ They date to Chile's successful campaign to disrupt the Peruvian-Bolivian Confederation in the 1830s.³⁵ The two countries have maintained only consular relations since the failure of the Charaña negotiations of 1978,³⁶ and have had no formal diplomatic relations since the early 1960s except between 1975-1978.³⁷ Contested political alignments, shifting allegiances, corrupt governance, and secret agreements overlay a historical map of disputed and

³¹ See *The Republic of El Salvador v. The Republic of Nicaragua*, 11 AM. SOCIETY OF INT'L L. 674, 712 (1917) (noting condominium arrangements are not common in the relations among nations) [hereinafter *El Salvador v. Nicaragua*].

³² See Peter Schneider, *Condominium*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 732, 734 (Rudolf L. Bernhardt ed., 1992) (referring to condominium arrangements as an "historical relic from the feudal age"); 6 J.H.W. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 69 (1973) (referring to condominium as "peculiar and exceptional"); Samuels, *supra* note 11, at 728-30 (noting problems with the concept as a workable concept).

³³ *El Salvador v. Nicaragua*, *supra* note 31, at 712 (noting condominium arrangements are "not an inconceivable or an isolated fact"). Several historical examples of condominium arrangements include the joint US-UK control over the Oregon Country from 1815-1846, the provisional arrangement in 1920 concerning the Free City of Danzig, the 1910-13 trilateral conference discussions among Norway, Sweden and Russia regarding Spitsbergen, and Andorra, which from 1278-1993 was administered jointly by France and the Catalan Bishop of Urgell. See Rossi, *supra* note 29, at 799. For a problematic pelagic adaptation of the condominium concept involving three Central American countries, see *generally id.*

³⁴ See *generally* Wehner, *supra* note 23 (discussing Bolivia and Chile's socially constructed culture of rivalry).

³⁵ See CLEMENTS R. MARKHAM, *THE WAR BETWEEN PERU AND CHILE, 1879-1882*, 31-34 (1882) (discussing Chilean endeavors to dissolve the Confederation); SATER, *CHILE AND THE WAR OF THE PACIFIC*, *supra* note 5, at 2 (noting Chile's triumphant fight against establishment of a Peruvian-Bolivian Confederation during the 1830s).

³⁶ Chile and Bolivia entered into secret negotiations in 1973 following the rupture in diplomatic relations caused by the Lauca River diversion dispute of 1962. In 1975 Chilean leader Augusto Pinochet and Bolivian President Hugo Banzer met in the Bolivian border town of Charaña, where a forestalled land exchange was discussed. See *infra* text accompanying n. 274.

³⁷ See ULDARICIO FIGUEROA, *LA DEMANDA MARITIME BOLIVIANA EN LOS FOROS INTERNACIONALES* 117-37 (2007) (discussing the resumption of diplomatic relations from 1975-78 and the preceding thaw beginning in 1970).

indeterminate boundaries regarding territory emergent in resources – gold and silver from the time of Pizarro’s sixteenth century assault on the Inca Empire;³⁸ fertilizer-rich guano, caliche (sodium nitrate), saltpeter (potassium nitrate), rubber and copper in the nineteenth century; tin, gas, and oil in the early twentieth century.³⁹ Control over these resources has repeatedly complicated this dispute as well as Andean relations throughout the Southern Cone.⁴⁰ It has challenged the effectiveness of international law’s blunt doctrine of *uti possidetis* (as you possess, so you may possess) and has resulted in war, annexation, revolution, and territorial dismemberment. As uncompromising as this border dispute seems,⁴¹ the least popular solution –for Bolivia to agree to drop its claim and be content with only reaping the economic benefits of using Chilean ports – appears the most obvious, and it has some historical support within the hostile environment of the Atacama Desert.⁴²

Woven throughout this complicated history is the recurring problem of territorial temptation – the desire of capable states to control emergent resources, or when not possible, then to share the resources or work to preclude another state’s ability to secure

³⁸ See JOHN HEMMING, *THE CONQUEST OF THE INCAS* 47-48 (1970); KIM MACQUARRIE, *THE LAST DAYS OF THE INCAS* 95-96 (2007) (noting astonishing accounts of Francisco Pizarro’s third expedition to Peru and his 1532 capture of the Incan nobleman, Atahualpa and his famous offer of a room full of gold, twice filled over with silver, if his life were to be spared).

³⁹ Andean countries, Chile and Bolivia particularly, are repositories of the world’s largest untapped lithium reserves, a mineral essential to operating computers, batteries, cell phones, and portable electronic devices. Hal Hodson, *Follow the Lithium Dreams Expedition to Chile and Bolivia*, *NEW SCIENTIST* (July 22, 2015), <https://www.newscientist.com/article/follow-the-lithium-dreams-expedition-to-chile-and-bolivia/>.

⁴⁰ See ARIE M. KOCOWICZ, *ZONES OF PEACE IN THE THIRD WORLD: SOUTH AMERICA AND WEST AFRICA IN COMPARATIVE PERSPECTIVE* 67 (1998) (Southern Cone countries include: Argentina, Brazil, Chile, Peru, Bolivia, Paraguay, Uruguay, and Ecuador).

⁴¹ Indeed, Bolivia’s 2009 Constitution declares an “inalienable and imprescriptible” right over the territory giving access to the Pacific Ocean and its maritime space. “El Estado boliviano declara su derecho irrenunciable e imprescriptible sobre el territorio que le dé acceso al océano Pacífico y su espacio marítimo.” See CONSTITUCIÓN POLÍTICA DEL ESTADO PLURINACIONAL DE BOLIVIA [Constitution] Feb. 7, 2009, art. 267.

⁴² See *Bolivia/Chile Pacific Access*, COUNCIL ON HEMISPHERIC AFFAIRS (June 24, 2011), <http://www.coha.org/boliviachile-pacific-access/>.

them.⁴³ Territorial temptation and condominium arrangements seem incompatible, unless they inescapably reflect the rational interests of all parties concerned. A solution that reflects these interests seems more tenable than Bolivia's demand for a return of territory as a reparation for Chile's war of aggression,⁴⁴ and more practical than an appeal to Chile's sense of international comity or conscience. Perhaps a point of shared interest arises in the northern Atacama Desert and makes the prospect of an accommodation feasible, notwithstanding the overarching historical record: this case marks another stage in a longstanding feud, perhaps the most "intractable" border dispute in the Americas,⁴⁵ and yet another contentious chapter in the centuries-long complications arising from Spain's conquest and colonial rule of the Americas.⁴⁶

In addition to this introduction, this Article will proceed as follows: Part II will detail the parties' competing perspectives about their duties to negotiate, as well as the ICJ's preliminary decision upholding its jurisdiction. Part III will discuss two principal forms of negotiation presented by the case, the *pactum de contrahendo* and the *pactum de negotiando*, and distinguish their binding effects from unilateral declarations. Part IV will review the broad historical and factual circumstances underpinning the dispute, concentrating on the colonial history dating to the Spanish rule over the New World, and the post-colonial territorial disputes that resulted in the War of

⁴³ See Christopher R. Rossi, *A Particular Kind of Dominion: The Grotian Tendency and the Global Commons in a Time of High Arctic Change*, 11 J. INT'L L. & INT'L REL 1, 26 (2015) (discussing territorial temptation).

⁴⁴ See CARLOS D. MESA GISBERT, PRESIDENCIA SITIADA: MEMORIAS DE MI GOBIERNO 243 (2008).

⁴⁵ WALTRAUD Q. MORALES, A BRIEF HISTORY OF BOLIVIA 78 (2d ed., 2003). In June 2016, Chile instituted another proceeding against Bolivia before the ICJ concerning the status and use of waters of the Silala (the Bolivian name)/Siloli (the Chilean name), a disputed international watercourse fed by groundwater springs in Bolivia and flowing into Chilean territory. Chile Institutes Proceedings Against Bolivia with Regard to a Dispute Concerning the Status and Use of the Waters of the Silala, I.C.J. (June 6, 2016), <http://www.icj-cij.org/docket/files/162/19018.pdf> (unofficial press release).

⁴⁶ Latin America is the most represented continent in contentious cases before the I.C.J., with eight of thirty suits initiated between 2000 and 2013. Laetitia Rouvière & Latetitia Perrier Bruslé, *Bolivia-Chile-Peru: Sea Access*, in 1 BORDER DISPUTES: A GLOBAL ENCYCLOPEDIA 53 (Emmanuel Brunet-Jailly ed., 2015).

the Pacific and its shattering aftermath. Part V will review the accumulative evidence following that war to shed light on the legal basis involving the parties' duty to negotiate. Part VI will discuss the prospects for establishing a zone of tripartite sovereigns in the northern Atacama, and draw conclusions about the constructed modalities that could produce a fruitful resolution to the dispute, mindful however of the territorial temptations that have made this border issue a vexing problem throughout South America.

II. A DUTY TO NEGOTIATE *WHAT*? JUDGE OWADA'S QUESTION

The ICJ's ruling on the preliminary question suggested the subject matter of this dispute may revolve around a question other than that of a condominium arrangement.⁴⁷ The ruling focused on a duty to negotiate rather than to grant, much less share, sovereignty.⁴⁸ This duty arises to resolve a "mutual problem [of] common interest," presumably where a state's legal right intersects with another state's right.⁴⁹ But this duty begs an important question in this case: *what* must the parties negotiate? The question is more subtle than appearances indicate, prompting Judge Hisashi Owada to ask during oral hearings what did the parties mean by their repeated references to a "sovereign access to the sea[?]"⁵⁰

A. *Chile's View*

Chile contended the access it agreed to provide to Bolivia in the 1904 Peace Treaty pertained in perpetuity to the "fullest and most unrestricted right of commercial transit in its territory and its Pacific

⁴⁷ See *Obligation to Negotiate Access, Preliminary Objection*, *supra* note 6, at 12-15, ¶¶ 25-36.

⁴⁸ *Id.*, at 14, ¶ 34.

⁴⁹ Rogoff, *supra* note 28, at 148. In the *Fisheries Jurisdiction Case*, the ICJ noted the intersection of Iceland's "preferential fishing rights" and Great Britain's "traditional fishing rights" in a common maritime area, holding a state assumes its own obligation to take account of the rights of other States' in such circumstances. See *e.g.* *Fisheries Jurisdiction Case (UK v. Ice.)*, Merits, Judgment, 1974 I.C.J. No. 55, 31, ¶ 71 (July 25).

⁵⁰ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Public Sitting, 2015 C.R. 21, 38-39 (May 8), <http://www.icj-cij.org/docket/files/153/18648.pdf> (Judge Owada's question) [hereinafter May 8 Public Sitting].

ports” and that the access “Bolivia has a right to is not sovereign access.”⁵¹ Chile contended Bolivia aimed to force a negotiation on the transfer of “coastal territory bathed by the Pacific Ocean.”⁵² It claimed the ICJ lacked jurisdiction to consider this issue because the 1904 Peace Treaty “already settled” that matter.⁵³ In Chile’s view, Bolivia’s plea ‘artificially’ reframed the fact of Chile’s territorial sovereignty and the question of Bolivia’s ‘right of access’ to the sea into a negotiation *only* about the details of Bolivia’s sovereign access – that is, how much territory was involved and its location – as if these factors already had not been settled by war and peace.⁵⁴ Bolivia’s posturing, according to Chile, attempted to secure a judicially predetermined outcome to revise or nullify the 1904 Peace Treaty.⁵⁵ Chile argued that re-litigating its history would potentially unravel and destabilize the continent’s borders.⁵⁶ At most, Chile acknowledged a duty to negotiate access, which neither implied a duty to reach an agreement nor to grant sovereignty.

⁵¹ Letter from Felipe Bulnes, Agent of Chile, to Registrar of the Court, Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Chile’s Answer to Judge Owada’s question concerning the meaning of “sovereign access to the sea” (May 12, 2015) <http://www.icj-cij.org/docket/files/153/18662.pdf> (citing art. VI of the 1904 Peace Treaty, in which Chile recognizes “in favour of Bolivia in perpetuity the fullest and most unrestricted right of commercial transit in its territory and its Pacific ports”).

⁵² *Id.*

⁵³ Specifically, Chile claimed pursuant to art. VI of the Pact of Bogotá (1948), to which both parties belonged, that the ICJ lacked jurisdiction under art. XXXI of the Pact (the article establishing compulsory jurisdiction) because the matter was “already settled” and in force at the conclusion of the Pact. *See* Obligation to Negotiate Access, Preliminary Objection, *supra* note 6, at 10-11 ¶¶ 21-22.

⁵⁴ *Id.* at 13, ¶¶ 28- 29.

⁵⁵ *Id.* Underscoring its sense of moral outrage, Bolivia has referenced the Realpolitik conclusion of Abraham König, Chile’s Minister Plenipotentiary to La Paz, as evidence of Chile’s denial of previous commitments to negotiate. In a note dated August 13, 1900, König likened Chile’s takeover of the Atacama to Germany’s imperial annexation of Alsace and Lorraine: “Nuestros derechos nacen de la victoria, la ley suprema de las naciones. Que el Litoral es rico y vale muchos millones, eso ya lo sabíamos.” EL LIBRO DEL MAR 32 (Ministerio de Relaciones Exteriores de Bolivia 2nd ed. 2014).

⁵⁶ *See* Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile) Preliminary Objection, Public Sitting, 2015 C.R. 20, 41, ¶ 10 (May 7) (verbatim record of Mr. Koh) [hereinafter May 7 Public Sitting].

B. Bolivia's View

Bolivia claimed the case was not about the precise ‘modalities’ for granting a sovereign access to the sea, although elsewhere asserted a non-negotiable end result: “Chile must grant Bolivia its own access to the sea with sovereignty.”⁵⁷ Bolivia claimed “the specific modalities of sovereign access are not matters for the Court but, rather, are matters for future agreement” between the parties and that the dispute had nothing to do with the 1904 Peace Treaty because “the alleged obligation to negotiate existed independently of and in parallel to, the 1904 Peace Treaty.”⁵⁸ Bolivia’s sovereign entitlement derived “from Chile’s own unilateral declarations or its repeated agreements with Bolivia to negotiate sovereign access[;]”⁵⁹ from Chile’s declarations preceding and subsequently confirming a 1950 Exchange of Notes;⁶⁰ from “agreements, diplomatic practice and . . . declarations attributable to [Chile]” extending more than a

⁵⁷ See *Bolivia’s Response to the Question of Judge Owada*, ICJ, <http://www.icj-cij.org/docket/files/153/18660.pdf> (last visited Nov. 13, 2016).

⁵⁸ Obligation to Negotiate Access, Preliminary Objection, *supra* note 6, at 13, ¶ 30.

⁵⁹ See *Bolivia’s Comments on Chile’s Reply to Judge Owada’s Questions* ¶ 3, ICJ, <http://www.icj-cij.org/docket/files/153/18664.pdf> (last visited Nov. 13, 2016).

⁶⁰ See *id.* at ¶¶ 3-6. (explaining that Bolivia contends a 1950 Note of the Chilean Minister of Foreign Affairs on June 20, 1950 expressly recognized prior agreements aimed at “finding a formula” that will make it possible to give to Bolivia a sovereign access to the Pacific Ocean of its own. The Note recognized: “the 1895 Transfer Treaty, the 1920 Act [between Bolivian and Chilean foreign ministries, which considered Bolivian sovereign access to the sea through Arica], Chile’s Note of 1923, the 1926 Kellogg proposal and Matte Memorandum [a U.S. proposal favorable to Bolivia],” declarations of the Chilean President between 1946 and 1949, Chile’s Memorandum of July 10, 1961 [repeating and subsequently confirming the 1950 Exchange of Notes], and various resolutions of the Organization of American States (O.A.S.) unanimously calling for “a formula for giving Bolivia a sovereign outlet to the Pacific Ocean, on bases that take into account mutual conveniences, rights and interests of all parties involved”).

century,⁶¹ reaching to Chile's highest-level representatives,⁶² and existing independently from the 1904 Peace Treaty,⁶³ and ultimately breached by Chile when it denied its obligation to negotiate in 2011 and 2012.⁶⁴ Bolivia argued the teleological implications of the obligation to negotiate required an agreement, the precise form to be determined by future negotiations.⁶⁵

C. *The ICJ's View*

The ICJ agreed with Bolivia, holding that previous agreements did not bar the Court from proceeding, although it held certain claims in abeyance.⁶⁶ It ruled the case at this juncture was not about affirming Bolivia's sovereign access to the sea, nor about pronouncing the legal status of the 1904 Peace Treaty;⁶⁷ these contentions, assuming *arguendo* the ICJ were to find them valid, are subjects of future consideration.⁶⁸ The subject-matter of the dispute "is whether Chile is obligated to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean and, if such an obligation exists, whether Chile has breached it[?]"⁶⁹ This issue pertains to the duty to negotiate sovereignty, not determine sovereignty. Similar to its limited charge in the *North Sea Continental Shelf Cases*, the drawing of a

⁶¹ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile): The Court Rejects the Preliminary Objection Raised by Chile and Finds That it has Jurisdiction to Entertain the Application filed by Bolivia on 24 April 2013*, I.C.J. (Sept. 24, 2015), <http://www.icj-cij.org/docket/files/153/18756.pdf> (unofficial press release) (quoting Bolivian memorial).

⁶² *Obligation to Negotiate Access, Preliminary Objection*, *supra* note 6, at 13-14, ¶ 31.

⁶³ *Id.* at 14, ¶ 31.

⁶⁴ *Id.*

⁶⁵ *See* May 8 Public Sitting, *supra* note 50, at 32, ¶ 7 ("What matters is that it would be an agreed solution, and not an imposed solution.") (Mr. Akhayan).

⁶⁶ *See* *Obligation to Negotiate access, Preliminary Objection*, *supra* note 6, at 19 ¶ 50.

⁶⁷ *Id.* at 14, ¶ 33 ("[T]he Court recalls that Bolivia does not ask the Court to declare that it has a right to sovereign access to the sea or to pronounce on the legal status of the 1904 Peace Treaty").

⁶⁸ *See id.* ("it would not be for the Court to predetermine the outcome of any negotiation").

⁶⁹ *Id.* at 14, ¶ 34.

new border appears to be overtaken by the ICJ's explication of principles the parties must themselves apply.⁷⁰ As *that* matter has not been "already settled" pursuant to the jurisdictional requirement of Article VI of the Pact of Bogotá,⁷¹ the case proceeds.⁷²

III. DISTINCTIONS WITH DIFFERENCES: THE DUTY TO NEGOTIATE SOVEREIGNTY AND THE DUTY TO SHARE SOVEREIGNTY

Judge Owada's query about the meaning of 'a sovereign access to the sea' raised subtle issues about a duty to negotiate, a subject he is thoroughly familiar with as an academic and diplomat.⁷³ His question followed Bolivia's oral argument about "obligations arising from" *pacta de contrahendo*, *negocio [negotiando]* and estoppel,⁷⁴ elsewhere reformulated in terms of "unilateral declarations."⁷⁵

A. *Pacta de Contrahendo and Negotiando and Unilateral Declarations*

A *pactum de contrahendo* obligates parties to conclude a future agreement; a *pactum de negotiando*, equally binding although less

⁷⁰ North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. Nos. 51 & 52, at 6 (Feb. 20) (By Special Agreement, parties in the North Sea Continental Shelf Cases limited the Court to decide "[w]hat principles and rules of international law are applicable to the delimitation as between the Parties.").

⁷¹ See *Obligation to Negotiate Access, Preliminary Objection*, *supra* note 6, at 15-20, ¶¶ 37-54.

⁷² *Id.* at 20, ¶ 54.

⁷³ See HISASHI OWADA, *STUDY ON TREATY RESERVATIONS AND DECLARATIONS, INTERNATIONAL LAW, UN AND JAPAN*. TOKYO Festschrift TAKANO 361-384 (1988). Owada served as Japan's permanent representative to the United Nations and as the director-general of the Treaties Bureau (principal legal advisor) for the Japanese Foreign Ministry, and taught at Tokyo University, Harvard, Columbia, and New York University. See *Who We Are: Hisashi Owada (Japan)*, UNITED NATIONS FOUNDATIONS, <http://www.unfoundation.org/who-we-are/board/hisashi-owada-japan.html?referrer=https://www.google.com/> (last visited Aug. 26, 2016).

⁷⁴ See May 8 Public Sitting, *supra* note 50, at 32, ¶ 6 (verbatim record of Mr. Akhavan).

⁷⁵ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Public sitting, 2015 C.R. 19, 52 ¶ 6 (May 6) (verbatim record of Mr. Akhavan) [hereinafter May 6 Public Sitting].

demanding in substance, obligates parties to enter into future negotiations, but does not “[bind] the parties to arrive at an agreement.”⁷⁶ Unilateral statements made by authorized officials have legal effect and can work as an estoppel.⁷⁷ They have been held binding against the interests of the declarant state in territorial disputes,⁷⁸ questions of jurisdiction,⁷⁹ and in general statements opposable to the world (*erga omnes*).⁸⁰

While *pacta de contrahendo* and *negotiendo* share legal characteristics, in treaty and general international law, and at times are “nearly imperceptible” in terms of difference, they express different

⁷⁶ See Hisashi Owada, *Pactum de Contrahendo, Pactum de Negotiando*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 3-6 (2008). See also Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT'L L. 564, 566-68 (1993) (distinguishing *pacta de contrahendo* from the “more tenuous” *pacta de negotiando*). In the North Sea Continental Shelf Cases, the ICJ (citing P.C.I.J.’s Advisory Opinion in the case of Railway Traffic between Lithuania and Poland) recognized “the obligation [to negotiate] was ‘not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements’, even if an obligation to negotiate did not imply an obligation to reach agreement.” North Sea Continental Shelf, *supra* note 70, at 47-48 ¶¶87.

⁷⁷ See generally D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L L. 176 (1957); W. Michael Reisman & Mahnouch H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 ICSID REVIEW 328, 339-40 (2004) (noting the doctrine of estoppel’s place in discussions of unilateral statements and its requirement of detrimental reliance).

⁷⁸ See Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J., ser. A/B, No. 53, at 36, 57, 71 (Apr. 5) (holding Norway Foreign Minister Ihlen’s pledge that Danish sovereignty over Greenland “would meet with no difficulties on the part of Norway” was binding) [the Ihlen Declaration]; see Arbitral Award Made by the King of Spain on 23 December 1906 (Hon. v. Nic.), Judgment, 1960 I.C.J. No. 39, at 210 (Nov. 18) (involving a telegram sent by the President of Nicaragua to the President of Honduras recognizing as a binding acceptance a territorial award made by the King of Spain).

⁷⁹ Temple of Preah Vihear (Camb. v. Thai.), Judgment, Preliminary Objections, 1961, I.C.J. No. 45, at 17 (May 26) (involving acceptance of the Court’s jurisdiction).

⁸⁰ See Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1974, I.C.J. No. 59, 472 ¶¶ 44-46 (Dec. 20) (noting France’s unilateral declaration to cease atmospheric nuclear tests was binding against France, although issued as a general statement).

understandings of parties' intent to be bound.⁸¹ Judge Charles De Visscher found them almost indistinguishable when the object of negotiations "is only to apply in practice principles forming part of a pre-established" agreement.⁸² Even so, an obligation to negotiate does not mean an obligation to agree.⁸³ The parties' intent also distinguishes the *pacta* from nonbinding agreements⁸⁴ and other forms of dispute settlement, such as conciliation and mediation.⁸⁵ Importantly, both principles impose obligations that cannot be changed by the will of one party (*non si voluero*), and both are distinguished from unaccepted offers, aspirations, guidelines, or so-called pollicitations (*punctationes*), which are not enforceable.⁸⁶ They have arisen in the interpretation of important and familiar treaties, including the Camp David Accords,⁸⁷ the United Nations Convention on the Law of the Sea (UNCLOS),⁸⁸ the Non-Proliferation Treaty

⁸¹ Owada, *supra* note 76, at ¶ 29-30; McNair *supra* note 28, at 29 (referencing *pactum de contrahendo*'s misleading association with the obligation to negotiate in good faith).

⁸² International Status of South West Africa, Advisory Opinion, 1950 I.C.J. No. 10,186, 188 (Judge De Visscher dissenting).

⁸³ Stephen L. Kass, *Obligatory Negotiations in International Organizations*, 1965 CAN. Y.B. INT'L L. 36, 38 (1965).

⁸⁴ Beyerlin, *Pactum de Contrahendo und Pactum de Negotiando im Völkerrecht?*, *supra* note 28, at 412 ("Der rechtliche Bindungswille der Parteien liefert somit das maßgebliche Kriterium für die Abgrenzung zwischen einem pactum und einer rechtlich unverbindlichen Abrede").

⁸⁵ Rogoff, *supra* note 28, at 148 (distinguishing the obligation to negotiate from other forms of dispute settlement such as conciliation, mediation, inquiry, arbitration, and more).

⁸⁶ 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 660-61 (Ronald F. Roxburgh ed., 3d ed. 1920).

⁸⁷ Owada, *supra* note 76, at ¶ 19.

⁸⁸ See United Nations Convention on the Law of the Sea, art. 283,1833 U.N.T.S. 397 (Dec. 10, 1982) (requiring that disputes "proceed expeditiously to an exchange of views regarding [their] settlement by negotiation or other peaceful means").

(NPT),⁸⁹ the 1993 ‘Declaration of Principles on Interim Self-Government Arrangements’ signed by Israel and the PLO,⁹⁰ and in numerous non-binding instruments.⁹¹

*B. Problems with Pacta Contrahendo and Negotiando:
Articulating and Enforcing an Operational Standard*

As weighty as these above references appear, *pacta de contrahendo* and *negotiando* are sometimes employed by hostile parties to avoid any claim of “premature substantive agreement,”⁹² or to postpone agreement over substantive content.⁹³ They establish the lowest common denominator of agreed upon procedures on which future discussions can build,⁹⁴ and at times provide much needed breathing space for “states to order their conduct on the basis of general agreements while adjusting details” as developing circumstances dictate.⁹⁵ Case law suggests that if a *pactum de contrahendo* or *negotiando* exists between the parties, the intent to be bound should be expressed in “positive” rather than inferential terms;⁹⁶ but “[it would not be] for the Court to determine what shall be the final

⁸⁹ See Treaty on the Non-Proliferation of Nuclear Weapons, art. VI, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, available at <http://www.un.org/en/conf/npt/2005/npttreaty.html> (“Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.”).

⁹⁰ See Cassese, *supra* note 76, at 566 (noting the Declaration includes “a host of *pacta de contrahendo* and also *pacta de negotiando*”) [footnote omitted]; see also Ruth Lapidoth, *Relation between the Camp David Frameworks and the Treaty of Peace – Another Dimension*, 15 Is. L.R. 191, 193 (1980) (noting “many examples” of such agreements).

⁹¹ See Owada, *supra* note 76, at ¶ 31-32.

⁹² Cassese, *supra* note 76, at 566 n.6 (summarizing Beyerlin’s view).

⁹³ See Beyerlin, *Pactum de Contrahendo und Pactum de Negotiando im Völkerrecht?*, *supra* note 28, at 415–17.

⁹⁴ Cassese, *supra* note 76, at 566 n.6.

⁹⁵ Kass, *supra* note 83, at 39.

⁹⁶ See International Status of South-West Africa, *supra* note 82, at 140 (discussing whether the UN Charter articles 77 and 80 obligated mandatory powers to negotiate placement of territory under the UN Trusteeship system).

result It is for the Parties themselves to find an agreed solution”⁹⁷ —provided the negotiations are meaningful and “‘pursue[d] as far as possible with a view to concluding agreements’, even if an obligation to negotiate did not imply an obligation to reach agreement.”⁹⁸ Merely abiding by the formalities of a process of negotiation is not sufficient proof of good faith.⁹⁹

The requirement of good faith in the performance of obligations is well established in international law and in domestic legal systems.¹⁰⁰ In civil law systems, a violation of good faith imputes fault, which is expressed in the doctrine of *culpa in contrahendo*.¹⁰¹ Common law systems do not have an exact counterpart, but violations of good faith find similar expression in doctrines of negligence, promissory estoppel, and implied contract.¹⁰² In international law, the law of state responsibility would provide the legal means for demanding the implementation of the obligation to conclude an agreement,¹⁰³ and although important scholars regard the obligation as an absolute obligation,¹⁰⁴ problems arise.

⁹⁷ Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, 75 ¶¶ 139, 141 (Sept. 25).

⁹⁸ North Sea Continental Shelf, Judgment, *supra* note 70, at 48, ¶ 87 (internal quotations omitted); Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys), Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42 at 116 (Oct. 15); Claims Arising out of Decisions of the Mixed Graeco-German Arbitral Tribunal Set up under Article 304 in Part X of the Treaty of Versailles (Greece v. F. R. G.) 2 U.N.R.I.A.A. 27, 57 (1972).

⁹⁹ See North Sea Continental Shelf, *supra* note 70, at 47, ¶ 85.

¹⁰⁰ See Vienna Convention on the Law of Treaties art. 26, Jan 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 (*pacta sunt servanda*); Rogoff, *supra* note 28, at 144, 146 (discussing good faith in conventional, customary, and municipal legal systems).

¹⁰¹ Rogoff, *supra* note 28, at 146 n.21 (citing *inter alia*, the French *Code Civile*).

¹⁰² See generally Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 369–404 (1980); Willard L. Boyd III & Robert K. Huffman, *The Treatment of Implied-In-Law and Implied-In-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U. L. REV. 605 (1991).

¹⁰³ See Cassese, *supra* note 76, at 566.

¹⁰⁴ See David Simon, *Article VI of the Non-Proliferation Treaty is a Pactum de Contrahendo and has Serious Legal Obligation by Implication*, 2 U. PA. J.

Articulating an operational standard that distinguishes good faith performance from bad faith performance presents challenges when applying the *pacta*.¹⁰⁵ Enforcing this elusive standard internationally, for instance through a judicial order to specifically perform an agreement or to resume negotiations in good faith, also challenges the integrity of an international court or tribunal. *Pacta de contrahendo* and *negotiando* are rudimentary expressions of agreement.¹⁰⁶ At this base level, an agreement to agree at a later date amounts to an agreement to postpone an agreement – a distinction that may create the illusion of a good faith negotiation; it may serve as a cosmetic façade, masking nothing more than the intention *not* to reach an agreement.¹⁰⁷ Some doctrinal treatments view them skeptically. Stephen Kass argued “[e]ven when states are bound to reach agreement, international law requires no more than good faith efforts to fulfill that obligation.”¹⁰⁸ Richard Baxter thought *pacta de contrahendo* “empty” and “rhetorical,” and without appropriate machinery in place, “no court or other agency can determine whether a State has or has not negotiated in good faith and what the duty . . . requires.”¹⁰⁹ Myron Nordquist wrote that they are, “largely declaratory of policy goals,”¹¹⁰ and [often] couched in the language

INT’L L. 1, 4 (2005), available at https://www.law.upenn.edu/journals/jil/jilp/articles/2-1_Simon_David.pdf (citing McNair, Oppenheim, Lauterpacht, and Hahn).

¹⁰⁵ See Burton, *supra* note 102, at 369.

¹⁰⁶ See Cassese, *supra* note 76, at 566.

¹⁰⁷ Examples of categories of bad faith include the evasion of the spirit of the agreement, lack of diligence and slacking off, willfully rendering only ‘substantial performance,’ abuse of a power to specify terms, abuse of a power to determine compliance, and interference with or failure to cooperate in the other party’s performance. See Burton, *supra* note 102, at 369 n.5 (summarizing Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968)).

¹⁰⁸ Kass, *supra* note 83, at 40.

¹⁰⁹ R.R. Baxter, *International Law in “Her Infinite Variety”*, 29 INT’L & COMP. L. Q. 549, 552 (1980).

¹¹⁰ IV CENTER FOR OCEANS POLICY, UNIVERSITY OF VIRGINIA, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 668 (Myron H. Nordquist et al. eds., 1982) quoted in Gaetan Verhoosel, *Beyond the Unsustainable Rhetoric of Sustainable Development: Transferring Environmentally Sound Technologies*, 11 GEO. INT’L ENVTL. L. REV. 49, 54 (1988) (describing the technology transfer provision of art. 14 of the UN Convention on the Law of the Sea).

of ‘guidelines’—not legally enforceable as a legal duty.¹¹¹ Alternatively, U.S. President Calvin Coolidge, acting as sole arbitrator in the *Tacna-Arica Arbitration* (1925), noted that a tribunal could nullify the original treaty based on one party’s intentional frustration of the good faith obligation to negotiate.¹¹² Of course, Coolidge was aware the original treaty traced to a peace treaty¹¹³ and his rumination on a possible third party remedy for non-performance was kept squarely in the realm of *obiter dictum*.¹¹⁴ But bad faith could not be imputed from the failed implementation of a particular provision alone; “something more must appear” and “should not be lightly imputed.”¹¹⁵ Clear and convincing evidence was required to support the existence of bad faith, not disputable inferences.¹¹⁶ Chile seemingly suggested this latter point to no avail during the preliminary stage, implying no meeting of the minds existed in support of a *pactum de contrahendo* and no measure of good faith in support of a *pactum de negotiando* could force a result amenable only to Bolivia.

C. *Unilateral Declarations Distinguished from the Pacta*

By definition, *pacta de contrahendo* and *negotiando* are distinct from unilateral declarations, but they share many points of contact involving the intent to be bound.¹¹⁷ Deciphering the binding effect of unilateral declarations also involves consideration of their disputed consequences, factual circumstances, the clarity, consistency, and specificity of the declarations, the context in which they are made, and the authority on which they are based.¹¹⁸ This tangled

¹¹¹ Simon, *supra* note 104, at 6 (citing Colin M. Alberts, *Technology Transfer and Its Role in International Environmental Law: A Structural Dilemma*, 6 HARV. J.L. & TECH, 63, 71 (1992)).

¹¹² Tacna-Arica Question (Chile/Peru), 2 U.N.R.I.A.A. 921, 929 (Mar. 4, 1925) [hereinafter Tacna-Arica Question].

¹¹³ *Id.* at 928 (“the Treaty of Ancon was a peace treaty—the Parties were engaged in a devastating war”).

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 930.

¹¹⁶ *Id.*

¹¹⁷ *See* Cassese, *supra* note 76, at 566.

¹¹⁸ *See e.g.* Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. of the Congo v. Rwanda) Judgment, 2006 I.C.J. No. 126, 28-29 ¶¶ 49-53.

context, as President Coolidge noted in the failed *Tacna-Arica Arbitration*, required a thorough examination of the historical evidence and diplomatic record,¹¹⁹ a difficult pathway that nevertheless invites the following review.

IV. ORIGINS OF THE DISPUTE

The dispute before the ICJ traces to the nineteenth century War of the Pacific (1879-1884), which pitted Bolivia and Peru against victorious Chile.¹²⁰ In broader terms, the conflict originates with Spain's nineteenth century retreat from empire in the New World and the fractious territorial disputes that followed the disintegration of Spain's three hundred year rule.¹²¹

A. *The Broader Issue: The Legacy of Spanish Imperial Rule in the Americas*

The Spanish conquest of the Americas introduced an administrative system to govern its vast holdings.¹²² The system was known as "vice kingdoms," or viceroyalties.¹²³ Over time, the viceroyalties grew to include four administrative divisions, a system of royal courts (*Las Reales Audiencias*),¹²⁴ and the Captaincy-General of Chile.¹²⁵ The appointed "vice-kings" exercised tremendous regional

¹¹⁹ See *Tacna-Arica Question*, *supra* note 112, at 930.

¹²⁰ See generally WILLIAM F. SATER, *ANDEAN TRAGEDY: FIGHTING THE WAR OF THE PACIFIC, 1879-1884* (University of Nebraska, 2007), available at <http://www.jstor.org/stable/j.ctt1djmdh2>.

¹²¹ See generally CHRISTOPHER G. BATES, *THE EARLY REPUBLIC AND ANTEBELLUM AMERICA: AN ENCYCLOPEDIA OF SOCIAL, POLITICAL, CULTURAL, AND ECONOMIC HISTORY* (Routledge, Taylor, and Francis Group, 2015).

¹²² See FARCAU, *THE TEN CENTS WAR*, *supra* note 2, at 31.

¹²³ *Id.*

¹²⁴ See generally CHARLES HENRY CUNNINGHAM, *THE AUDIENCIA IN THE SPANISH COLONIES AS ILLUSTRATED BY THE AUDIENCIA OF MANILA, 1583-1800* (1919). The Audiencias (and their capitals) included the Audiencias of Panama (Panama), Santa Fé (Bogotá), Quito (Quito), Lima (Lima), Charcas (La Paz), and Chile (Santiago). See HEIDE V. SCOTT, *CONTESTED TERRITORY: MAPPING PERU IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* 12 (2009).

¹²⁵ See FARCAU, *THE TEN CENTS WAR*, *supra* note 2, at 31. Other Captaincies-General existed, for example in Cuba, Guatemala, and Venezuela; while the latter two achieved practical autonomy, only the Captaincy-General of Chile was granted complete independence from its viceroy (of Peru) by order of the Spanish

authority and autonomy, none more absolutist than Peru's viceroy, José Abascal, marqués de la Concordia (1808-16),¹²⁶ but they also represented the imperial ethos and prerogative power of the Spanish Crown.¹²⁷

Land under Spanish control north of the Isthmus of Panama became known as the viceroyalty of New Spain (1535), which consisted of Central America, Mexico, and parts of what would become the western U.S., the Spanish Caribbean, and the Philippines.¹²⁸ The viceroyalty of Peru (1543) originally ruled throughout all of South America, but it ceded territory to new viceroyalties as the Spanish presence penetrated the Southern Hemisphere.¹²⁹ It came to include Bolivia (known as Alto Peru) and Chile.¹³⁰ The viceroyalty of New Granada (1718) consisted of Venezuela, Colombia, and Ecuador,¹³¹ and the viceroyalty of Río de la Plata (1776) consisted of Argentina, Uruguay, and Paraguay.¹³² For a time, Bolivia/Alto Peru was transferred to the jurisdiction of Río de la Plata to shore up defenses against the encroaching Portuguese,¹³³ but it reverted to Peru in 1810, in Spain's effort to consolidate dwindling power.¹³⁴

At the beginning of the nineteenth century, Spain nominally controlled the entire Pacific coast of South America.¹³⁵ The Captaincy-

government, thus allowing it to exercise authority over the *audiencia* of Chile, with its seat in Santiago. WILLIAM SPENCE ROBERTSON, *RISE OF THE SPANISH-AMERICAN REPUBLICS AS TOLD IN THE LIVES OF THEIR LIBERATORS* 6 (1921).

¹²⁶ Timothy E. Anna, *The Last Viceroys of Spain and Peru: An Appraisal*, 81 *THE AM. HIST. REV.* 38, 43 (1976).

¹²⁷ *Id.* at 41-42.

¹²⁸ ROBERTSON, *supra* note 125, at 3.

¹²⁹ *Id.* at 3-4.

¹³⁰ See ST. JOHN, *BOUNDARIES, TRADE, AND SEAPORTS*, *supra* note 12, at 1.

¹³¹ ROBERTSON, *supra* note 125, at 4.

¹³² *Id.*

¹³³ OSCAR CORNBLIT, *POWER AND VIOLENCE IN THE COLONIAL CITY: ORURO FROM THE MINING RENAISSANCE TO THE REBELLION OF TUPAC AMARU (1740-1782)*, 130 (1995).

¹³⁴ *Wars of Spanish-American Independence*, *LATIN AMERICAN HISTORY OXFORD RESEARCH ENCYCLOPEDIA* (Aug. 2015), <http://latinamericanhistory.oxfordre.com/view/10.1093/acrefore/9780199366439.001.0001/acrefore-9780199366439-e-66>.

¹³⁵ *Indians and Europeans on the Northwest Coast: Historical Context*, CENTER FOR THE STUDY OF THE PACIFIC NORTHWEST, <http://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Indians%20&%20Europeans/II.html> (last visited Nov. 20, 2016).

General of Chile, one of the smallest and poorest colonies, contrasted starkly with the wealth of Peru and New Granada—“the two jewels in Spain’s imperial crown.”¹³⁶ Intense demand for New World minerals and metals spread throughout the empire.¹³⁷ Gold and silver not shipped back to Spain were distributed unevenly, but effectively enough to facilitate Spain’s lengthy rule.¹³⁸ But a sense of crisis enveloped the New World when word circulated in 1808 that the metropolitan power, already beset by popular uprisings, fell to Napoleon.¹³⁹ Its two Bourbon kings, Charles IV, and his son, Ferdinand VII, abdicated, and Napoleon put his brother, Joseph, on the Spanish throne.¹⁴⁰

i. The end of empire

A crisis of allegiance unfolded and the turmoil spurred pro-independence movements across South America, headed by *El Libertador*, Simón Bolívar (1783-1839) and José de San Martín (1778-1850).¹⁴¹ La Plata (Argentina) gained independence in 1810; Chile in 1818; New Granada (Ecuador, Colombia, Panama, and Venezuela) in 1819; Peru in 1821; and Bolivia in 1825.¹⁴²

The relatively rapid dissolution of the Spanish Empire in the New World affected borders that stretched across thousands of

¹³⁶ Christon I. Archer, 82(1) J. MOD. HIST. 221, 222 (2010) (reviewing GABRIEL PAQUETTE, ENLIGHTENMENT, GOVERNANCE, AND REFORM IN SPAIN AND ITS EMPIRE, 1759-1808).

¹³⁷ See generally HUGH THOMAS, RIVERS OF GOLD: THE RISE OF THE SPANISH EMPIRE (2003); see also LYLE N. MCALISTER, SPAIN AND PORTUGAL IN THE NEW WORLD 1492-1700, at 227-30 (1984) (estimating sixteenth century gold and silver production).

¹³⁸ See Alejandra Irigoin & Regina Grafe, *Bargaining for Absolutism: A Spanish Path to Nation-State and Empire Building*, 88 HISP. AM. HIST. REV. 173, 191 (2008) (discussing the imperial distribution of revenue).

¹³⁹ *Id.* at 201.

¹⁴⁰ *Id.* (summarizing historians’ view that the Bourbon kings’ forced abdication by Napoleon was the “turning point for the birth of modern republics in Spanish America”).

¹⁴¹ *Simón Bolívar and José de San Martín*, THE SAYLOR FOUNDATION, <https://www.saylor.org/site/wp-content/uploads/2012/11/HIST303-4.3.2-Bolivar-and-SanMartin-FINAL.pdf> (last visited Nov. 20, 2016).

¹⁴² See PETER BAKEWELL, A HISTORY OF LATIN AMERICA TO 1825 476 (Wiley-Blackwell 3rd ed. 2010).

miles. But exact boundaries between viceroalties or successor governments were inexactly defined because “colonial and post-colonial societies tended to cluster around a handful” of urban centers, separated “by vast tracts of inhospitable, unproductive, and often impassable land, jungles, mountains, and deserts.”¹⁴³

ii. The application of *uti possidetes*

Against the backdrops of decolonization and emerging statehood, a rudimentary principle of Roman law won immediate favor. To guard against contested boundary claims, emerging Latin American republics employed the principle of *uti possidetis*.¹⁴⁴ The principle froze territorial title at the moment of independence, “no matter how arbitrary those boundaries may have been drawn.”¹⁴⁵ As a convenient means of quieting title, the principle ensured that colonial boundaries instantly became international boundaries for Latin America’s new republics.¹⁴⁶ It proved a costly means of securing non-violent transitions to sovereignty,¹⁴⁷ and it has been criticized for its agnostic regard for the human populations disrupted by the territorial divisions.¹⁴⁸ But it has ‘kept its place’ among the most important legal principles of international law.¹⁴⁹

The principle’s “rote application,” which favored the *status quo*,¹⁵⁰ took two forms: *uti possidetis juris* pertained to border demarcations drawing from references to royal documents, or decrees (*cédulas*), and *uti possidetis de facto* applied to territory actually possessed.¹⁵¹ Variances in the administrative practices of Spanish

¹⁴³ FARCAU, THE TEN CENTS WAR, *supra* note 2, at 32.

¹⁴⁴ See Jan Klabbers & René Lefeber, *Africa: Lost Between Self-Determination and Uti Possidetis*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 54 (Catherine Brölmann et al. eds., 1993).

¹⁴⁵ *Id.*

¹⁴⁶ See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 31.

¹⁴⁷ See Christopher R. Rossi, *The Northern Sea Route and the Seaward Extension of Uti Possidetis (Juris)*, 83 NORDIC J. INT’L L. 476, 488 (2014).

¹⁴⁸ See JOSHUA CASTELLINO & STEVE ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS 10 (2003).

¹⁴⁹ Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J., 567 ¶ 26 (Dec. 22) (“kept its place among the most important legal principles”).

¹⁵⁰ Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM J. INT’L L. 590, 601 (1996).

¹⁵¹ See Giuseppe Nesi, *Uti Possidetis Doctrine*, OXFORD PUBLIC INTERNATIONAL LAW, <http://opil.oupilaw.com/view/10.1093/law:epil/9780199231690/law->

and Portuguese imperial holdings account for the distinction.¹⁵² However, “the borders between the various administrative units of the Spanish Empire were never meant to be international boundaries” because they were vague, contradictory, and based on imprecise terms of travel and description “all done at a time when the accurate location of parallels of latitude was an inexact art and that of finding longitude was an unfathomable mystery.”¹⁵³ This maw of undifferentiated boundaries transcended the Atacama Desert;¹⁵⁴ Spanish colonial demarcations lacked precision in Patagonia, Tierra del Fuego, the Amazon, and in the sprawling basins of the Orinoco River.¹⁵⁵ The vicerojal administrative system of the Spanish Empire turned out to be an “entirely inadequate” precursor to the arrival of the state system in Latin America,¹⁵⁶ more so in Africa.¹⁵⁷

B. *The More Immediate Cause: The War of the Pacific*

Following South America’s independence from Spain in the early nineteenth century, Bolivia’s founding fathers, Simón Bolívar and General Antonio José Sucre, claimed for Bolivia the barren Atacama Desert, partly to provide a buffer between Peru and Chile, and partly to provide access to the Pacific Ocean through the tiny port at Antofagasta.¹⁵⁸ But Bolivia’s southern border with Chile relied on

9780199231690-e1125 (discussing the dual purposes of the term) (last updated Jan. 2011).

¹⁵² See *id.* (“in particolare dal Brasile”).

¹⁵³ FARCAU, *THE TEN CENTS WAR*, *supra* note 2, at 32.

¹⁵⁴ See ROBERT N. BURR, *BY REASON OR FORCE: CHILE AND THE BALANCING OF POWER IN SOUTH AMERICA 1830-1905*, at 5 (1965).

¹⁵⁵ *Id.* The dispute between Chile and Argentina over Patagonia resulted in an award favoring Argentina in the Cordillera of the Andes Boundary Case (1902). See *The Cordillera of the Anders Boundary Case (Argentina/Chile)*, 9 U.N.R.I.A.A. 37 (Nov. 20, 1902).

¹⁵⁶ BURR, *supra* note 154, at 5 (claiming Spanish colonial precedent as a means of demarcating with precision administrative units “was entirely inadequate as a legal basis for determining their boundaries”).

¹⁵⁷ See generally SAADIA TOUVAL, *THE BOUNDARY POLITICS OF INDEPENDENT AFRICA* (1972).

¹⁵⁸ See Farcau, *War of the Pacific*, *supra* note 15, at 1624. The Bolivians referred to the coastline as the Departamento del Litoral. See also May 6 Public Sitting, *supra* note 75, at 10, ¶ 3. *But cf.* Morales, *supra* note 45, at 78 (claiming Bolívar designated the port of Cobija as Bolivia’s Pacific seaport in 1825). St. John noted Bolivia quickly deemed the original port of Cobija inadequate, and far removed from the most logical trade route to the Peruvian port of Arica; an 1826

Spanish colonial maps of the *Audiencia* of Charcas (a colonial subdivision of the viceroyalty of Peru), which variously placed the border along the Salado River or the Copiapó River; and the course of these rivers proved difficult to fix.¹⁵⁹ Chile also made overlapping historical claims,¹⁶⁰ and its constitutions of 1822, 1823, 1828, and 1833 claimed all of the Pacific coast territory, but made no mention of where its northern frontier ended.¹⁶¹ Peru, on three occasions (1822, 1823, and 1825) recognized the need to demarcate its boundaries, but overriding territorial uncertainty forestalled efforts of its congressional boundary commission to come to any conclusion.¹⁶² Bolivia and Peru disputed their frontiers between the Loa River in the north and Tocopilla in the south.¹⁶³ At the time of independence in 1825, Bolivia “claimed a broad desert corridor between the Loa River and the Salado River with Peru and Chile making conflicting, overlapping claims to the north and south.”¹⁶⁴ The only circumstance favoring these nascent republics and the enveloping border confusion was the inhospitable terrain, which negated conflicts over ownership.¹⁶⁵ There was nothing to fight over, until reports surfaced

agreement between Peru and Bolivia secured Arica as a Bolivian port, but the Peruvian Congress refused to ratify the agreement. “[I]t proved to be the only time the Peruvian government ever agreed to give Arica to Bolivia.” ST. JOHN, BOUNDARIES, TRADE, AND SEAPORTS, *supra* note 12, at 3-4.

¹⁵⁹ See ST. JOHN, BOUNDARIES, TRADE, AND SEAPORTS, *supra* note 12, at 3.

¹⁶⁰ See LUIS BARROS BORGONO, THE PROBLEM OF THE PACIFIC AND THE NEW POLICIES OF BOLIVIA 45-55 (1924) (discussing, *inter alia*, references to Chile’s historic title to and ‘possessory’ occupation of the Atacama Desert, including references to the Liberator Bolívar; Law V, Title 15, Book 2 of the Laws of the Indies, November 1, 1681 organized by the Royal Audiencia of Lima, extended on January 2, 1791; a 1793 report commissioned by the viceroy of Peru, don Francisco Gil de Taboada y Lémus; twenty jurisdictional acts of Chilean authority over the desert region during the colonial period up to the beginning years of the nineteenth century, as recorded by historian Miguel Luis Amunátegui in THE BOUNDARY QUESTION BETWEEN CHILE AND BOLIVIA (1863); and the authority that emanates from “a true gem of national history,” the *Epítome Chileno* (1648) published by Field marshal Santiago de Tesillo).

¹⁶¹ See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 33.

¹⁶² See ST. JOHN, BOUNDARIES, TRADE, AND SEAPORTS, *supra* note 12, at 2.

¹⁶³ *Id.* at 3.

¹⁶⁴ *Id.*

¹⁶⁵ SATER, CHILE AND THE WAR OF THE PACIFIC, *supra* note 5, at 5-6.

in the 1840s of valuable fertilizer deposits.¹⁶⁶ Instead, the republics focused on managing chaotic internal affairs, particularly Peru and Bolivia, which were wracked by political instability more so than Chile.¹⁶⁷ But it was at this moment that a colonial boundary dispute gained impetus as a territorial temptation, which thereafter has “raised serious issues of economic development and regional hegemony.”¹⁶⁸

i. A contributing factor: Bolivia’s late-stage development

By the mid-1800s, Bolivia was the weakest economy in the hemisphere.¹⁶⁹ It was the last South American country to achieve independence (1825); it lacked democratic political tradition; it had no manufacturing base; it had a vast and variegated landscape (bigger than Texas and California); and it had a sparse population of perhaps two million.¹⁷⁰ Eighty percent of the inhabitants did not speak Spanish,¹⁷¹ and seven-eighths of the population lived in five small cities in the western highlands.¹⁷² It lacked the technology and finance capital to connect by railway its capital, La Paz, situated in the Andes twelve thousand feet above sea level, to the nearest port in Arica,

¹⁶⁶ See *id.*; Morales, *supra* note 45, at 79 (noting Chile did not seriously begin challenging Bolivian sovereignty in the Atacama until after the first reports of guano deposits in the 1840s). Cf. ST. JOHN, BOUNDARIES, TRADE, AND SEAPORTS, *supra* note 12, at 7 (noting Chilean indifference to the exact location of its northern border ended with the discovery of guano).

¹⁶⁷ See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 26 (comparing Chile’s small civil wars and less serious rebellions to ‘revolving door’ political unease in Peru and Chile). Sater notes whereas Chile elected four leaders over 40 years beginning in the 1830s (not without strife), Peru adopted six different constitutions between 1823-30 and Bolivia underwent eleven regime changes and more than 100 revolutions between 1839-76. See WILLIAM F. SATER, ANDEAN TRAGEDY: FIGHTING THE WAR OF THE PACIFIC, 1879-1884, at. 15-16 (2007) [hereinafter SATER, ANDEAN TRADEGY].

¹⁶⁸ See Ronald Bruce St. John, *Chile, Peru and the Treaty of 1929: The Final Settlement*, 8 IBRU BOUNDARY & SECURITY BULLETIN 91, 98 (2000), available at https://www.dur.ac.uk/resources/ibru/publications/full/bsb8-1_john.pdf.

¹⁶⁹ FARCAU, THE TEN CENTS WAR, *supra* note 2, at 20-21.

¹⁷⁰ *Id.* at 20-22.

¹⁷¹ *Id.* at 21.

¹⁷² See SATER, ANDEAN TRAGEDY, *supra* note 167, at 12 (listing La Paz, Oruro, Cochabamba, Sucre, and Potosí).

Peru,¹⁷³ travel time using the most direct route between La Paz and the Pacific could take almost one month.¹⁷⁴ But in 1857, huge deposits of guano and nitrates also were discovered in the Mejillones region of the Atacama Desert, an area remote from Bolivia's nascent commercial infrastructure located on the *Altiplano* (highland plateau).¹⁷⁵ The land suddenly became valuable to Chile and Bolivia,¹⁷⁶ and potentially threatening to Peru's monopoly control over guano.¹⁷⁷

ii. The condominium agreement of 1866

Elsewhere, European intrigues in the Western Hemisphere put South American republics on high alert.¹⁷⁸ Spain became a direct concern again when it retook the Dominican Republic (Santo Domingo) in 1861;¹⁷⁹ suspicions heightened across South America when the Spanish fleet rounded the southern tip of South America, Cape Horn, and headed up the Pacific coast to Peru's chief port, Callao.¹⁸⁰ A local incident provoked the "revindication" of Spanish interests, and Spain seized Peru's guano-rich Chincha Islands in

¹⁷³ The port city is now the northernmost port of Chile. Chile is credited with the engineering feat of connecting Arica to the Bolivian border, hence La Paz, by rail, in fulfillment of one clause of the 1904 Peace Treaty.

¹⁷⁴ SATER, ANDEAN TRAGEDY, *supra* note 167, at 9-10.

¹⁷⁵ See HERBERT S. KLEIN, A CONCISE HISTORY OF BOLIVIA 129 (2nd ed. 2011); BURR, *supra* note 155, at 89 (citing "vast new guano deposits in the Mejillones region").

¹⁷⁶ See MORALES, *supra* note 45, at 80 (noting Chile's attempt to seize the guano-rich Mejillones region, bringing Chile and Bolivia to the brink of war). See SATER, CHILE AND THE WAR OF THE PACIFIC, *supra* note 5, at 6.

¹⁷⁷ The Chincha Islands off of Peru's coast had provided the source of almost all of the world's supply of guano at this time, although, in addition to the Atacama Desert holdings, deposits later would be discovered in the Caribbean, on Pacific Atolls, and off Australia. See Christopher R. Rossi, 'A Unique International Problem': The Svalbard Treaty, Equal Enjoyment, and Terra Nullius: Lessons of Territorial Temptation from History, 15 WASH. U. GLOBAL STUD. L. REV. 93, 123 (2016).

¹⁷⁸ With the U.S. consumed by civil war, politically unstable and weak Latin American republics looked with alarm at French, British, and Spanish interventions in Mexico to make good on Mexican foreign debt. See BURR, *supra* note 154, at 90 (noting European interventions and particularly the French attempt to establish a monarchy in Mexico "deeply shocked the entire hemisphere").

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

1864.¹⁸¹ Regional tensions, particularly between Chile and Bolivia over the Mejillones region,¹⁸² were put aside and a quadruple alliance of the South American west coast states—Ecuador, Chile, Bolivia, and Peru—formed to oppose successfully Spain’s irredentist meddling.¹⁸³ Following Spain’s defeat – its last grasp at empire in South America—a brief period of amity facilitated an 1866 accord between the governments of La Paz and Santiago (the Mutual Benefits Treaty).¹⁸⁴ That agreement divided the contested Atacama territory at the 24th parallel South,¹⁸⁵ granted exploitation rights to each republic, and imposed a fiscal condominium arrangement over “guano deposits [and minerals] discovered in Mejillones, and in all such further deposits of this same fertilizer which may be discovered in the territory comprised between 23° and 25° South latitude.”¹⁸⁶ Tax revenue generated from mining interests in the area were to be shared equally.¹⁸⁷ Bolivia agreed to construct a customs house and port facility at Mejillones and to use no other port for the export of guano or minerals from the shared territory.¹⁸⁸ An export duty exemption applied to all products produced between the 24° and 25° latitude, and was extended to cover natural products Chile exported through Mejillones.¹⁸⁹ Other export duty assessments required the

¹⁸¹ See *id.* at 90–92 (recounting the ‘Talambo’ incident and the seizure of the Chincha Islands).

¹⁸² In May 1863, the Bolivian National Assembly empowered the President to declare war on Chile regarding Bolivia’s southern border and mineral dispute with Chile. See ST. JOHN, BOUNDARIES, TRADE, AND SEAPORTS, *supra* note 12, at 8.

¹⁸³ See BURR, *supra* note 155, at 99 (discussing formation of the quadruple alliance); WILLIAM E. SKUBAN, LINES IN THE SAND: NATIONALISM AND IDENTITY ON THE PERUVIAN-CHILEAN FRONTIER 8 (2007); ROBERT D. TALBOTT, A HISTORY OF THE CHILEAN BOUNDARIES 35 (1974) (noting the subordination of regional differences in the combined Peru/Bolivia/Chile/Ecuador alliance against Spain). Spain would suffer a humiliating defeat against Chile’s navy (the Chincha Island War), which would represent the last gasp of the Spanish Empire in South America, save for remnant holdings of empire in Puerto Rico and Cuba.

¹⁸⁴ See WILLIAM JEFFERSON DENNIS, DOCUMENTARY HISTORY OF THE TACNA-ARICA DISPUTE 49–50 (1927).

¹⁸⁵ See *id.* (establishing a “line of demarcation . . . between Bolivia and Chile” from the 24° South parallel subject to an exact survey to be undertaken).

¹⁸⁶ See *id.* (discussing article 2).

¹⁸⁷ See *id.*; see also SATER, CHILE AND THE WAR OF THE PACIFIC, *supra* note 5, at 6.

¹⁸⁸ See DENNIS, *supra* note 184, art. 3.

¹⁸⁹ *Id.* art. 4.

mutual agreement of the parties.¹⁹⁰ The treaty also secured for the parties a *jus prohibendi* pledge: Neither Chile nor Bolivia could transfer their right of joint possession to another state, association or individual,¹⁹¹ and remuneration for outstanding claims held in abeyance by previous political disruptions were to indemnified equally by the two coparceners.¹⁹²

It was a remarkable agreement— a historically important, but now obscure attempt to share sovereignty. But it imploded under the weight of fatal non-starters: it was made practical through a cooperative spirit—albeit a negative spirit directed against Spain rather than in support of mutual respect and regional accord. It fueled the personal greed of Bolivia's dictator, Mariano Melgarejo, who had secret personal connections to Chile's nitrate interests.¹⁹³ It ceded, from Bolivian perspectives, a disproportionate amount of Bolivian territory, including all claims south of the 25th parallel.¹⁹⁴ And it was predicated on a fictitious equality between the parties that appeared reasonable given the expansive, desolate environment.¹⁹⁵ In fact, Chile was much more capitalized than Bolivia by this time.¹⁹⁶ British financiers fortified its corporate strength with a network of heavy industries and rail lines,¹⁹⁷ contributing to arguments that the

¹⁹⁰ *Id.* art. 5.

¹⁹¹ *Id.* art. 6.

¹⁹² *Id.* art. 7.

¹⁹³ See MORALES, *supra* note 45, at 65.

¹⁹⁴ *Id.* at 80–81 (particularly after the discovery of silver near Caracoles, in territory south of the 25th parallel); Klein, *supra* note 176, at 133 (“justifiably condemned . . . for selling the nation to the highest bidder”).

¹⁹⁵ See MORALES, *supra* note 45, at 80–81.

¹⁹⁶ See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 24–28.

¹⁹⁷ See generally JOHN MAYO, BRITISH MERCHANTS AND CHILEAN DEVELOPMENT 1851–1886 (1987); see also JOHN MAYO & SIMON COLLIER, MINING IN CHILE'S NORTE CHICO: JOURNALS OF CHARLES LAMBERT 1825–1830, at 2 (1998) (noting the mining presence of more than forty British-organized companies as early as the 1820s); J. FRED RIPPY, BRITISH INVESTMENTS IN LATIN AMERICA, 1822–1949: A CASE STUDY IN OPERATIONS OF PRIVATE ENTERPRISE IN RETARDED REGIONS 133–41 (1966) (detailing British concessionaires in Chile's railway, telegraph, and nitrate industries).

war ‘was more a British war against Peru using Chile as its instrument.’¹⁹⁸ Chile benefited from a constellation of internal economic growth factors, as well as relative demographic/linguistic homogeneity, a diversified agricultural economy, and an amenable geographic station, which promoted if not necessitated seafaring transit and commerce.¹⁹⁹ Indeed, Chile’s use of the Pacific Ocean as a highway to circumvent the Atacama wasteland to its north facilitated migration and played an important role in changing the region’s history.²⁰⁰ Ten thousand Chilean laborers accessed the Atacama through its desert ports,²⁰¹ ports essentially cut off from Bolivia’s meagre and distant population centers in the Andean highlands.²⁰² But fifty percent of Bolivia’s revenue depended on taxes from Atacama’s excavation ventures and the labor power provided by Chileans.²⁰³ Stemming the influx of these migrants presented difficult economic repercussions for the cash-strapped Bolivian state.²⁰⁴ The situation replayed problems involving the settlement of Texas, or the northern frontier of New Spain in the 1820s.²⁰⁵ With encouragement of the Mexican government,²⁰⁶ settlers from the U.S. began to

¹⁹⁸ See Heraclio Bonilla, *The War of the Pacific and the National and Colonial Problem in Peru*, 81 PAST & PRESENT 92, 92-95 (1978) (summarizing a perspective from imperialist literature and quoting the 1882 view of the U.S. Secretary of State).

¹⁹⁹ See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 24–26.

²⁰⁰ An important sub-chapter to the War of the Pacific involved the naval battles between Peru and Chile and the preceding arms race of the early 1870s between the republics to upgrade their respective fleets with British-built central battery ironclads. In a minor footnote to international legal history, the Chilean fleet included the wooden corvette, *Abtao*, a combination sail and steam engine vessel that was the sister ship of the Confederate raider, *Alabama*, outfitted also by British, and subject of one of the most famous cases in international law, the *Alabama Arbitration*. See SATER, ANDEAN TRAGEDY, *supra* note 167, at 96–116 (comparing the navies and also noting the *Abtao*).

²⁰¹ *Id.* at 13.

²⁰² See BORGONO, *supra* note 160, at 75 (noting specifically Antofagasta’s remoteness for Bolivians and Chile’s responsibility for its development).

²⁰³ See SATER, ANDEAN TRAGEDY, *supra* note 167, at 13.

²⁰⁴ *Id.*

²⁰⁵ See generally Mark E. Nackman, *Anglo-American Migrants to the West: Men of Broken Fortunes The Case of Texas, 1821- 46*, 5 W. HIST. Q. 441 (1974).

²⁰⁶ *Id.* at 445 (noting Mexico allowed expatriate American settlers in the country beginning in 1821).

populate *Teyshas/Tejas*,²⁰⁷ and the rapid infusion of migrants threatened Mexican sovereignty;²⁰⁸ within a generation a secession movement established Texas as a republic in 1836.²⁰⁹

Similarly, the northern migration of Chilean commerce, capital, and labor quickly dominated the economics of the Atacama.²¹⁰ This Chilean migration would encroach on the nitrate fields of Peru's Tarapacá province,²¹¹ ultimately against Peru's interests as well. Immediately preceding the outbreak of war, the estimated ratio of Chileans to Bolivians in the Atacama was seventeen to one.²¹² Chilean labor discontent caused an uprising in Mejillones in 1861, which provoked a Bolivian threat to use force if its sovereignty was not respected.²¹³ In 1872, Bolivian forces put down an attempt by insurrectionists to seize Antofagasta; complaints of Chilean complicity in the matter (The *Paquete de los Vilos* Affair) stirred Bolivian passions about the security of its entire littoral,²¹⁴ and prompted a secret mutual security pact with Peru.²¹⁵ In 1879, Chilean 'patriotic societies' in the Atacama appealed to Santiago for relief from Bolivian 'misrule.'²¹⁶ The protection of Chilean nationals would factor into the initiation of war.²¹⁷

²⁰⁷ The 'Texas' region under Mexican rule between 1821–1836 derives from the Caddo people. Its name was variously transcribed by the Spanish (tejas, tyshas, texias, thecas, techan teysas techas) before coming into English as Texas. See Phillip L. Fry, *Texas, Origin of Name*, HANDBOOK OF TEXAS ONLINE, <https://tshaonline.org/handbook/online/articles/pft04> (last visited Nov. 17, 2016).

²⁰⁸ More than one hundred thousand Anglo-American settlers arrived in the 'Texas' region between 1821–1846. See Nackman, *supra* note 205, at 441 (noting as well that expatriate Americans outnumbered Mexicans in the region by a factor of ten (30,000:3,000) by 1835).

²⁰⁹ *Id.* at 445.

²¹⁰ See BURR, *supra* note 154, at 119 (noting the "efficient and aggressive business interests of Chile quickly began to exploit the [Atacama]"). Discovery of a silver lode at Caracoles provoked a dispute about the demarcations of the condominium zone. *Id.*

²¹¹ *Id.* at 131 (noting by 1875 that Tarapacá's nitrate fields attracted more than 10,000 Chilean workers, engineers, and administrators and 20 million Chilean pesos in investment).

²¹² SATER ANDEAN TRAGEDY, *supra* note 167, at 11.

²¹³ See *id.* at 17.

²¹⁴ See BURR, *supra* note 154, at 122–23.

²¹⁵ See *id.* at 124 (discussing the 1873 secret treaty between Peru and Bolivia).

²¹⁶ See SATER, ANDEAN TRAGEDY, *supra* note 167, at 11.

²¹⁷ *Id.*

iii. Condominium rescinded

In 1871, Bolivian General Melgarejo was overthrown by Colonel Agustín Morales,²¹⁸ and Bolivia rescinded the 1866 condominium agreement.²¹⁹ In practice, the condominium failed almost from the beginning.²²⁰ Although a mixed commission did map and demarcate uncharted areas,²²¹ the treaty displeased both governments from the outset; without the common enemy of Spain to deflect animosity, sentiments of “resentment and distrust” quickly returned.²²² Bolivia began redirecting mineral exports above the 23rd parallel, through Cobija to avoid revenue-sharing at the port of Mejillones;²²³ it withheld payment of half the customs receipts collected at Mejillones, and it refused to indemnify outstanding claims overtaken by the condominium agreement.²²⁴ Chile objected to Bolivia’s selective enforcement of the agreement,²²⁵ resented the treatment of its nationals, and chafed at the Bolivian disregard of direct investment that was improving territory many Chileans regarded as historically and rightfully theirs.²²⁶

Following failed diplomatic efforts to reinstate the condominium arrangement,²²⁷ which the Bolivian Congress again rejected (the 1873 Lindsay-Corral Treaty), Chile proposed a settlement—the 1874 Boundary Treaty—that affirmed the 24th latitude as the border with Bolivia,²²⁸ and abandoned the joint sovereignty arrangement in exchange for Bolivia’s pledge of a twenty-five year moratorium on imposts levied against Chilean corporate interests or excavated

²¹⁸ See MORALES, *supra* note 45, at 67–68 (later General Morales); FARCAU, THE TEN CENTS WAR, *supra* note 2, at 36.

²¹⁹ See BURR, *supra* note 154, at 120.

²²⁰ Talbott argues “neither government found the treaty satisfactory at the time it was signed” and “each nation returned to its former position of resentment and distrust of the other.” TALBOTT, *supra* note 184, at 36–37.

²²¹ See *id.* at 37.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 37–38.

²²⁵ *Id.*

²²⁶ See SATER, CHILE AND THE WAR OF THE PACIFIC, *supra* note 5, at 9–10 (discussing Chilean attitudes against Bolivia).

²²⁷ See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 36 (noting one unacceptable offer after another).

²²⁸ The new boundary was established at the 24th parallel south from the Pacific Ocean to the Cordillera of the Andes. See TALBOTT, *supra* note 183, at 38.

products in the Atacama region.²²⁹ But Bolivia's abrogation of the 1874 Boundary Treaty convinced the *Moneda*, Chile's seat of executive power, to "revindicate" its rights,²³⁰ propelling the region into war.

iv. The ten cents tax

A ten cents tax ignited the war. In 1873, Bolivia granted the Chilean-owned Antofagasta Railroad and Nitrate Company (*La Compañía de Salitres y Ferrocarril de Antofagasta*) a concession to mine nitrates in the Atacama.²³¹ The Bolivian National Assembly failed to immediately approve the decree, but the concessionaire continued doing business.²³² In 1878, Bolivia approved the 1873 decree, but added a ten cents tax per hundredweight of nitrates exported.²³³ The ten cents tax clearly violated the 1874 Boundary Treaty and the 1873 concession contract,²³⁴ but Bolivia justified it on the grounds that the dictator, Melgarejo, illegally concluded the agreement in violation of domestic law.²³⁵

v. Chile's geo-strategic concern

Chile's attempts to accommodate Bolivia in the Atacama up to this time reflected geo-strategic, not pan-Andean, concerns. A naval armament race with Peru and serious border disputes with Argentina

²²⁹ SATER, CHILE AND THE WAR OF THE PACIFIC, *supra* note 5, at 6; BURR, *supra* note 155, at 130–31.

²³⁰ SATER, CHILE AND THE WAR OF THE PACIFIC, *supra* note 5, at 7.

²³¹ See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 39.

²³² *Bolivia/Chile Pacific Access*, COUNCIL ON HEMISPHERIC AFFAIRS (June 24, 2011), <http://www.coha.org/boliviachile-pacific-access/>.

²³³ Historians have noted that the tax, in addition to generating revenue for Bolivia, brought prices for Bolivian guano and nitrates more in line with price hikes in Peru, which had nationalized its nitrate mines. Bolivia, with its secret security pact with Peru, depended on Peru's navy as a counterbalance to Chile's naval build-up and could not afford to provoke Peru by granting Chile more congenial allowances for mining interests that would undercut Peru's price setting. See TALBOTT, *supra* note 183, at 41–43.

²³⁴ See *id.* at 42–43 (discussing Article 4 of the 1874 treaty and Clause 4 of the 1873 concession contract).

²³⁵ *Id.* at 43.

made opening up a third foreign policy dispute with Bolivia unworkable.²³⁶ But Chilean balance of power calculations changed with upgrades to its fleet, and although misconceived in terms of its naval preparedness at the war's onset,²³⁷ Chile quickly settled an outstanding border dispute with Argentina over Patagonia and the Straits of Magellan (the Fierro-Sarratea Treaty) in January 1879,²³⁸ and turned its full attention toward pressing Bolivia for an arbitral solution to the Atacama dispute, as required by the 1874 treaty.²³⁹ Bolivia refused the request, effectively shut down concession operations, and issued an ultimatum, promising to expropriate the Antofagasta Railroad and Nitrate Company concession if the taxes were not paid by February 14, 1879.²⁴⁰ In a peremptory move, a Chilean militia of two hundred invaded the port of Antofagasta on that day, encountered no resistance from Bolivian gendarmes (who had retreated on orders of the prefect of the port), and immediately recruited a substantial number of disgruntled Chilean laborers as combatants from the overwhelming stock of Chilean nationals who had been put out

²³⁶ Sater speculates that Bolivia's president, General Hilarión Daza, imposed the tax thinking the *Moneda* would be too preoccupied and "fearfully looking over its shoulder toward Argentina," thus affording Bolivia a propitious moment to levy the tax against Chile. SATER, ANDEAN TRAGEDY, *supra* note 167, at 55. See also FARCAU, THE TEN CENTS WAR, *supra* note 2, at 41 (discussing Daza's "serious miscalculation").

²³⁷ See SATER, ANDEAN TRAGEDY, *supra* note 167, at 107 (describing Chile's navy at the outbreak of war as "in various stages of disrepair").

²³⁸ See BURR, *supra* note 154, at 134-135. The treaty ran into immediate problems regarding ratification in Buenos Aires. See GEORGE V. RAUCH, CONFLICT IN THE SOUTHERN CONE: THE ARGENTINE MILITARY AND THE BOUNDARY DISPUTE WITH CHILE, 1870-1902, at 167 (1999).

²³⁹ See TALBOTT, *supra* note 183, at 44.

²⁴⁰ Before the decree was to take effect, Bolivia shut down operations of the company by preventing the loading of nitrates for export at the port, which caused massive unemployment among Chilean stevedores. Bolivia also ordered the arrest of the company's manager, who sought asylum aboard a Chilean warship menacingly anchored in Antofagasta's harbor, and ordered the seizure of 90,948 bolivianos and 13 centavos. *Id.* at 43-44. Chile dispatched two other warships in short order. See also FARCAU, THE TEN CENTS WAR, *supra* note 2, at 42.

of work by the de facto seizure of the concession.²⁴¹ Mediation efforts failed.²⁴² Bolivia declared war.²⁴³ Aware of Peru's secret alliance with Bolivia, Chile demanded Peruvian neutrality, but Peru rejected the demand and Chile declared war on both countries on April 5, 1879.²⁴⁴

A most interesting prelude to the War of the Pacific, an intrigue of such logical sense that Chile would propose it repeatedly during the war, related to Chile's attempt to sever Bolivia from its longstanding relationship with Peru.²⁴⁵ It was an attempt to convert Bolivia into an ally, and to cement an irreparable division between Bolivia and Peru that would eliminate the threat of united opposition to Chile's north, cultivate Bolivia as an ally bordering Chile's nemesis to the east, Argentina, while at the same time substituting Bolivia not only as Peru's antagonistic neighbor to the south but as Chile's friendly buffer to the north.²⁴⁶ To accomplish these objectives, Chile proposed exchanging Bolivian sovereignty in the Atacama between the 23rd and 24th parallels for Bolivian ownership over the coastal region of Arica above the Loa River— territory Chile did not own,²⁴⁷ but would support Bolivia in securing.²⁴⁸ This proposal sought to guarantee Bolivia its long sought after blue water port, not at the remote and inaccessible Atacama sea outlets, but at the much more proximate terminus at Arica. But Chile "could not cede what it [at that time] did not own," however appealing the thought of forcing Peru to pay Chile's obligations.²⁴⁹

C. *Aftermath and the Failed Plebiscite*

The War of the Pacific resulted in Chile's three-year occupation of Lima beginning in early 1881 and ultimately cost Peru its southernmost provinces, including the nitrate-rich provinces of Tarapacá

²⁴¹ FARCAU, *THE TEN CENTS WAR*, *supra* note 2, at 42.

²⁴² *See* BURR, *supra* note 154, at 136.

²⁴³ *See* SATER, *CHILE AND THE WAR OF THE PACIFIC*, *supra* note 5, at 9.

²⁴⁴ BURR, *supra* note 154, at 136; WILLIAM JEFFERSON DENNIS, *TACNA AND ARICA: AN ACCOUNT OF THE CHILE-PERU BOUNDARY DISPUTE AND OF THE ARBITRATIONS BY THE UNITED STATES* 80–81 (1931).

²⁴⁵ *See* FARCAU, *THE TEN CENTS WAR*, *supra* note 2, at 36–37.

²⁴⁶ *See* BURR, *supra* note 154, at 140–41.

²⁴⁷ *Id.* at 141.

²⁴⁸ FARCAU, *THE TEN CENTS WAR*, *supra* note 2, at 37.

²⁴⁹ SATER, *CHILE AND THE WAR OF THE PACIFIC*, *supra* note 5, at 224.

and Arica.²⁵⁰ The peace agreement re-establishing relations between Peru and Chile, the Treaty of Ancón, placed the provinces of Tacna and Arica under the control of Chile for ten years, after which the questions of “dominium and sovereignty” were to be put to a popular vote.²⁵¹ The plebiscite dashed Bolivian dreams of securing the port of Arica, “as Chile could not be expected to give Bolivia territory which would separate Tarapacá from the rest of Chile.”²⁵² A provision “kept from the public at the time, prohibited the cession of any part of the territory in question to a third party [i.e., Bolivia] without the consent of the signatories. . . . a point of bitter frustration for Bolivia to this day.”²⁵³ This *jus prohibendi* provision negotiated bilaterally by Peru and Chile in the Treaty of Ancón worked against the interests of Bolivia in much the same way Chile and Bolivia used it to foreclose Peru’s presence in the Atacama with the 1866 condominium agreement. And attempts to hold the plebiscite – a key feature of the peace agreement – met a fate similar to the quick demise of the condominium agreement, which was to be held ten years after the peace agreement had been concluded. Prior to the expiration of Chile’s ten-year control of Tacna and Arica, Chile fruitlessly attempted to purchase the territory in lump sum from Peru.²⁵⁴ It then threatened the “‘Chileanization’ of the two provinces” through massive public works expenditures to entice twenty thousand Chilean citizens to the regions,²⁵⁵ certainly with a mind toward determining the outcome of the required plebiscite. Such maneuvering stalled the plebiscite process. Attempts to hold the plebiscite involved three U.S. administrations, a tortured series of

²⁵⁰ Farcau estimates the Chilean conquest of the Atacama and Tarapacá regions garnered for Chile close to three billion pesos in nitrate exports within twenty years. See FARCAU, *THE TEN CENTS WAR*, *supra* note 2, at 194.

²⁵¹ See Treaty of Ancón, *supra* note 8 (discussing Article 3).

²⁵² ST. JOHN, *BOUNDARIES, TRADE, AND SEAPORTS*, *supra* note 12, at 15-16.

²⁵³ FARCAU, *THE TEN CENTS WAR*, *supra* note 2, at 198-99.

²⁵⁴ BURR, *supra* note 154, at 180.

²⁵⁵ See *id.* at 190; see generally Alberto Díaz Araya, *Problemas y Perspectivas Sociohistóricas en el Norte Chileno: Análisis Sobre la “Chilenización” de Tacna y Arica*, in 5 *SI SOMOS AMERICANOS. REVISTA DE ESTUDIOS TRANSFRONTERIZOS* 49-81 (2003).

negotiations, Coolidge's failed arbitration, and ultimately the repudiation of the promise to hold the plebiscite altogether.²⁵⁶ The failure of this plebiscite—itsself a failed *pactum de contrahendo*—complicated regional relations. It served as a sly reminder of difficulties awaiting Bolivia in its quest to secure performance by Chile of an alleged *pactum* involving quite possibly the same disputed territory. Chile subsequently returned the province of Tacna in 1929, which now forms Peru's southernmost border with Chile and Bolivia, but it kept the port and province of Arica.²⁵⁷ “[T]he only party that

²⁵⁶ A series of negotiations begun by the US Harding Administration led to failed arbitrations commencing in 1925 with US President Calvin Coolidge serving as arbitrator, followed by ‘Plebiscitary Commissioners’ Generals John J. Pershing and William Lassiter in succession. See DENNIS, *supra* note 244, at 225, 282. Sater claims successive Chilean governments stalled then refused to hold the plebiscite, fearful Peru would win. See SATER, CHILE AND THE WAR OF THE PACIFIC, *supra* note 5, at 224. Ultimately, no plebiscite was held, and under the auspices of the US Hoover Administration, an agreement was reached: Tacna reverted to Peru and Arica to Chile. See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 198.

²⁵⁷ See Treaty between Chile and Peru for the Settlement of the Dispute Regarding Tacna and Arica (the Treaty of Lima) art. 2, Bol.-Chile, June 3, 1929, <http://www.icj-cij.org/docket/files/153/18616.pdf> (*translated in* Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, 2014 I.C.J., Annex 11, at art. 2 (July 15)) [hereinafter the Treaty of Lima]. Like the Treaty of Ancón, the supplementary protocol established a *jus prohibendi*, precluding Chile and Peru, without previous agreement, from ceding to any third power territories pertaining to the treaty (i.e., Tacna and Arica). The maritime boundary implications of the Treaty of Lima later became an issue of dispute between the two countries, resulting in a partial delimitation by the ICJ in 2014. See Maritime Dispute (Peru v. Chile), Judgment, 2014 I.C.J. Rep. 2014, 10 ¶ 1 (Jan. 27), <http://www.icj-cij.org/docket/files/137/17930.pdf>. The judgment retained the border for the first 80 miles offshore but partially redrew the demarcation thereafter, awarding to Peru more than half of the thirty-seven thousand square miles it originally sought. See Adriana Leon & Chris Kraul, *Peru Wins Maritime Border Dispute with Chile Over Key Fishing Grounds*, LA TIMES (Jan. 27, 2014), <http://articles.latimes.com/2014/jan/27/world/la-fg-wn-peru-territorial-dispute-chile-20140127>. The settlement of the maritime claim has been followed by yet another dispute over a nine acre (37,610 sq. meter) “land triangle” in the La Yarada-Los Palos district of Tacna involving overlapping claims by Chile and Peru based on competing interpretations of the 1929 Treaty of Lima. See *Boundary Tensions Between Peru and Chile Continue*, IBRU BOUNDARY NEWS (Oct. 22, 2015), https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=25974&ref=%2Fibru%2Fnews%2F&resubj=Boundary+news+Headlines.

might have protested the Treaty” – Bolivia – “was allowed no role in the negotiations.”²⁵⁸

The outcome for Bolivia was even more devastating. The war cost Bolivia 250 miles (400km) of its Pacific coastline – all of its coastline, in fact – including the province of Atacama, its largest port-city capital, Antofagasta, and its four other outlets to the ocean—Mejillones, Cobija, Huanillo and Tocopilla; Bolivia lost 108,000 square miles of mineral-rich land in the Atacama Desert (territory almost the size of Nevada), which Chile annexed.²⁵⁹ It altered collective memories as well as boundaries.²⁶⁰ The defeat transformed Bolivians instantly into a nation of landlubbers. Its landlocked status weighs heavily on its national conscience and economy today,²⁶¹ and compels the Bolivian navy to maintain its fleet of ninety vessels, four thousand six hundred personnel, two thousand marines and naval aviation accompaniment in the brown water ports of Lake Titicaca and on other internal waterways²⁶² in wishful anticipation of a change in political fortune that will provide pelagic purpose to its admiralty. Ironically, Bolivia did not even

²⁵⁸ Gordon, *supra* note 17, at 323.

²⁵⁹ See Christopher Woody, *Chile and Bolivia are still arguing over the outcome of a war they fought 131 years ago*, THE BUSINESS INSIDER (Oct. 4, 2015), <http://www.businessinsider.com/chile-bolivia-sea-access-land-dispute-2015-10>.

²⁶⁰ See SATER, ANDEAN TRADEGY, *supra* note 167, at 1.

²⁶¹ See JONATHAN R. BARTON, A POLITICAL GEOGRAPHY OF LATIN AMERICA 65 (1997). Bolivia has indirect access to the Pacific and Atlantic Oceans via Chile, Peru, Paraguay, and Brazil; most exports and imports go through the Chilean ports of Antofagasta and Arica on the Pacific, as well as through the Peruvian ports of Ilo Mollendo, Tachna, and Matarini (via Brazil’s ports of Belem and Santos). See Daniel Arthur McCray, *Eternal Ramifications of the War of the Pacific*, 4 (2005) (graduate thesis, University of Florida), http://etd.fcla.edu/UF/UFE0009403/mccray_d.pdf.

²⁶² See ERIC WERTHEIM, THE NAVAL INSTITUTE GUIDE TO COMBAT FLEETS OF THE WORLD, 16TH EDITION, THEIR SHIPS, AIRCRAFT, AND SYSTEMS 52 (16th ed. 2013). Deprived of a coast to protect, the *Armada Boliviana* patrols 10,000 miles of internal waterways, principally three internal basins, including the Amazon basin, involving the Ichilo, Mamore Itenez, Yacuma, Orthon, Abuna, Beni and Madre de Dios rivers, the central basin, comprising Lake Titicaca, and the Del Plata basin, including the Paraguay and Bermejo rivers. Advanced sea training is carried out in Argentina and Peru, which, pursuant to a 2010 agreement between the Presidents of Peru and Bolivia, granted Bolivia a small port near the Peruvian port of Ilo. See STEPHEN SAUNDERS, IHS JANE’S FIGHTING SHIPS 2014-2015, at 68-69 (116th rev. ed., 2014).

have a navy to deploy during the War of the Pacific²⁶³ (the *Armada Boliviana* was founded in 1963);²⁶⁴ it offered instead Letters of Marque and Reprisal to hire privateers to cruise against the Chileans.²⁶⁵ The plan failed, leaving its ally, Peru, to battle the Chilean ironclads alone,²⁶⁶ which it did until Chile destroyed Peru's armada in early 1881.²⁶⁷

The annexation secured for Chile a monopoly over the world's supply of nitrates, a commodity as valuable then as oil is today.²⁶⁸ Nitrates were essential to the manufacture of gunpowder and made more lucrative because of a new use for it found by Alfred Nobel in 1867: Dynamite.²⁶⁹ Overall, the war increased the size of Chile by one-third²⁷⁰ and the Atacama would later reveal repositories of some of the world's richest copper deposits.²⁷¹

²⁶³ See FARCAU, WAR OF THE PACIFIC, *supra* note 15, at 1625.

²⁶⁴ See SAUNDERS, *supra* note 262, at 68.

²⁶⁵ Letters of Marque vexed international relations at sea for centuries, due to their loose supervision. The practice was outlawed only among signatories by the 1856 Paris Declaration, which Bolivia refused to sign. For the text of the Declaration, see generally Declaration Respecting Maritime Law, Fr-U.K., Apr. 16, 1856, T.S. No. 9; Hisakazu Fujita, *1856 Paris Declaration Respecting Maritime Law*, in THE LAW OF THE NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 61-65 (Natalino Ronzitti ed., 1988). For a discussion of its abuse, see Todd Emerson Hutchins, *Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates*, 99 CAL. L. REV. 819, 855 (2011).

²⁶⁶ For a comparison of Chilean and Peruvian navies during the War of the Pacific, see SATER, ANDEAN TRAGEDY, *supra* 167, at 96-116.

²⁶⁷ See *id.* at 117-69 (describing the naval encounters during the War of the Pacific, encounters that demonstrated effective use of contact mines, torpedoes, and submarines).

²⁶⁸ STEPHEN R. BOWN, A MOST DAMNABLE INVENTION: DYNAMITE, NITRATES, AND THE MAKING OF THE MODERN WORLD 4, 162 (2005).

²⁶⁹ *Id.* at 162 (noting Chile's virtual control over the entire global supply of industrial-scale commercial nitrates on the cusp of the world's greatest increase in demand); *id.* at 82 (discussing demand for dynamite immediately following its invention).

²⁷⁰ See SATER, CHILE AND THE WAR OF THE PACIFIC, *supra* note 5, at 1-2.

²⁷¹ See SATER, ANDEAN TRAGEDY, *supra* note 167, at 1. Bolivia's Minister of Foreign Affairs estimated Chile earned more than 900 billion USD in copper exports from the Atacama since 1879. *Lo Que Gana Chile y Pierde Bolivia Por No Tener Acceso al Mar*, CORREO DEL SUR (May 6 2015), http://www.correodelsur.com/politica/20150506_lo-que-gana-chile-y-pierde-bolivia-por-no-tener-acceso-al-mar-.html (quoting David Choquehuanca). Chile produces almost a third of the

Bolivia signed an armistice – the Truce Pact – on April 4, 1884.²⁷² Pending a final settlement, Chile retained territories from the 23rd parallel South to the mouth of the Loa River (at the 21st parallel South).²⁷³ Commercial relations and customs exemptions for natural products were re-established, with Bolivia receiving free transit for goods introduced via the port of Antofagasta.²⁷⁴ Bolivia received port access to Arica, but with conditions attached until outstanding obligations to Chile were satisfied, after which, Bolivia would be able to establish its own internal customs office, allowing foreign goods to transit freely through Arica.²⁷⁵

The 1904 Peace Treaty re-established peaceful relations between Bolivia and Chile.²⁷⁶ Bolivia recognized Chilean sovereignty over coastal territory that had been Bolivian.²⁷⁷ Chile granted Bolivia in perpetuity a right of commercial free transit to the Pacific and at Chilean ports,²⁷⁸ together with the right to establish Bolivian customs posts at Chilean ports.²⁷⁹ Chile also agreed to build and pay for a railway from Arica (Chile's northernmost port) to the plateau of La Paz,²⁸⁰ to guarantee obligations incurred by Bolivia to attract railway investment, to settle debts associate with coastal territory that had been Bolivian, and to make a substantial cash payment to Bolivia.²⁸¹

world's copper; the vast majority of that copper comes from the Collahuasi, Chuquicamata and Radomiro Tomic, Escondida, and Los Pelambres mining operations in the Atacama. See Christopher Woody, *Chile and Bolivia are Still Arguing Over the Outcome of a War they fought 131 Years Ago*, BUSINESS INSIDER (Oct. 4, 2015), <http://www.businessinsider.com/chile-bolivia-sea-access-land-dispute-2015-10>.

²⁷² See 1884 Truce Pact, *supra* note 8.

²⁷³ *Id.* ¶ 2.

²⁷⁴ *Id.* ¶ 5.

²⁷⁵ *Id.* ¶ 6.

²⁷⁶ See 1904 Peace Treaty, *supra* note 7, at art. I.

²⁷⁷ *Id.* at art. II.

²⁷⁸ *Id.* at art. VI.

²⁷⁹ *Id.* at art. VII.

²⁸⁰ *Id.* at art. III.

²⁸¹ See 1904 Peace Treaty, *supra* note 7, at arts. III, V, IV.

But the 1904 Treaty cemented the loss of the Atacama Desert, psychologically scarring Bolivia's national identity.²⁸² It came on the heels of a rebellion that forced Bolivia to cede the southeast rubber-rich Acre region to Brazil (Treaty of Petropólis, 1903).²⁸³ Three decades later, Bolivia clashed with Paraguay over control of the oil-rich Gran Chaco region,²⁸⁴ the war lasted from 1932-1935, contained Bolivian elements of an unrealistic dream to access the Atlantic Ocean via the Paraguay River,²⁸⁵ claimed one hundred thousand lives, wounded one hundred and fifty thousand, and became the bloodiest war in modern Latin American history and the bloodiest hemispheric war since the U.S. Civil War.²⁸⁶ It officially concluded with the Treaty of Buenos Aires (1938), which awarded twenty thousand square miles of oil and gas fields to Paraguay.²⁸⁷ Bolivia has disputed boundaries with all of its neighbors and it has lost most if not all of its disputes.²⁸⁸ But the focal point of its foreign policy and national identity distills to the loss of the Atacama and the corridor it once provided to the sea.²⁸⁹ It serves as a constant

²⁸² GIBBERT, *supra* note 44, at 242 (declaring: "El mar se convirtió en el gran cohesionador espiritual del país" and the loss of access to it "un Tatuaje en el alma de Bolivia").

²⁸³ See generally Treaty of Petropólis, Braz.-Bol., Nov. 17, 1903, 698 U.N.T.S. 246.

²⁸⁴ See FARCAU, THE TEN CENTS WAR, *supra* note 2, at 193.

²⁸⁵ *Id.* at 192-93.

²⁸⁶ See BRUCE W. FARCAU, THE CHACO WAR: BOLIVIA AND PARAGUAY, 1932-1935, ix (1996) (noting 100,000 men killed out of a total combined population of less than five million); WILLIAM R. GARNER, THE CHACO DISPUTE: A STUDY OF PRESTIGE DIPLOMACY 107 (1966) (citing 55,000 Bolivian deaths and 83,000 injured and 45,000 Paraguayan deaths and 67,000 injured); Paul H. Lewis, *Paraguay Since 1930*, in 8 CAMBRIDGE HISTORY OF LATIN AMERICA 233, 234 (Leslie Bethell ed., 1991) (declaring the Chaco War the "bloodies war in Latin American history"); DAVID H. ZOOK, JR., THE CONDUCT OF THE CHACO WAR 23 (1960) (labeling it "the hemisphere's greatest struggle since the American Civil War).

²⁸⁷ Frank Jacobs, *How Bolivia Lost Its Hat*, THE NEW YORK TIMES (Apr. 3, 2012), http://opinionator.blogs.nytimes.com/2012/04/03/how-bolivia-lost-its-hat/?_r=0.

²⁸⁸ Bolivia unquestionably lost the War of the Pacific against Chile, the Acre War against Brazil, and the Chaco War against Paraguay; its defeat along with Peru in the War of the Confederation involved a coalition of opposing forces that included Chileans, Peruvians, and Argentines.

²⁸⁹ See EL LIBRO DEL MAR, *supra* note 55, at 19 ("Ninguna controversia internacional o conflagración bélica que afrontó Bolivia en su historia ocasionó una

historical reminder of the poverty of the doctrine of *uti possidetis* despite its necessity, and the limited utility of competing historical narratives based on factual circumstances (*les effectivités*). These narratives tend to rely on evidence scattered along an historical arc of parochialism, confusion, and indeterminacy; as international arbitrators once opined, they can be voluminous in quantity, but sparse in useful content.²⁹⁰ Reliance on competing pre- and post-colonial narratives formed part of Bolivia's case before the ICJ.²⁹¹ But the turbulent yet unavoidable history of *uti possidetis* suggests that the 'revindication' of Bolivia's interests will follow a different legal route – a route alternatively informed by the application of *pacta de contrahendo* or *negotando*, or a claim involving legal consequences associated with Chilean declarations.

V. BOLIVIA'S APPEAL TO ACCUMULATIVE EVIDENCE AND JUDGE GREENWOOD'S QUESTION

During oral proceedings, Judge Christopher Greenwood posed the following question to Bolivia's lawyers: "On what date does Bolivia maintain that an agreement to negotiate sovereign access was concluded?"²⁹² Unlike the argument of Chile's counsel, who emphasized a need to show when the obligation crystallized,²⁹³ Bolivia's counsel pointed to an "accumulation of successive acts by

pérdida tan importante como la Guerra del Pacífico."); GIBBERT, *supra* note 44, at 241-42 ("Es que ni en el Acre ni en el Chaco habíamos perdido nuestra cualidad y acceso a las cuencas del Amazonas y del Plata, en cambio en la Guerra con Chile perdimos la cualidad marítima y el acceso a la Cuenca de Pacífico, cuya importancia es central en la economía mundial del siglo XXI").

²⁹⁰ *Territorial Sovereignty and Scope of the Dispute*, (Eri. v. Yemen), 22 U.N.R.I.A.A. 209, at ch. VII, ¶ 239 (Oct. 9, 1998).

²⁹¹ Documents prepared and submitted to the ICJ post- and pre-date Bolivia's independence from Spain and date to ancient times and the connections the Tiwanaku and Aymara peoples. EL LIBRO DEL MAR, *supra* note 55, 23-33 (examples of Bolivia's historical account).

²⁹² May 6 Public Sitting, *supra* note 75, ¶ 31, at 60 (verbatim record of Judge Greenwood).

²⁹³ May 7 Public Sitting, *supra* note 56, ¶ 4, at 32 ("Mais alors, de cet engagement, on ne sait toujours pas davantage à partir de quel moment ses différents éléments constitutifs sont réputés avoir atteint la phase de cristallisation nécessaire à la formation d'une obligation juridique, au-delà de simples pourparlers diplomatiques?") (verbatim record of M. Dupuy).

Chile,”²⁹⁴ arguing no principal of international law requires a “magical moment when agreements or understandings appear out of nothingness, like the story of creation.”²⁹⁵

Bolivia’s appeal to the accumulative evidence implies a reliance on historical evidence (*effectivités*) dating to colonial rule, but centers on affirmations by Chilean officials, noting, the ‘particularly important’ Treaty on the Transfer of Territories of May 18, 1895,²⁹⁶ its protocol,²⁹⁷ and a litany of subsequent official pronouncements.²⁹⁸ With the 1895 Transfer of Territories document, Chile pledged to acquire dominion over Tacna and Arica and to “transfer them to” Bolivia by way of compensation of five million silver pesos.²⁹⁹ Failing that acquisition, Article 4 of the protocol recorded

²⁹⁴ May 8 Public Sitting, *supra* note 50, ¶ 9, at 33-34 (verbatim record of Mr. Akhavan).

²⁹⁵ *Id.* ¶ 9, at 33. *But see* J. Klabbbers & R. Lefeber, *supra* note 145, at 568 (1993) (discussing *uti possidetis*’ immediate application, thus freezing territorial title at the critical date of independence); Frontier Dispute, *supra* note 150, ¶¶ 26-27, at 109 (describing *uti possidetis* as ‘photographing’ the territorial situation; “freez[ing] territorial title; and “stop[ping] the clock” but not putting back the hands). Bolivia’s rejection of a ‘magical moment’ signifying the crystallization of its claim distinguishes its argument from other examples involving the binding effect of unilateral declarations.

²⁹⁶ Treaty on Transfer of Territory Between Bolivia and Chile (the 1895 Treaty), Bol.-Chile, May 18, 1895, <http://www.icj-cij.org/docket/files/153/18616.pdf> (*translated in* Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, 2014 I.C.J., Annex 3, (July 15)) [hereinafter 1895 Treaty].

²⁹⁷ Protocol on the Scope of the Obligations Agreed Upon in the Treaties of 18 May between Bolivia and Chile (the December 1895 Protocol), Bol.-Chile, Dec. 9, 1895, <http://www.icj-cij.org/docket/files/153/18616.pdf> (*translated in* Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, 2014 I.C.J., Annex 4, (July 15)) (binding Chile to “make use of all legal measures . . . so as to acquire the port and territories of Arica and Tacna, with the unavoidable purpose of ceding them to Bolivia . . .”) [hereinafter 1895 Protocol].

²⁹⁸ *See* EL LIBRO DEL MAR, *supra* note 55, 53-64 (cataloging Bolivian claims regarding Chilean presidents, foreign ministers, and ambassadors who undertook to negotiate a sovereign access to the sea with Bolivia).

²⁹⁹ *See* 1895 Treaty, *supra* note 296, at 91-97 (noting in the preamble agreement between Chile and Bolivia “that a higher need and the future development and commercial prosperity of Bolivia require its free and natural access to the sea,” and in art. 1 that if Chile acquired dominion over Tachna and Arica through a plebiscite, “it undertakes to transfer them to . . . Bolivia” in return for compensation).

that “the said obligation undertaken by Chile will not be regarded as fulfilled, until it cedes a port and zone that fully satisfies the current and future needs of Bolivian trade and industry.”³⁰⁰ Although the agreements were signed, the Congresses of both states failed to approve the protocols; and in an 1896 exchange of notes, both countries agreed they were “wholly without effect.”³⁰¹

In 1910, Bolivian Foreign Minister Daniel Sánchez Bustamante restated the logic and justice of establishing an ocean passageway through Arica;³⁰² he noted that Chile and Peru “should no longer be neighboring countries” and that Bolivia more properly should be the territorial sovereign of an intermediate buffer zone (containing “at least one convenient port”) for the stability of Hispanic-American nations.³⁰³ He later wrote Arica was “the natural port of Bolivia.”³⁰⁴ Bolivia claimed this memorandum reaffirmed expectations of a title transfer that had been created by Chile, which had survived the conclusion of the 1904 Peace Treaty.³⁰⁵ A 1920 protocol signed by Bolivian and Chilean Foreign Ministers “agreed to . . . exchange general ideas” and acknowledged “the aim of reaching an agreement

³⁰⁰ See 1895 Protocol, *supra* note 297, at 108 (mentioning specifically the small port of Vitor or an analogous inlet).

³⁰¹ Note from Adolfo Guerrero, Minister of Foreign Affairs of Chile, to Heriberto Gutierrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile (Apr. 29, 1896), <http://www.icj-cij.org/docket/files/153/18616.pdf> (*translated in* Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, 2014 I.C.J., Annex 6 (July 15)); *also see* Note from Heriberto Gutiérrez, Extraordinary Envoy and Minister Plenipotentiary of Bolivia in Chile, to Adolfo Guerrero, Minister of Foreign Affairs of Chile, (Apr. 20, 1896), <http://www.icj-cij.org/docket/files/153/18616.pdf> (*translated in* Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, 2014 I.C.J., Annex 7 (July 15)).

³⁰² Memorandum from the Minister of Foreign Affairs of Bolivia, Daniel Sánchez Bustamante, (Apr. 22, 1910), <http://www.icj-cij.org/docket/files/153/18616.pdf> (*translated in* Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, 2014 I.C.J., Annex 8 (July 15)).

³⁰³ *Id.*

³⁰⁴ José E. Pradel B., *Daniel Sánchez Bustamante y el Memorandum de 1910*, EL DIARIO NUEVOS HORIZONTES (Nov. 4, 2014), http://www.eldiario.net/noticias/2014/2014_11/nt141104/nuevoshorizontes.php?n=5&-daniel-sanchez-bustamante-y-el-memorandum-de-1910 (noting the memorandum “demostraba además la vinculación real del Puerto de Arica con Bolivia” and that “Arica, siendo como es el puerto natural de Bolivia, y solo de Bolivia”).

³⁰⁵ See Application to Negotiate Access, *supra* note 1, ¶¶ 14, 17.

pursuant to which Bolivia could satisfy its aspiration of obtaining its own access to the Pacific [independent of the 1904 Peace Treaty];” article IV read: “Chile is willing to ensure that Bolivia acquires its own access to the sea, by ceding an important part of that area north of Arica and of the railway line that is located in the territories that are the object of the plebiscite provided for in the Treaty of Ancón.”³⁰⁶ Bolivia later claimed in a 1950 Exchange of Notes (reaffirmed in a memorandum in 1961)³⁰⁷ that this 1920 *Acta Protocolizada* represented Chile’s acceptance of the transfer to Bolivia of access to the Pacific Ocean, along with the ‘clear direction’ of Chile’s international policy.³⁰⁸ The Chilean Foreign Ministry note indicated that Chile “has been willing to consider, in direct negotiations with Bolivia, the possibility of satisfying” Bolivia’s aspirations and in a spirit of fraternal friendship “is willing to formally enter into a direct negotiation aim[ed] at finding the formula which would make it possible to grant Bolivia its own and sovereign access to the Pacific Ocean and for Chile to obtain compensations that are not of a territorial nature”³⁰⁹ This latter expression appears to be the sturdiest of the wet reeds on which leans Bolivia’s *pactum de contrahendo* argument.

Bolivia has recounted numerous attempts over the last century to demonstrate Chile’s intent to negotiate a sovereign access, but many of them seem to blur the distinction between a duty to negotiate and a duty to agree. In 1926, for instance, U.S. Secretary of State, Frank B. Kellogg, fielded an inquiry from Chilean Ambassador, Miguel Cruchaga, to Washington about the prospect of ceding Tacna to Peru, Arica to Chile, and a four-kilometer wide corridor between Arica and Los Palos, Peru to Bolivia.³¹⁰ Shortly after, Kellogg delivered to Chile and Peru a memorandum in 1926 offering

³⁰⁶ *Id.* at Annex 9, at 44 (Protocol (“*Acta Protocolizada*”) Subscribed between the Foreign Affairs Minister of Bolivia, Carlos Gutiérrez, and the Extraordinary Envoy and Plenipotentiary Minister of the Republic of Chile, Emilio Bello Codesido 10 January 1920).

³⁰⁷ *See id.* at Annex 12, at 50 (Memorandum from the Embassy of Chile in La Paz, 10 July 1961).

³⁰⁸ *See id.* at Annex 10, at 46 (Note of 1 June 1950 from the Ambassador of Bolivia to the Minister of Foreign Affairs of Chile [Alberto Ostría Gutiérrez]).

³⁰⁹ *See id.* at Annex 11, at 48 (Note of 20 June 1950 from the Minister of Foreign Affairs of Chile to the Ambassador of Bolivia [Horacio Walker Larraín]).

³¹⁰ *See EL LIBRO DEL MAR, supra* note 55, at 38.

the good offices of the U.S. to help find a solution to the stalled plebiscite disposition of Tacna and Arica.³¹¹ Of the three possible dispositions of the *res* contemplated – assign it to one or the other; divide it; or “effect some arrangement whereby neither contestant shall get any of the territory,” only the third option contained the essential element of compromise that made sense to him; he suggested the voluntary but compensated ceding of the provinces of Tacna and Arica to Bolivia.³¹² Bolivia claims Chilean Foreign Minister, Jorge Matte, confirmed Chile’s willingness to grant a strip of territory and a port to Bolivia once the definitive possession of Tacna and Arica was clarified.³¹³ In fact, Matte wrote “the Chilean Government would honor its declarations in regard to the consideration of Bolivian aspirations,” but declared that Kellogg’s suggestion “goes much farther than the concessions which the Chilean Government has generously been able to make.”³¹⁴

In 1975 Chilean leader Augusto Pinochet and Bolivian President Hugo Banzer met in the Bolivian border town of Charaña, where Pinochet offered Bolivia a small strip of ‘demilitarized’ land between Arica and the Peruvian border (extending into the territorial sea) in exchange for equivalent territorial compensation taken from the Bolivian *Altiplano*.³¹⁵

³¹¹ Frank B. Kellogg, *Tacna-Arica*, 89 ADVOCATE OF PEACE THROUGH JUSTICE 55, 55 (1927).

³¹² *Id.* at 56–57.

³¹³ EL LIBRO DEL MAR, *supra* note 55, at 39.

³¹⁴ *Id.* at 120 (Memorandum issued by the Chancellor of Chile Jorge Matte to the Secretary of State Frank B. Kellogg of 30 November 1926).

³¹⁵ 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 (Dec. 19, 1975), <http://www.icj-cij.org/docket/files/153/18620.pdf> (*translated in* Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile), Preliminary Objection of the Republic of Chile, 2014 I.C.J. vol. 3, Annex 52, at 767 (July 15)) (“Chile would be willing to negotiate with Bolivia the cession of a strip of territory north of Arica up to the Línea de la Concordia”); see Protocol to Seek an Arrangement to Put an End to the War of the Pacific (Feb. 13, 1884), <http://www.icj-cij.org/docket/files/153/18618.pdf> (*translated in* Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile), Preliminary Objection of the Republic of Chile, 2014 I.C.J. vol 2, Annex 14, at 265-273 (July 15)). The Chilean plan also demanded recognition of Chile’s right to use the Rio Lauca. See Gordon, *supra* note 17, at 325. The ICJ recognized

Bolivia reconsidered and ultimately balked at the idea of further relinquishing land to obtain territory improperly seized to begin with.³¹⁶ Additionally, the *jus prohibendi* provision in the 1929 Treaty of Lima required Peruvian consent, which was not given.³¹⁷ Peru President General Francisco Morales Bermúdez offered in 1976 a counterproposal: a zone of tripartite sovereigns between the city of Arica and the Peruvian border, “with Bolivia receiving a corridor feeding into this zone.”³¹⁸ Peru’s plan masterfully reinserted its parochial interests into the buffer zone while offering “Bolivia at least as much as the Chileans had.”³¹⁹ Chile regarded the trilateral economic development of the territory as an undue complication and rejected the proposal.³²⁰ Citing Chile’s lack of sincerity, Bolivia broke diplomatic relations in March 1978,³²¹ and the diplomatic impasse remains to this date.

Attempts to resolve this dispute have historically oscillated between bilateral and trilateral negotiations, but Bolivia also has attempted periodically to internationalize the discussion. It sought a revision of the 1904 Peace Treaty through an appeal to the League of Nations in 1920,³²² which declared the complaint inadmissible because the League Assembly lacked capacity to modify any treaty.³²³ It approached the Non-Aligned movement,³²⁴ and the Organization of American States (OAS), first in 1962 by linking the

these negotiations in a separate case before the ICJ involving a maritime delimitation dispute between Chile and Peru. *See Maritime Dispute, supra* note 257, ¶¶ 131-133.

³¹⁶ *See* St. John, *supra* note 168, at 94-95.

³¹⁷ *See id.* at 95.

³¹⁸ *Id.*

³¹⁹ Gordon, *supra* note 17, at 325.

³²⁰ *See* St. John, *supra* note 168, at 94-95.

³²¹ *See* Gordon, *supra* note 17, at 327.

³²² *See* Letter from the Delegates of Bolivia to the League of Nations to James Eric Drummond, Secretary-General of the League of Nations (Nov. 1, 1920), <http://www.icj-cij.org/docket/files/153/18618.pdf> (*translated in* *Obligation to Negotiate Access to the Pacific Ocean (Bolivia-Chile)*, 2014 I.C.J. vol 2, Annex 37, at 579 (July 15)); *see* FIGUEROA, *supra* note 37, at 43-58 (discussing Bolivia’s efforts to secure a review by the League of Nations).

³²³ League of Nations, Report of the Commission of Jurists on the Complaints of Peru and Bolivia (Sept. 21, 1921), <http://www.icj-cij.org/docket/files/153/18618.pdf> (*translated in* *Obligation to Negotiate Access to the Pacific Ocean (Bolivia-Chile)*, 2014 I.C.J. vol 2, Annex 39, at 593 (July 15)).

³²⁴ *See* FIGUEROA, *supra* note 37, at 144.

Lauca River issue to access to the sea,³²⁵ then on the occasion of the hundredth anniversary of the War of the Pacific in 1979,³²⁶ and periodically thereafter. The OAS has approved resolutions encouraging the parties to find a formula for giving Bolivia a sovereign outlet to the Pacific Ocean while taking account of the rights and interests of all parties involved.³²⁷ The parties returned to numerous bilateral meetings in Uruguay (the “Fresh Approach” meetings, 1986-87), at the XIII Ibero-American Summit in Bolivia (2003), at the Monterrey Summit of the Americas (2004), on four occasions in 2005, (New York, Salamanca, Mar del Plata, and Montevideo).³²⁸ During the Sixty-Seventh Session of the United Nations General Assembly in 2012, Bolivia affirmed that bilateral options remained open with Chile;³²⁹ Chile responded by declaring Bolivia lacks any legal basis for claiming a sovereign access to the Pacific Ocean by territories

³²⁵ See Wehner, *supra* note 23, at 11 (discussing Bolivia’s OAS claim linking of the 1962 Lauca River dispute with Chile to the question of its access to the sea).

³²⁶ GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, *Access by Bolivia to the Pacific Ocean (Resolution adopted at the twelfth plenary session held on October 31, 1979)*, AG/Res. 426 (IX-0/79), p. 55 (July 1980), <http://www.oas.org/en/sla/docs/ag03793E01.pdf> (calling for an equitable solution “for the purpose of providing Bolivia with a free and sovereign territorial connection with the Pacific Ocean” taking into account the rights and interest of the parties involved as well as the Bolivian proposal that no territorial compensation be included).

³²⁷ GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, *Report on the Maritime Problem of Bolivia (Resolution adopted at the seventh plenary session, held on November 18, 1983)*, AG/Res. 686 (XIII-0/83), p. 100 (Dec. 1983), <http://www.oas.org/en/sla/docs/ag03797E01.pdf>. See also GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, *Report on the Maritime Problem of Bolivia (Resolution adopted at the eighth plenary session, held on December 10, 1981)*, AG/Res. 560 (XI-0/81), p. 95 (June 1982), <http://www.oas.org/en/sla/docs/ag03795E01.pdf>; see GENERAL SECRETARIAT, ORGANIZATION OF AMERICAN STATES, *Report on the Maritime Problem of Bolivia (Resolution adopted at the sixth plenary session, held on November 27, 1980)*, AG/Res. 481 (X-0/80), p. 28 (May 1981), <http://www.oas.org/en/sla/docs/ag03794E01.pdf>.

³²⁸ See EL LIBRO DEL MAR, *supra* note 55, 47-50.

³²⁹ See Speech by the President of the Plurinational State of Bolivia, Mr. Evo Morales Ayma, UN doc. A/66/PV.13 (Sep. 21, 2011), <http://gadebate.un.org/66/bolivia-plurinational-state> (claiming to keep bilateral channels of negotiation open with Chile); see also H.E. Mr. Evo Morales Ayma, President, GENERAL ASSEMBLY OF THE UNITED NATIONS, (Sept. 26, 2012), <http://gadebate.un.org/no/396> (addressing Bolivia’s right to Chile’s return of its coastline).

belonging to Chile,³³⁰ a claim repeated in 2012,³³¹ prompting Bolivia to bring the case before the ICJ.³³²

VI. CONCLUSION

Should the case result in a judgment on the merits, the determination of the substantive law relating to the duty to negotiate presents many challenges for the ICJ and the parties. Outcomes appear less than satisfying: a finding that a *pactum de contrahendo* exists, based on the unilateral or repeated ‘declarations’ of Chilean authorities, would compel the parties to return to diplomacy to find the specific ‘modalities’ for a solution. Absent a timetable and conditioned only by the difficult-to-measure duty to negotiate in good faith, a Bolivian victory may result in a Pyrrhic victory. Similarly, a finding that a *pactum de negotiando* exists, may only extend the rhetorical torpor that prompted Bolivia to seek third party resolution—consigning all parties once again to the diplomatic *pergatorium* that has afflicted these Andean coastal countries since the War of the Pacific. A finding that Chile has been negotiating in bad faith institutionally presents the Court with the loathsome prospect of invalidating peace treaties, opening up the prospect of another dispute involving redrawing boundary lines in the region. Were Bolivia to secure an outcome favorable to its Pacific coastline desires, it would be left to reconcile the economic equations of its geo-strategic predicament and the attending costs of connecting, operationalizing, and developing additional infrastructure between the coast and its

³³⁰ *Declaración del Ministerio de Relaciones Exteriores de Chile Sobre la Entrega de una Nota Por Parte de Bolivia a la Corte Internacional de Justicia*, MINISTERIO DE RELACIONES EXTERIORES DE CHILE (July 12, 2011), http://www.minrel.gob.cl/prontus_minrel/site/artic/20110712/pags/20110712144736.php (“Bolivia carece de todo fundamento jurídico para reclamar un acceso soberano al Océano Pacífico por territorios que pertenecen a Chile. Los límites entre Chile y Bolivia fueron establecidos con precisión hace más de 100 años, en el Tratado de Paz y Amistad de 1904, el cual es reconocido y respetado por ambos países y se encuentra plenamente vigente.”).

³³¹ *See Chile, H.E. Mr. Alfredo Moreno Charme, Minister for Foreign Affairs*, GENERAL ASSEMBLY OF THE UNITED NATIONS (Sept. 28, 2012), <https://gadebate.un.org/en/67/chile> (categorically rejecting Bolivia’s claim of an outstanding border issue).

³³² Obligation to Negotiate Access, Preliminary Objection, *supra* note 6, ¶ 47, at 18.

commercial centers on the *Altiplano*. A close look at Chile's less than clean hands also would probably prompt a judicial reconsideration of Bolivia's historical record, including its rescission of the 1866 condominium agreement and the double-dealing of the Melgarejo dictatorship, its imposition of the illegal ten cents tax, its refusal to arbitrate as required by the 1874 Boundary Treaty, and its nineteenth century rejection of efforts to reinstate the condominium agreement. A finding that neither *pactum* exists would restate the *status quo* and underscore the realities of Chile's dominion over territory won in a war fought one hundred and thirty-five years ago. It would blunt the equitable momentum Bolivia has been able to muster within the OAS and elsewhere but also could radicalize regional relations demarcated already along radical/liberal and indigenous/post-colonial fault lines.³³³ A judgment favoring Chile would underscore a primordial feature of territorial temptation: Sentiments of comity and conscience do not motivate states to cede sovereignty. Chile negotiated a return of Tacna to Peru but in exchange secured Arica and its key port, and the fulfilment of its international legal obligation created by the *pactum de contrahendo* of the 1883 Treaty of Ancón. It also secured a *jus prohibendi* agreement with Peru regarding any future disposition of the territory. Most important, it secured for Chile a Peruvian sense of satisfaction. Peru long ago stopped re-fighting the War of the Pacific – and this dividend also remunerates Chile. That Chile historically has been willing to negotiate and accommodate a Bolivian access to the sea can signify Chile's bona fides in attempting a regional accord as much as it can signify Chile's elaborate ruse to forestall good faith negotiations. But it is not clear Bolivian internal politics can accommodate this interpretation.

The more obvious path to an accord would require all parties to identify with the dissatisfaction of the existing situation and the poverty of seeking a resolution of this dispute inside the formal strictures of a third party dispute settlement forum. That formal pathway

³³³ See generally Steve Ellner, *Latin America's Radical Left in Power: Complexities and Challenges in the Twenty-first Century*, 40 LATIN AMERICAN PERSPECTIVES 5 (2013); *South America's New Caudillos: Evo Morales of Bolivia and Democracy*, NY TIMES (Oct. 16, 2014) http://www.nytimes.com/2014/10/17/opinion/evo-morales-of-bolivia-and-democracy.html?_r=0.

to shaping a solution in many ways seems inferior to the social interactions constructed by other, informal or less formal pathways to international law creation. In this constructivist sense, despite the perils it may invite, a ruling establishing a *pactum de negotiando* could support and enhance notable efforts crafted by the parties, efforts that may reflect a more meaningful pathway simply by not interfering with the parties' inter-subjective determination of what exactly constitutes a 'sovereign access to the sea.'

That phrase itself is oblique. As noted by Judge Owada, the phrase is "not a term of art in general international law," despite its usage by both sides in oral and written proceedings.³³⁴ One should not presume that the language of international law is necessarily informing the outcome or the parameters of this case; rather, it would appear the social and diplomatic interactions of the parties could possibly affect the *legelect* of international law.

The *legelect* of this case, perhaps un-selfconsciously, has been informed by the parties, notwithstanding the "lengthy and convoluted nature of the Bolivia-Chile-Peru dispute."³³⁵ A litany of creative if forestalled proposals creates modalities for an accord or future negotiations, including: an 1866 condominium-like arrangement based on a zone of tripartite occupation as suggested by Peru's President Morales in 1976; territorial concessions linked to resource exchanges, such as Bolivian liquefied natural gas production to supplement Chile's and Peru's energy needs in exchange for territorial concessions linked to a maritime zone or riparian issue; territorial swaps as proposed by Chile during the Charaña discussions, then by Peru; special territorial corridors or shared sovereignty over ports as contemplated by Coolidge in the *Tacna-Arica Arbitration*; development of a Free City zone as contemplated by the 1866 condominium arrangement and U.S. Secretary of State Kellogg; expansion of agreements to facilitate transportation networks modeled on Chile's construction of the Arica-La Paz railroad or infrastructure needs around the port of Ilo; or the 'creation of a special transportation

³³⁴ May 8 Public Sitting, *supra* note 50, at 38.

³³⁵ THE CARTER CTR., APPROACHES TO SOLVING TERRITORIAL CONFLICTS: SOURCES, SITUATIONS, SCENARIOS, AND SUGGESTIONS 39 (2010) [hereinafter CARTER CENTER].

corridor of a nonterritorial nature',³³⁶ perhaps to accommodate Bolivia's and Chile's untapped world-wide comparative advantage in the production of lithium.³³⁷

These are the modalities the parties need to reconfigure, but within a trilateral rather than bilateral context. Clearly, a return to the 13-point agenda discussions would be of benefit, but with Peru's inclusion, as well. Tri-national discussions are not only implied by the *jus prohibendi* provision agreed to by Chile and Peru, but would signify a fully integrated resolution strategy that could create inter-subjective avenues for sub-regional economic, political, and legal development. The basis for the 13-point agenda already has been broached officially and unofficially by a group of diplomats, journalists, and scholars, who in 2001 launched the *Proyecto Trinacional* to remove conceptual and practical obstacles by advancing academic, cultural, and commercial ties.³³⁸

Trilateral discussions also would promote the possibility of this sub-regional growth triangle in ways only indirectly attempted. Sub-regional growth triangles have been well studied in a South East Asian context,³³⁹ as well as specifically within South American and West African comparative perspectives.³⁴⁰ The unencumbered movement of labor, technology, and capital in these regions have been known to create significant political, social, and economic consequences.³⁴¹ Factors associated with successful examples seem possible within the Andean context: economic complementarity, ge-

³³⁶ *Id.*

³³⁷ See Hodson *supra* note 39.

³³⁸ See Ronald Bruce St. John, *Same Space, Different Dreams: Bolivia's Quest for a Pacific Port*, 1 THE BOLIVIAN RESEARCH REVIEW (2001), available at http://www.bolivianstudies.org/revista/2001_07.htm; See also CENTRO DE ESTUDIOS ESTRATÉGICOS PARA LA INTEGRACIÓN LATINOAMERICANA ET AL., HACIA UN EFNOQUE TRINACIONAL DE LAS RELACIONES ENTRE BOLIVIA, CHILE Y PERÚ 8 (2001).

³³⁹ See David Wadley & Hayu Parasati, *Inside South East Asia's Growth Triangles*, 85 GEOGRAPHY 323,323-34 (2000).

³⁴⁰ See generally ARIE M. KACOWICZ, ZONES OF PEACE IN THE THIRD WORLD: SOUTH AMERICA AND WEST AFRICA IN COMPARATIVE PERSPECTIVE (1998).

³⁴¹ See generally Brian Bridges, *Beyond Economics: Growth Triangles in Southeast Asia*, 21 ASIAN PERSPECTIVE 55 (1997).

ographic proximity, government commitment and policy coordination, infrastructure development, and private sector market forces.³⁴² South America's context, turbulence notwithstanding, presents relative macro-conditions not present elsewhere: Since the War of the Pacific, it has not been the *situs* of major international war; it has been less impeded by ethnic or religious cleavages; although internally weak in terms of political structures, South American states escaped the *quasi*-status of less fully-fledged nation states; and peoples of the region have been better able to democratize while developing regional, cultural, normative, and transnational identities.³⁴³ The establishment of a 'nascent pluralistic security community' in the Southern Cone generates guarded optimism about transforming national identities and historical zones of conflict into "incipient zones of negative peace"³⁴⁴ – which are conceived as "the absence of systemic, large-scale collective violence between political communities."³⁴⁵ It may also have an effect on the regional construction of sovereignty. Taken for granted as an inflexible norm, 'it is easy to overlook the extent to which sovereignty norms reflect an ongoing artifact of practice' – not a once-and-for-all creation of norms established by the War of the Pacific.³⁴⁶ The most dynamic aspect of this problem is that the three parties could reconfigure sovereignty away from the limiting and seemingly intractable options presented by its Westphalian construction. Perhaps sovereignty in the Northern Atacama Desert is a *jus dispositivum* awaiting a sensible reconstruction by the parties most affected by the War of the Pacific.

A complicated history involving borders imposed by the fiat power of *uti possidetis* was meant to protect against post-colonial land grabs throughout South America. But indeterminate territorial demarcations in the Atacama following the collapse of the Spanish Empire prompted competing claims of possession, occupation, and development,³⁴⁷ but not immediately. Territorial temptations ex-

³⁴² Wadley & Parasati, *supra* note 339, at 324; *see generally* Bridges, *supra* note, 341.

³⁴³ *See* KACOWICZ, *supra* note 340, at 178–80.

³⁴⁴ *Id.* at 177.

³⁴⁵ *Id.* at 7.

³⁴⁶ *See* Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 413 (1992).

³⁴⁷ *See* ST. JOHN BOUNDARIES, TRADE, AND SEAPORTS, *supra* note 12, at 29.

posed the weakness of *uti possidetis* for Bolivia, Chile, and Peru because of mid-nineteenth century disputes over resources. Competing historical narratives, national interests, forestalled plebiscites, massive migration, secret and broken promises, and clean and dirty hand complicate the question of a sovereign access for Bolivia to the sea. The question involves, certainly for Bolivia and Chile, and of late Peru, national identity and honor. Chile and Peru litigated before the ICJ a maritime boundary dispute directly stemming from the 1929 Treaty of Lima, resulting in a 2014 ICJ judgment.³⁴⁸ The settlement of that maritime claim, itself problematic because it leaves no maritime space for Bolivia to ‘own’ should it achieve a sovereign access to the sea, almost immediately has propelled Chile and Peru into a dispute over a nine acre (37,610 sq. meter) triangle (the La Yarada-Los Palos district of Tacna) landward of the point (*Punto Concordia*) used by the ICJ for its seaward delimitation.³⁴⁹ The dispute has involved diplomatic exchanges and allegations of troop deployments,³⁵⁰ the recall of both ambassadors,³⁵¹ and tensions fueled by other charges of espionage.³⁵²

The principle of *pacta tertiis*, itself a reflection of the sovereign equality of states, ensures that judicial settlements will not affect the interests of non-parties.³⁵³ But as the recent maritime delimitation case between Peru and Chile suggests, it does not necessarily preclude the ICJ from ruling on a case before it as between Chile and Bolivia.

The question is whether the ICJ can impute more meaning to ‘a sovereign access to the sea’ than would be suggested by finding, at best, that a *pactum de negotiandum* exists based on the historical record and factual *effectivités*. The essential indeterminacy of the historical record suggests ‘something more’ clear and convincing is needed other than the disputable inferences and references proffered

³⁴⁸ See Maritime Dispute, *supra* note 257, at 3.

³⁴⁹ See *Boundary Tensions Between Peru and Chile Continue*, *supra* note 258.

³⁵⁰ *Chile and Peru in Border Spat Over La Yarada-Los Palos Area*, BBC NEWS (Nov. 8, 2015), <http://www.bbc.com/news/world-latin-america-34759018>.

³⁵¹ See Colin Post, *Border Rhetoric Heats Up Between Chile and Peru*, PERU REPORTS (Nov. 7, 2015), <http://perureports.com/2015/11/07/border-rhetoric-heat-s-up-between-chile-and-peru/>.

³⁵² See *Boundary Tensions Between Peru and Chile Continue*, *supra* note 258.

³⁵³ See MICHAEL VAGIAS, THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 187 (2014).

by Bolivia. Given that indeterminacy, it is doubtful the ICJ will provide finality to this ongoing saga, and that does not appear to be its charge. Absent a *deus ex machina*, the opportunity costs to settlement increase for this sub-regional growth triangle, reinvigorating the prospect that the three principal parties, not the ICJ, already have constructed an array of intersubjective modalities that can lead to settlement, and indeed potential cooperation, informing along the way the rich and informal texture of international law creation.