INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

# OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC OCEAN

(BOLIVIA *v.* CHILE)

**JUDGMENT OF 1 OCTOBER 2018**

# 2018

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

# OBLIGATION DE NÉGOCIER UN ACCÈS À L'OCÉAN PACIFIQUE

(BOLIVIE c. CHILI)

**ARRÊT DU 1er OCTOBRE 2018**

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

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

*between*

the Plurinational State of Bolivia,

represented by

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

as Agent;

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

as Co-Agent;

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

as National Authority;

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

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

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

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

Mr. Payam Akhavan, LLM SJD (Harvard), Professor of International Law, McGill University, Montreal, member of the Permanent Court of Arbitration, member of the New York State Bar and of the Law Society of Upper Canada,

Ms Amy Sander, member of the Bar of England and Wales,

as Counsel and Advocates;

Mr. Fernando Huanacuni, Minister for Foreign Affairs of the Plurinational State of Bolivia,

Mr. Héctor Arce, Minister of Justice and Institutional Transparency of the Plurinational State of Bolivia,
Mr. Pablo Menacho, Attorney General of the Plurinational State of Bolivia and Professor of Constitutional Law, Universidad Mayor de San Andrés, La Paz,
Mr. Emerson Calderón, Secretary-General of the Strategic Maritime Vindication Office (DIREMAR) and Professor of Public International Law, Universidad Mayor de San Andrés, La Paz,

as Advisers;

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

as Special Guests;

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Ms Olga Dalbinoë, Doctoral Candidate in Public International Law, Universidad Autónoma de Madrid,
Ms Melina Antoniadis, BCL/LLB, McGill University, Montreal,

as Assistant Counsel,

*and*

the Republic of Chile,

represented by

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as Agent;

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

as National Authority;

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

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Mr. Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary-General of the Hague Academy of International Law,
Mr. Harold Hongju Koh, Sterling Professor of International Law, Yale Law School, member of the Bars of New York and the District of Columbia,
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Ms Kate Parlett, member of the Bar of England and Wales, 20 Essex Street Chambers,

as Counsel and Advocates;

H.E. Mr. Heraldo Muñoz Valenzuela, former Minister for Foreign Affairs of the Republic of Chile, Professor of International Relations, University of Chile,
H.E. Ms Ximena Fuentes Torrijo, National Director of Frontiers and Limits, Ministry of Foreign Affairs of the Republic of Chile, Professor of Public International Law, University of Chile,
H.E. Mr. Alberto van Klaveren Stork, former Vice-Minister for Foreign Affairs of the Republic of Chile, Professor of International Relations, University of Chile,
Ms Carolina Valdivia, General Co-ordinator, Ministry of Foreign Affairs of the Republic of Chile,
Ms Alexandra van der Meulen, *avocat au barreau de Paris* and member of the Bar of the State of New York, Freshfields Bruckhaus Deringer LLP,
Ms Mariana Durney, Director of Limits, Ministry of Foreign Affairs of the Republic of Chile,
H.E. Mr. Luis Winter, Ministry of Foreign Affairs of the Republic of Chile,
Mr. Hernán Salinas, Professor of International Law, Catholic University of Chile, Chairman of the Inter-American Juridical Committee,
Mr. Andrés Jana, Professor of Civil Law, University of Chile,
Mr. Claudio Troncoso Repetto, Professor of Public International Law, University of Chile,
Mr. Daniel Müller, *avocat au barreau de Paris*, Freshfields Bruckhaus Deringer LLP, *chercheur associé*, Centre de droit international de Nanterre (CEDIN),
Ms Callista Harris, Solicitor admitted in New South Wales, Freshfields Bruckhaus Deringer LLP,
Ms Catherine Drummond, Solicitor admitted in Queensland, Freshfields Bruckhaus Deringer LLP,
Mr. Yuri Mantilla, member of the Bars of the District of Columbia and Florida, Freshfields Bruckhaus Deringer LLP,

as Advisers;

Ms María Alicia Ríos, Ministry of Foreign Affairs of the Republic of Chile,
Mr. Juan Enrique Loyer, Second Secretary, Embassy of the Republic of Chile in the Kingdom of the Netherlands,
Mr. Coalter G. Lathrop, Special Adviser, Sovereign Geographic, member of the North Carolina Bar,
Mr. José Hernández, Second Secretary, Ministry of Foreign Affairs of the Republic of Chile,
Mr. Giovanni Cisternas, Third Secretary, Ministry of Foreign Affairs of the Republic of Chile,
Mr. Robert Carter Parét, member of the Bar of the State of New York,

as Assistant Advisers,

The COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*

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

"For the above reasons Bolivia respectfully requests the Court to adjudge and declare that:

*(a)* Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean;

*(b)* Chile has breached the said obligation;

(*c*) Chile must perform the said obligation in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean."

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

*On behalf of the Government of Bolivia,*

in the Memorial and in the Reply:

"For the reasons given [in Bolivia's Memorial and Reply], Bolivia requests the Court to adjudge and declare that:

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

*On behalf of the Government of Chile,*

in the Counter-Memorial and in the Rejoinder:

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

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

*On behalf of the Government of Bolivia,*

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

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

*On behalf of the Government of Chile,*

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

* * *

## I. Historical and Factual Background

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

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

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

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

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

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

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

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

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

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

### *2. The 1904 Peace Treaty*

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

### *3. Exchanges and Statements in the 1920s*

#### *A. The 1920 "Acta Protocolizada"*

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

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

> "[it] cannot live isolated from the sea. Now and always, to the extent of its abilities, it will do as much as possible to possess at least one port on the Pacific, and will never resign itself to inaction each time the Tacna and Arica question is raised, jeopardizing the very foundation of its existence."

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

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

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

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

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

30. The representative of Bolivia then responded as follows:

"III. Bolivia's aspiration for its own port on the Pacific Ocean has not been reduced at any time in history and has currently reached a greater intensity. The railway from Arica to El Alto de La Paz that has facilitated Bolivian trade, contributes to promoting the legitimate aspiration of securing a port that can be incorporated under Bolivian sovereignty. That aspiration will not, however, lead Bolivia to commit any act contrary to the law.

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

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

*B. Follow-up exchanges (1920-1925)*

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

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

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

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

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

The Chilean delegate also stated that:

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

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

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

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

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

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

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

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

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

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

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

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

. . . . . .

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

. . . . . .

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

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

*C. The 1926 Kellogg Proposal and the 1926 Matte Memorandum*

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

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

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

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

*(a)* The Republics of Chile and Peru, either by joint or by several instruments freely and voluntarily executed, to cede to the Republic of Bolivia, in perpetuity, all right, title and interest which either may have in the Provinces of Tacna and Arica; the cession to be made subject to appropriate guaranties for the protection and preservation, without discrimination, of the personal and property rights of all of the inhabitants of the provinces of whatever nationality."

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

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

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

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

. . . . . .

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

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

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

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

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

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

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

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

*5. The 1950 Exchange of Notes*

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

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

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

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

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

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

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

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

### *6. The 1961 Trucco Memorandum*

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

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

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

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

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

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

> "its full consent to initiate, as soon as possible, direct negotiations aimed at satisfying the fundamental national need of its own sovereign access to the Pacific Ocean, in return for compensation that, without being territorial in character, takes into account the reciprocal benefits and effective interests of both countries".

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

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

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

### *7. The Charaña Process*

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

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

> "Upon reaffirming the historic commitment to strengthen, once more, the unity and solidarity between our peoples, we offer the greatest understanding to the landlocked condition affecting Bolivia, a situation that demands the most attentive consideration leading towards constructive understanding."

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

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

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

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

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

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

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

. . . . . .

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

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

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

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

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

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

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

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

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

. . . . . .

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

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

. . . . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "regret . . . that the latest talks held between Chile and Bolivia were broken off, and to again urge the [S]tates directly involved in this problem to resume negotiations in an effort to find a means of making it possible to give Bolivia an outlet to the Pacific Ocean".

### *9. The "Fresh Approach" of 1986-1987*

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

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

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

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

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

79. From 2000 to 2003, the Parties engaged in discussions regarding a Chilean concession to Bolivia for the creation of a special economic zone for an initial time period of 50 years, but the project was finally rejected by Bolivia. On 1 September 2000, the Presidents of Bolivia and Chile, General Banzer and Mr. Lagos, issued a joint communiqué in which they "reiterated . . . the willingness of their Governments to engage in a dialogue on all issues concerning their bilateral relations".

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

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

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

> "The High Level Bi-National Commission examined the progress of the Agenda of the 13 Points, especially the maritime issue . . . The Ministers of Foreign Affairs have also set out future projects which, taking into account the sensitivity of both Governments, will aim at reaching results as soon as possible, on the basis of concrete, feasible, and useful proposals for the whole of the agenda."

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

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

## II. Preliminary Considerations

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

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

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

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

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

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

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

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

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

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

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

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

*1. Bilateral Agreements*

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

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

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

* *

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

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

*A. The diplomatic exchanges of the 1920s*

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

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

100. Moreover, Bolivia contends that the follow-up exchanges to the "Acta Protocolizada" confirm that Chile was under an obligation to negotiate with Bolivia. For instance, Bolivia recalls the letter of 19 September 1922 from the Chilean delegate to the Assembly of the League of Nations according to which Chile "expressed the greatest willingness to enter into direct negotiations, which it would conduct in a spirit of frank conciliation, and in the ardent desire that the mutual interests of the two parties might be satisfied" (see paragraph 35 above). According to Bolivia, further reassurances were given in the following year through various Notes from the Chilean Government.

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

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

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

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

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

* *

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

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

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

*B. The 1950 exchange of Notes*

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

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

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

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

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

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

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

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

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

* *

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

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

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

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

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

### *C. The 1975 Charaña Declaration*

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

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

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

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

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

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

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

* *

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

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

### *D. The communiqués of 1986*

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

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

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

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

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

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

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

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

*E. The Algarve Declaration (2000)*

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

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

* *

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

*F. The 13-Point Agenda (2006)*

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

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

* *

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

* * *

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

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

*2. Chile's Declarations and other Unilateral Acts*

140. Bolivia submits that Chile's obligation to negotiate Bolivia's sovereign access to the Pacific Ocean is also based on a number of Chile's declarations and other unilateral acts. In Bolivia's view, "[i]t is well established in international law that written and oral declarations made by representatives of States which evidence a clear intention to accept obligations vis-à-vis another State may generate legal effects, without requiring reciprocal undertakings from that other State". Bolivia maintains that at multiple occasions in its jurisprudence the Court has taken into account unilateral acts and has recognized their autonomous character. According to Bolivia, "no subsequent acceptance or response from the other State is required" in order for such acts to establish legal obligations.

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

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

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

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

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

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

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

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

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

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

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

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

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

* *

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

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

> creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 472, para. 46.)

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

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

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

### *3. Acquiescence*

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

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

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

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

* *

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

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

### *4. Estoppel*

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

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

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

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

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

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

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

* *

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

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

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

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

### *5. Legitimate Expectations*

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

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

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

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

* *

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

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

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

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

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

* *

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

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

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

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

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

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

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

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

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

* *

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

> "to begin a process of rapprochement and strengthening of friendship of the Bolivian and Chilean peoples, directed toward normalizing their relations and overcoming the difficulties that separate them — including, especially, a formula for giving Bolivia a sovereign outlet to the Pacific Ocean, on bases that take into account mutual conveniences, rights and interests of all parties involved".

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

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

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

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

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

* *

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

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

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

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

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

* * *

177. For these reasons,

THE COURT,

(1) By twelve votes to three,

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

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

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

(2) By twelve votes to three,

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

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

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

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

*(Signed)* Abdulqawi Ahmed YUSUF,
President.

*(Signed)* Philippe COUVREUR,
Registrar.

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

*(Initialled)* A.A.Y.

*(Initialled)* Ph.C.

# DECLARATION OF PRESIDENT YUSUF

1. As noted in various parts of the Judgment, an obligation to negotiate, like any other obligation in international law, can only arise from a binding commitment assumed by a party in the context of a bilateral agreement or as a unilateral undertaking.

2. The expression of a willingness to negotiate or the acceptance of an invitation to negotiate with another State signals a readiness to come to the table and to talk to each other in an attempt to understand each other's point of view, to explore the possibilities of a meeting of minds on specific issues, or to formulate a common position either in writing or through actual conduct on an issue of mutual interest. It does not become an obligation unless the parties express a clear intention to make it so in a manner consistent with the various means of assuming obligations in international law.

3. In the context of diplomatic exchanges, which are the lifeblood of international relations, States invite each other to the table of negotiations and accept to do so without subscribing to a legal obligation to engage in such negotiations or to pursue them until either an impasse is reached or certain results are achieved.

4. In the present case, periodic exchanges and statements of the Parties from the early twentieth century until 2011 show varied expressions of readiness to negotiate to find a solution to the landlocked situation of Bolivia. They reflect the attempts made in good faith by both Parties to overcome the effects of the Pacific War of 1879-1884 in the region.

5. The Court has left no stone unturned to ascertain whether, on the basis of the evidence made available to it, Chile had undertaken a legal obligation to negotiate Bolivia's "sovereign access" to the Pacific Ocean. As indicated in the Judgment, it has not been able to find such a legal obligation.

6. The primary function of the Court is to settle disputes through law. That is made clear by Article 38, paragraph 1, of the Statute which provides that the Court's "function is to decide in accordance with international law such disputes as are submitted to it . . ." The law cannot, however, claim to apprehend all aspects of disputes or the reality of all types of relations between States.

7. There are certain differences or divergence of opinions between States which inherently elude judicial settlement through the application of the law. Even when these divergences have a legal dimension, tackling

those legal aspects by judicial means may not necessarily lead to their settlement. This may be due to the fact that the role of the law is often limited by virtue of its instrumental dimension.

8. It is possible, as is the case here, that the Court may reject the relief requested by an applicant because it is not sufficiently founded on law. This may satisfy the judicial function of the Court, but it may not put to an end the issues which divide the Parties or remove all the uncertainties affecting their relations. It is not inappropriate, in such circumstances, for the Court to draw the attention of the Parties to the possibility of exploring or continuing to explore other avenues for the settlement of their dispute in the interest of peace and harmony amongst them (see Judgment, para. 176). As the PCIJ held in *Free Zones*,

> "the judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; [ ] consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement" (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13; see also *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 20, para. 35).

9. Envisaging such post-Judgment possibilities does not mean that the Court, as an institution of international justice, has renounced its role. It means that it has done what it could as a court of law, but that it is cognizant of the fact that relations between States cannot be limited to their bare legal aspects and that certain disputes may usefully benefit from other means of resolution that may be available to the parties (see, for example, *Haya de la Torre (Colombia* v. *Peru), Judgment, I.C.J. Reports 1951*, p. 83). This is recognized explicitly by Article 38 (2) of the Statute of the Court, which allows the Court to render a decision *ex aequo et bono* should the parties so desire.

10. As Hersch Lauterpacht noted:

> "the legal decision creates a convenient and welcome starting-point for an attitude of accommodation. It clears the air. Before the law can be changed it is essential to know what the existing law is; if a future relation is to be established on the basis of equity, then the existing legal position, which only in exceptional cases is entirely devoid of an element of equity and justice, must furnish one of the bases of the future settlement . . . It is incompatible with the dignity of the law that it should be disobeyed, but it is not incompatible with its dignity that it should be changed, once it has been ascertained, by the agreement of the parties." (H. Lauterpacht, *The Function of Law in the International Community*, Oxford, 1933, pp. 330-331.)

11. The Court has played — and continues to play — an important role in the universe of inter-State dispute settlement. Even when judicial proceedings do not definitely settle the differences between States, they allow the parties to meet in one venue, to set out their respective views on the subject-matter of the dispute, to put on record the background to their contentious relations, and to re-engage in a dialogue that may have been frozen for years. In that respect, the Court's work facilitates the peaceful settlement of disputes above and beyond the realm of the strictly legal.

*(Signed)* Abdulqawi A. YUSUF.

# DISSENTING OPINION OF JUDGE ROBINSON

*Treaty — Article 2 (1)* (a)*, VCLT — "Governed by international law" — Intention to be bound under international law — How an expression of willingness takes on the character of a legal obligation — The 1960 Trucco Memorandum and Bolivian response constitute a treaty within the meaning of the VCLT — 1975 and 1977 Charaña Declarations constitute a treaty within the meaning of Article 2 (1)* (a) *of the VCLT — Chile has a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.*

1. In this opinion I explain why I was unable to agree with *(a)* the finding of the Court in paragraph 177 (1) of the Judgment that the Republic of Chile did not undertake a legal obligation to negotiate a sovereign access to the Pacific Ocean for the Plurinational State of Bolivia and *(b)* the finding in paragraph 177 (2) which consequently rejects the other final submissions by Bolivia.

## Background

2. By way of background, and as the Judgment itself has pointed out, following the War of the Pacific in 1879, in which Chile occupied Bolivia's coastal territory, there was drafted in 1895 a Treaty on the Transfer of Territories whereby Bolivia would have been granted territory affording it access to the Pacific. However that Treaty never entered into force. In 1904 there was adopted a Treaty of Peace and Friendship ("1904 Treaty") between the two countries confirming Chile's sovereignty over the coastal territory it had captured in the 1879 War and granting Bolivia a right of commercial transit in Chilean territories and Pacific ports.

3. Significantly, notwithstanding the many statements by Chile that it had always viewed the 1904 Treaty as an instrument that was sacrosanct and not open to any renegotiation or modification, a Chilean memorandum of 9 September 1919 from the Minister Plenipotentiary of Chile in Bolivia stated that Chile "was willing to initiate negotiations, independently of what was established by the 1904 Peace Treaty, in order for Bolivia to acquire an outlet to the sea subject to the result of the plebiscite envisaged by the 1883 Treaty of Ancón" (see Judgment, para. 27). A similar proposal was made by Chile in the 1920 Minutes in what was called the "Acta Protocolizada".

## Legal Bases for Bolivia's Claims

4. Bolivia argued that Chile has an obligation to negotiate Bolivia's sovereign access to the Pacific by virtue of

(i) agreements between the two countries;
(ii) unilateral declarations of Chile;
(iii) acquiescence;
(iv) estoppel;
(v) legitimate expectations;
(vi) resolutions of the General Assembly of the Organization of American States ("OAS");
(vii) the legal significance of acts and conduct taken cumulatively; and

(viii) general international law reflected in Article 2 (3) of the United Nations Charter and Article 3 of the Charter of the OAS.

I have found that Chile has an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean by virtue of agreements between the two countries.

5. In relation to agreements between the two countries, Bolivia argues that Chile's obligation to negotiate its sovereign access to the Pacific Ocean arose from a variety of diplomatic exchanges between the countries as follows:

(i) the 1920 Act/Minutes of a meeting at the Bolivian Ministry of Foreign Affairs between the Chilean Envoy Extraordinary and Minister Plenipotentiary and the Bolivian Minister for Foreign Affairs;

(ii) certain exchanges following that meeting in 1920;
(iii) the 1926 Proposal from the United States Secretary of State Frank Kellogg and the memorandum from the Chilean Minister for Foreign Affairs, Mr. Jorge Matte to Mr. Kellogg;
(iv) the 1929 Treaty of Lima and its Supplementary Protocol between Chile and Peru;
(v) the 1950 exchange of Notes;
(vi) the 1961 Memorandum from Manuel Trucco Ambassador of Chile to Bolivia to the Ministry of Foreign Affairs of Bolivia and the Bolivian response of 9 February 1962 ("Bolivia's response");

(vii) the 1975 and 1977 Charaña Declarations and the process that ensued;
(viii) the fresh approach of 1986-1987;
(ix) the Algarve Declaration in 2000; and
(x) the 13-Point Agenda of 2006.

6. From this plethora of communications and exchanges over a period of almost nine decades, this opinion has identified the Trucco Memoran-

dum along with Bolivia's response and the Charaña Declarations as giving rise to a legal obligation on the part of Chile to negotiate sovereign access to the Pacific for Bolivia; in other words, these two sets of instruments establish treaties within the meaning of the Vienna Convention on the Law of Treaties ("VCLT") obliging Chile to negotiate Bolivia's sovereign access to the Pacific.

## The Meaning of Sovereign Access

7. In the Judgment on preliminary objections the Court held that the dispute between the Parties is "whether Chile has an obligation to negotiate Bolivia's sovereign access to the sea and [whether,] if such an obligation exists, Chile has breached it"[1]. The Court also clarified that it was not asked to determine whether Bolivia has a right of sovereign access. Thus the issue before the Court is the question of the existence and breach of the obligation to negotiate Bolivia's sovereign access to the Pacific. Bolivia argues that sovereign access is access without any conditionalities whatsoever, for example, it must have exclusive administration and control, both legal and physical; in particular it makes the point that the right of commercial transit under the 1904 Treaty is not equivalent to sovereign access. For Chile, sovereign access necessarily implies cession of Chilean territory to Bolivia.

8. Bolivia has asked the Court to declare that "Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean".

9. Sovereign access is the cession by Chile to Bolivia of a part of its territory over which Bolivia will have sovereignty and which gives Bolivia access to the Pacific. In the circumstances of this case the Court has to determine on the basis of the material before it whether Chile has an "obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific".

## The Enquiry as to whether There Is a Treaty

10. Bolivia's claim is that Chile has an obligation to negotiate its sovereign access to the Pacific on the basis of agreements between the two countries. Essentially, therefore, this claim calls for a determination

[1] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 604, para. 32.

as to whether the diplomatic exchanges relied upon by Bolivia constitute a treaty. Article 2 (1) *(a)* of the VCLT, which reflects customary international law[2], provides: "'[t]reaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

11. It is immediately noticeable that although it is generally accepted that the most important ingredient of a treaty is the intention to create legal rights and obligations, there is no express reference in this definition to that element. However, the *travaux* make it clear that the expression "governed by international law" in the definition "covered the element of the intention to create obligations and rights in international law"[3]. Two other points are relevant to this case. First, the international agreement constituting a treaty may either be in a single instrument or in two or more related instruments. Secondly, the description or nomenclature of the international instrument is irrelevant to the determination that it is a treaty. In the circumstances of this case, therefore, what the Court is required to determine is whether any of the diplomatic exchanges relied upon by Bolivia reflects on the part of the Parties an intention to create "obligations and rights in international law", that is, the intention to be legally bound under international law.

12. The Court has on several occasions had to determine whether instruments, which on their face do not appear to be treaties, are treaties within the definition set out in Article 2 (1) *(a)* for the reason that they reflect an intention to be legally bound under international law.

13. In *Aegean Sea Continental Shelf*, the Court said that the determination whether a joint communiqué constituted an international agreement "depends on the nature of the act or transaction to which the Communiqué gives expression" and that required the Court to have regard to "its actual terms and to the particular circumstances in which it was drawn up"[4]. Therefore, in order to determine whether an instrument is a treaty what is called for is an examination of the terms of the relevant

[2] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 429, para. 263, referring to Art. 2, para. 1, of the VCLT.

[3] United Nations Conference on the Law of Treaties, Summary Records of Second Session, A/CONF.39/11/Add.1, p. 346, para. 22.

[4] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 39, para. 96.

instrument and the "particular circumstances" or context in which it was concluded.

14. In the instant case, the critically important question is whether one can discern in the exchanges between the Parties an intention to be legally bound under international law. What we are looking for is language, which in the words of the Court in *Qatar* v. *Bahrain*, evidences "commitments to which the Parties have consented"[5], thereby creating rights and obligations in international law for the Parties. A part of the problem in this case is that in some instances the language on which Bolivia relies as showing an obligation to negotiate is the traditional language of diplomatic discourse, couched in all the niceties, politeness and protestations of mutual respect that are part and parcel of exchanges at that level. However, it would clearly be wrong to conclude that language of a particular kind can never give rise to an obligation under international law. We already know that there is no requirement in international law for an international agreement to follow a particular form *(Aegean Sea Continental Shelf (Greece* v. *Turkey))*. It is equally true that there is no rule of international law that requires a treaty to be formulated in a specific kind of language. It is substance, not form that is determinative of whether the parties intended to be legally bound. To cite the Court's dictum in *Aegean Sea Continental Shelf* more fully, "[i]t does not settle the question simply to refer to the form — a communiqué — in which that act or transaction is embodied . . . the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up"[6]. In *Temple of Preah Vihear (Cambodia* v. *Thailand)*, the Court again used language emphasizing the prevalence of substance over form:

> "Where, on the other hand, as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it."[7]

15. In this regard, what is crucial is the intention of the parties to be bound under international law, objectively ascertained from the text, and the context or what the Court described in *Aegean Sea Continental Shelf* as "the particular circumstances in which [the particular instrument] was

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[5] See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 121, para. 25.

[6] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 39, para. 96.

[7] *Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections, Judgment, I.C.J. Reports 1961*, p. 31.

drawn up". Nothing illustrates the significance of "particular circumstances" or context better than one of the examples given by Chile, in oral arguments, relating to the use of the word "willing". Chile referred to the following statement of the Press Secretary of the United States of America's White House in 2013: "it had 'long been the position of President Obama' that he'd be willing to enter bilateral negotiations [with Iran] . . . The extended hand has been there from the moment the [P]resident was sworn into office."[8]

16. Chile cited this statement to substantiate its view that the word "willing" in diplomatic discourse does not signify any intent to undertake a legal obligation; and, as well they should, because in the context or, to borrow the phrase from *Aegean Sea Continental Shelf*, in "the particular circumstances" in which the words were used, they do not carry the connotation of a legal obligation. It is the context or "the particular circumstances" that distinguishes that example from the instant case. President Obama's "extended hand" had only been on display for five years. This case covers a period of at least 114 years, admittedly, punctuated by periods in which the pleadings do not disclose that the question of Bolivia's access to the Pacific was discussed, but marked by a persistent and enduring theme characterizing the relationship between the Parties: the desire of Bolivia to be granted sovereign access to the Pacific Ocean. Therefore, while the statement of the White House concerning President Obama's willingness to enter into bilateral negotiations may be viewed as episodic, the expression of willingness on the part of Chile to negotiate sovereign access is part of a continuum in which it was an enduring feature. In fact, it was like a recurring decimal throughout that long period. Another major contextual difference between the White House statement and the instant case is that whereas the statement does not identify any object of the bilateral negotiations, Chile's statements of willingness are always linked to the specific purpose, more often express than implied, of granting Bolivia sovereign access to the Pacific Ocean. The views expressed here are, of course, not to be construed as a comment on the question whether the United States of America has or does not have a legal obligation to negotiate with Iran; they are simply an indication that the example given by Chile is wholly inapt. The conclusion is that the word "willing" in diplomatic discourse should not be automatically taken to signify a non-binding political aspiration — everything depends on the context or "the particular circumstances" in which the relevant instrument was drawn up.

17. Another example of how context or "the particular circumstances" is determinative is the use of the word "agree" which would ordinarily be

[8] CR 2018/8, p. 48, para. 38 (Thouvenin).

understood to signify a binding commitment. In the *South China Sea Arbitration*, the Tribunal held that the word "agree" in a joint press statement was used in a political and aspirational context and did not signify a binding legal commitment. Specifically, the Tribunal stated: "Even where the statements and reports use the word 'agree', that usage occurs in the context of other terms suggestive of the documents being political and aspirational in nature."[9]

18. While I note Chile's argument that a finding that a statement of willingness to engage in negotiations giving rise to a legal obligation to negotiate would have a chilling effect on the "diplomatic space needed by States" in their international relations, I do not take it to heart. After all, the Court is not in virgin territory. In the past the Court has determined that the minutes of a meeting, double exchanges of letters, and a memorandum of understanding create binding legal obligations, without that determination having any adverse effect on the conduct of international relations through diplomatic exchanges.

19. It is noteworthy that the circumstances of this case are unique. The Court is being asked to determine whether language used in various acts and diplomatic Notes, declarations and statements over a period of at least 114 years (after the adoption of the 1904 Treaty) established a legal obligation to negotiate. One says "at least 114 years" because, although the 1895 Treaty never came into force, the negotiations that preceded it certainly show that the question of Bolivia's access to the Pacific Ocean was a live issue at that time.

## The Agreements Signifying Chile's Obligation to Negotiate Bolivia's Sovereign Access to the Pacific Ocean

20. An examination of the material before the Court shows that there are two agreements between Chile and Bolivia establishing Chile's obligation to negotiate Bolivia sovereign access to the Pacific; in other words, the material discloses two agreements evidencing Chile's intention to be legally bound to negotiate Bolivia's sovereign access to the Pacific, thereby constituting a treaty within the meaning of Article 2 (1) *(a)* of the VCLT. These agreements are, first, the 1961 Trucco Memorandum and Bolivia's response and second, the Charaña Declarations of 1975 and 1977.

[9] *South China Sea Arbitration (The Republic of Philippines* v. *The People's Republic of China), Award on Jurisdiction and Admissibility*, PCA Case No. 2013-19, p. 94, para. 242.

## Background to the Trucco Memorandum and Bolivia's Response

21. In order to fully comprehend how the Trucco Memorandum and Bolivia's response constitute a treaty between Chile and Bolivia, it is necessary to examine the 1950 Diplomatic Notes between the two countries and the background to those Notes.

### *Background to the 1950 Diplomatic Notes*

22. The material presented to the Court shows that in the period from 1910 to 1950 there were several diplomatic exchanges between Chile and Bolivia relating to the question of Bolivia's access to the Pacific: Bolivia's memorandum of 22 April 1910 to Chile and Peru; the 1920 Minutes of a Meeting between the Chilean Envoy Extraordinary and the Bolivian Minister for Foreign Affairs; certain exchanges following the 1920 Minutes; the 1926 Kellogg Proposal and the Matte Memorandum; the 1929 Treaty of Lima and its Supplementary Protocol between Chile and Peru. Except for the first-mentioned, all of the others are specifically addressed in the Judgment.

23. On 1 June 1948, the Chilean President made a statement which in oral arguments Chile described as setting the framework for the 1950 Notes. In that statement the Chilean President referred to the forthcoming negotiations — which eventually took place in 1950 — as "informal talks" and stated that the idea of granting a strip of territory to Bolivia had only been the subject of an informal conversation. The Bolivian Ambassador in Chile reported the content of these informal talks to the Minister for Foreign Affairs of Bolivia by a Note dated 28 June 1948. He expressed confidence in the intention of the Chilean President to resume negotiations after the conclusion of the Chilean elections, which took place in March 1949.

24. On 25 May 1950, the Bolivian Ambassador to Chile sent the following Note to Bolivia's Minister for Foreign Affairs which stated:

> "The submission of this note — a copy of which I am enclosing — was agreed to with the Under-Secretary of Foreign Affairs, Mr. Manuel Trucco, and has the aim of taking the port negotiation *out of the field of mere personal talks* which could be prolonged indefinitely, as has already happened since August 1946 — to formalize and document it."[10] (Emphasis apparently added by Bolivia.)

25. This statement indicates just how weary the Bolivian Ambassador had become by reason of the prolongation of talks between the two coun-

[10] CR 2018/8, p. 75, para. 30 (Wordsworth).

tries concerning Bolivia's access to the Pacific. He mentioned that the negotiations had been going on from 1946 but, in truth, the material before the Court shows that the negotiations had started long before that time. The Note signifies the Bolivian Ambassador's resolve to move the talks from an informal and personal to a formal level. Bearing in mind that the Note indicated that the Chilean Under-Secretary for Foreign Affairs was in agreement with it, it is reasonable to conclude that he also shared the resolve to move the talks to a formal level. Clearly, the Bolivian Ambassador was determined to have this problem which had been outstanding for well over 40 years taken up and resolved at a level different from the non-binding political discourse of diplomacy. Thus although the Note is an internal Bolivian document it plays an important role in understanding the development of Chile's expression of willingness to negotiate Bolivia's sovereign access to the Pacific into a legal obligation.

*The 1950 Notes*

26. By a diplomatic Note dated 1 June 1950[11], from the Bolivian Ambassador to the Chilean Minister for Foreign Affairs, Bolivia proposed that the Parties

> "formally enter into a direct negotiation to satisfy the fundamental need of Bolivia to obtain its own sovereign access to the Pacific Ocean, thus solving the problem of the landlocked situation of Bolivia on bases [terms] that take into account the mutual benefit and true [genuine] interests of both peoples"[12].

27. Chile responded by way of a Note dated 20 June 1950 from the Minister for Foreign Affairs of Chile to the Bolivian Ambassador. The Parties provide different translations of the Chilean response. The Bolivian translation of the original Spanish text is that, Chile:

> "is willing to formally enter into a direct negotiation aimed at searching for a formula that could make it possible to give to Bolivia its own and sovereign access to the Pacific Ocean and for Chile to obtain compensation of a non-territorial character that effectively takes into account its interests"[13].

[11] See Reply of Bolivia, p. 92, para. 234: "Although dated 1 June 1950, the Bolivian Note was formally sent to the Chilean Minister on 20 June 1950, that is the exact date of the Chilean Note, which was formally delivered to the Bolivian Ambassador."

[12] Counter-Memorial of Chile, Vol. 2, Ann 143, p. 533; the terms in square brackets are taken from the Bolivian translation (see Memorial of Bolivia, Annex 109A).

[13] Reply of Bolivia, Vol. 2, Ann. 266, p. 281.

28. The Chilean translation of the original Spanish text is that, Chile:

> "is open formally to enter into a direct negotiation aimed at searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests"[14].

29. In my view, there is no meaningful difference between "is open formally to enter into a direct negotiation" and "is willing to formally enter into a direct negotiation". The *Concise Oxford English Dictionary* gives the meaning of "open to" as "willing to receive". It can therefore be seen that both translations indicate Chile's willingness to formally enter into direct negotiation. The important issue, therefore, is whether Chile's expression of willingness to negotiate Bolivia's sovereign access to the Pacific assumes the character of a binding legal obligation.

30. The Note also said that the Chilean Government "will be consistent with that position".

31. Although dated 1 June 1950, the Bolivian Note was formally sent to the Chilean Minister on 20 June 1950, the same date as the Chilean Note.

32. The communication of these Notes injected a new energy and dynamism into the negotiations. The context or "the particular circumstances" signalling this new vigour, and ultimately showing how the expression of willingness to formally enter into negotiations for Bolivia's sovereign access to the Pacific takes on the character of a binding legal connotation, are set out below:

*(a)* An important factor in examining the significance of these Notes is that 46 years had elapsed since the 1904 Treaty and 71 years since the War of the Pacific; several discussions — including the 1920 Act, the exchanges following that Act, the Kellogg Proposal and the Matte Memorandum — had taken place during that time at the level of non-binding diplomatic political discourse, yielding no solution to the problem of Bolivia's sovereign access to the Pacific. It is against that background that the Bolivian Ambassador and the Chilean Minister for Foreign Affairs, frustrated by the failure to resolve the problem at the political level, and no doubt, realizing that only an agreement establishing a legally binding obligation could yield the result sought by Bolivia and which Chile was willing to support, decided to ratchet up or elevate the talks to a formal level. This was a significant change on Chile's part, bearing in mind that two years before in 1948, it had described the then forthcoming negotiations as informal talks.

[14] Counter-Memorial of Chile, Vol. 2, Ann. 144, p. 539.

Undeniably, formal negotiations need not be binding, but as will be shown, in this particular context the aim was to enter into a legally binding agreement, an aim that, but for Bolivia's non-response to Chile's counter-offer, would have been realized.

*(b)* It is by no means inconsequential that this important shift in the relationship between the Parties is marked by another significant event: for the first time the Parties begin to describe Bolivia's interest as one of "sovereign access", categorically implying cession of territory. This change is not simply semantic. Hitherto the Parties had spoken of "its or Bolivia's own outlet to the sea"; "access to the sea of its own", terms which, although open to the interpretation of substantially the same meaning as sovereign access to the Pacific, are not as explicit as "sovereign access to the Pacific" in describing the kind of access sought by Bolivia. The acceptance by Chile of the meaningful and loaded phrase, "sovereign access to the Pacific", introduced by Bolivia in its Note, signifies a change in Chile's mindset with regard to the question of Bolivia's access to the Pacific, indicating that it was prepared to consider cession of territory to Bolivia. Undoubtedly, this communication of Notes instilled new energy and dynamism into the long, floundering talks between the two countries concerning Bolivia's sovereign access to the Pacific.

*(c)* The use of the term "direct negotiations" indicates that the Parties did not intend to have third-party intervention in the negotiations. The background to this issue is that Chile was always disinclined to have the matter of Bolivia's sovereign access to the Pacific dealt with by international bodies or the regional OAS. In 1920, Bolivia took the question of its sovereign access to the Pacific to the League of Nations, which found that it had no competence to address it. Here, in indicating that it would enter into direct negotiations, Bolivia shows that it is sensitive to Chile's concerns and is willing to compromise, no doubt because it is serious about concluding a binding legal agreement.

*(d)* The very deliberate use of the word "formally" in the Bolivian Ambassador's Note.

*(e)* The equally deliberate use of the word "formally" in the response of the Chilean Minister for Foreign Affairs, describing the manner in which the negotiations would be initiated.

*(f)* The speed with which Chile replied to Bolivia's Note. Although the Bolivian Note is dated 1 June 1950, it was formally sent to the Chilean Minister on 20 June 1950. Chile's response on the very same day is wholly consistent with the new energy and dynamism that characterized the discussions in 1950 between the Parties relating to Bolivia's sovereign access to the Pacific. The speedy response shows

that the matter had been under discussion between the Parties for some time.

*(g)* The specificity of language indicating the object of the negotiation, that is, Bolivia's sovereign access to the Pacific.

Subject to the analysis below in paragraphs 34-37, it is entirely reasonable to conclude from these "particular circumstances" or contextual features in which the Notes were drawn up and communicated that Bolivia and Chile intended to be bound by the diplomatic Notes.

33. The phrase "aimed at searching for a formula that could make it possible" is not, as argued by Chile, inconsistent with an obligation to negotiate sovereign access. It is language that shows that in Chile's view, the road ahead would not be easy, the negotiations would be difficult. Indeed, searching for a formula is precisely the object of many negotiations. It also shows that in Chile's view, the negotiations were designed to achieve the specific result of finding a formula that would make it possible for Bolivia to gain its own sovereign access to the Pacific.

34. In order to determine whether the 1950 Notes constitute an agreement establishing an obligation to negotiate sovereign access to the Pacific between the Parties, one has to look at the Notes in their entirety, including the part of Chile's response indicating that it also wanted negotiations on the question of compensation of a non-territorial character for the territory it would cede to accommodate Bolivia's aspirations. This was a significant element of Chile's response. Simply put, there could never be a legally binding agreement between the two countries in the absence of agreement on that element. In light of the fact that there was no response from Bolivia accepting this counter-proposal, there was no consensus or mutuality of commitment, a necessary foundation for a binding treaty obligation.

35. There appears to be a difference of opinion between the Parties concerning the background to the inclusion in the Chilean Note of the element of compensation of a non-territorial character. Bolivia argues that it was Bolivia itself that proposed the addition of the phrase "of a non-territorial character" describing the kind of compensation to be given to Chile and that this was accepted by the Chilean Foreign Minister[15]. Consequently, in Bolivia's view, it had agreed to the addition of the element of compensation and therefore the Notes communicated between the Parties constituted an agreement establishing an obligation to negotiate sovereign access to the Pacific. However there is merit in the Chilean response made in oral argument that ultimately what the Court has to consider as a matter of evidence before it are two Notes — first, a Boliv-

[15] CR 2018/7, p. 10, para. 26 (Remiro-Brotóns).

ian Note proposing negotiations on sovereign access to the Pacific and which has no reference to the question of compensation for Chile; and second, a Chilean Note referring to the question of sovereign access to the Pacific, but in contradistinction to the Bolivian Note, including compensation of a non-territorial character. There is no material before the Court indicating that Bolivia accepted the Chilean request for such compensation.

36. It is Bolivia's failure to accept the Chilean proposal for non-territorial compensation that explains why the 1950 Notes do not establish an obligation to negotiate sovereign access to the Pacific. Notably, the impediment to the conclusion that these Notes establish an obligation to negotiate sovereign access to the Pacific is not the use of the word "willing" in the Chilean response that it was "willing to formally enter into a direct negotiation". An examination of "the particular circumstances" or context in which the Notes were communicated makes it clear that Chile was expressing a willingness to negotiate that goes beyond a declaration of a mere political aspiration. As we have seen, part of this context was the very long period that had elapsed since the War of the Pacific and the 1904 Treaty of Peace and Amity, frustration with the ineffectiveness of political dialogue to resolve the problem and the resolve of Bolivia and Chile to elevate the talks from an informal to a formal level. Contextually therefore the phrase "Chile is willing" means "Chile undertakes". In international relations it is only the context in which the word "willing" is used in diplomatic discourse that can determine whether it is used in a political, aspirational or legally binding sense.

37. If the Chilean Note had said "Chile is willing to formally consider entering into a direct negotiation or Chile is open formally to consider entering into a direct negotiation", there would be a stronger, if not unarguable case for saying that Chile did not wish to go beyond a political and aspirational level.

*The Majority's Approach to the Question whether the 1950 Notes Constitute an Agreement between Chile and Bolivia*

38. The majority's approach to the question whether the 1950 Notes constitute an agreement between Chile and Bolivia is set out in paragraphs 116 and 117 of the Judgment as follows:

> "116. The Court observes that under Article 2, paragraph (1) *(a)*, of the Vienna Convention, a treaty may be 'embodied . . . in two or more related instruments'. According to customary international law as reflected in Article 13 of the Vienna Convention, the existence of the States' consent to be bound by a treaty constituted by instruments

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

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

39. Before addressing the majority's approach to this question, one cannot help but observe that the majority have failed to carry out any meaningful examination of the content of the Notes and the "particular circumstances" or context in which they were drawn up in order to determine whether the Notes constitute a treaty within the meaning of Article 2 (1) *(a)* of the VCLT. This failure is the more telling in light of the majority's finding in paragraph 91 of the Judgment that "for there to be an obligation to negotiate on the basis of an agreement, the terms used by the parties, the subject-matter and the conditions of the negotiations must demonstrate an intention of the parties to be legally bound". The majority are content to adopt instead the somewhat artificial and formalistic approach of dismissing the Notes on the basis that they do not meet the requirements of Article 13 of the VCLT for the expression of consent to be bound by a treaty, when the real question is whether the Notes taken together, meet the requirements for a treaty within the terms of Article 2 (1) *(a)* of the VCLT.

40. In characterizing the Bolivian Note of 1 June 1950 and the Chilean Note of 20 June 1950 as an "exchange of Notes", apparently the majority have relied on this description of the Notes, principally by Bolivia. While Chile sometimes uses the term "exchange of notes" for example, in its Counter-Memorial, it is observed that in its Counter-Memorial it sometimes speaks more simply of "diplomatic notes". It is on this very uncertain basis that the majority proceed to examine the two Notes as an

exchange of Notes under Article 13 of the VCLT. The Court, of course, is not bound by the Parties' description of the Notes, and in any event, the position taken in this opinion is that the Court was obliged to determine whether the two Notes when taken together constitute a treaty within the definition of Article 2 (1) *(a)* of the VCLT. In that regard the nomenclature "the 1950 diplomatic notes", used sometimes by Chile is more apposite.

41. The first comment on paragraphs 116 and 117, in which the Court sets out its reasoning for concluding that the 1950 Notes do not constitute a treaty, must be that the citation of Article 2 (1) *(a)* of the VCLT omits the most important element in the definition of a treaty, that is, the agreement must be "governed by international law" which, as has already been mentioned, refers to "the intention to create obligations and rights" under international law. But perhaps this omission should not come as a surprise since the majority have not carried out any meaningful examination of the text of the Notes or the "particular circumstances" or context in which they were made in order to isolate this intention.

42. The majority have obviously been misled by the nomenclature "exchange of Notes" used at times by the Parties and, in so doing, have failed to follow the consistent jurisprudence of the Court that, in matters of this kind, substance prevails over form. This point has already been made in reference to *Aegean Sea Continental Shelf* and *Temple of Preah Vihear*. In this case the Parties have used the form of two instruments, the Notes of 1 and 20 June 1950 to reflect their intention to be legally bound. This approach is wholly consistent with the definition of a treaty in Article 2 (1) *(a)* of the VCLT. What the majority have done is to artificially attempt to fit the two Notes in a box called "exchange of Notes" and then for various reasons find that they do not fit into that box. Had they tried to fit the Notes into a box called "treaty", they would have found that the fit was better.

43. The majority's approach confuses *genus* with *species*. The *genus* of treaties has several *species* including joint communiqués, memoranda of understanding, exchange of Notes and any other instrument between States evidencing an intention to be bound under international law. If the two Notes do not meet the requirements for the *species* called an exchange of instruments, the Court is duty bound to enquire whether they nonetheless fall within the definition of the *genus* of a treaty, because they evidence the intention to be bound under international law. The Court is not bound by any of the Parties' description of the two Notes as an exchange of instruments and should not act as a rubber stamp of any such description.

44. It is useful to look at how two diplomatic Notes could constitute a treaty within the meaning of Article 2 (1) *(a)* of the VCLT, even though lacking the linguistic identity which paragraphs 116 and 117 of the Judgment identify as a usual feature of an exchange of Notes. Paragraph 38 of the Judgment refers to a Note of 12 February 1923 from the Minister Plenipotentiary of Bolivia in Chile to the Chilean Minister for Foreign Affairs proposing the revision of the 1904 Treaty. Paragraph 39 of the Judgment refers to a Note of 22 February 1923 from the Minister for Foreign Affairs of Chile to the Minister Plenipotentiary of Bolivia in Chile in which Chile rejected that proposal. If Chile had accepted the proposal, albeit in different language from the Bolivian proposal, the two Notes taken together could have constituted an international agreement, if there was the requisite intent to be legally bound. The point is that linguistic identity in the two Notes is not determinative in the making of an agreement that falls within the terms of Article 2 (1) *(a)* of the VCLT. What is important is substantial identity between the Parties as to content, evidencing a mutuality of commitment, sufficient to establish the intention to be legally bound under international law.

45. There is no rule of international law that for two related Notes, such as those communicated between Bolivia and Chile, to constitute a treaty they must be in the form of an exchange of Notes. The majority come close to acknowledging in paragraphs 116 and 117 this simple fact in their finding that the Notes do not follow the form "*usually adopted* . . . [in] an exchange of related instruments" and also by accepting that "[o]ther forms of exchange of instruments may [be envisaged]". But if that is so, it cannot be decisive for the determination of the treaty status of the Notes that they lack the customary elements of an exchange of instruments. For it is well known that an international agreement may be concluded through a myriad of forms other than an exchange of instruments. The Court's judicial task therefore is not to determine whether the two Notes constitute an exchange of instruments, but rather, to ascertain through an examination of the content of the Notes, the "particular circumstances" or context in which they were drawn up, whether when taken together they constitute a treaty within the meaning of Article 2 (1) *(a)* of the VCLT.

46. The relevant area of enquiry is not whether the Notes have or do not have the features of a traditionally worded exchange of Notes. The act of exchange is not the key factor in determining whether the Notes constitute a treaty. It is, rather, whether Bolivia's proposing Note of 1 June 1950 and Chile's responding Note of 20 June constitute an agreement within the terms of the definition of a treaty in Article 2 (1) *(a)* of

the VCLT. It is wholly artificial to construct an approach on the basis that literal linguistic identity between the two Notes is required if they are to constitute a treaty.

47. Moreover, even if, *arguendo*, it is correct to adopt the approach taken by the majority of examining the Notes through the lens of an exchange of instruments, there is no basis for the conclusion that the Notes do not reflect the State's consent to be bound under Article 13 of the VCLT. Article 13 provides:

> "The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:
> *(a)* The instruments provide that their exchange shall have that effect; or
> *(b)* It is otherwise established that those States were agreed that the exchange of instruments shall have that effect."

It is not difficult to agree that the requirement of Article 13 *(a)* of the VCLT is not met since the two Notes do not provide that their exchange has the effect of expressing the Parties' consent to be bound by the Notes. But the requirement of Article 13 *(b)* would certainly be met because, on the basis of the hypothesis of an exchange of Notes, there is an abundance of evidence arising from the "particular circumstances" or context in which they were drawn up, from which it could be inferred that the Parties were agreed that the exchange of instruments would have the effect of expressing the Parties' consent to be bound by the Notes. Some of these inferential indicia are set out in paragraph 32 above and it would have been perfectly appropriate for the Court to draw that inference. Out of an abundance of caution it is again stressed that the reasoning in this paragraph proceeds on the basis that the approach taken by the majority to view the Notes as an exchange of instruments is correct. As is stated in the very first sentence of this paragraph the reasoning proceeds *arguendo*.

48. Proper analysis reveals that but for the failure of Bolivia to accept Chile's counter-proposal of compensation of a non-territorial character, the Notes of 1 and 20 June 1950 would, on the basis of the analysis in paragraphs 32-37 of this opinion, constitute a treaty within the terms of the definition in Article 2 (1) *(a)* of the VCLT, since Bolivia's acceptance of the counter-proposal would have created a mutuality of commitment sufficient to reflect Chile's intention to be legally bound under international law to negotiate Bolivia's sovereign access to the Pacific. Note that the definition of a treaty in Article 2 (1) *(a)* of the VCLT does not confine treaties to a single instrument; it includes agreements set out in "two or more related instruments". Bolivia's Note of 1 June 1950 and Chile's Note of 20 June 1950 qualify as two related

instruments which, had Bolivia accepted Chile's counter-proposal, would have constituted a treaty.

49. Paragraph 118 is one of several conclusory statements made in the Judgment without any supporting reasoning. It reads: "In any event Chile's Note . . . conveys Chile's willingness to enter into direct negotiations, but one cannot infer from it Chile's acceptance of an obligation to negotiate Bolivia's sovereign access to the sea." Here there is an assertion without any supporting reasoning as to why Chile's Note does not convey its acceptance of an obligation to negotiate. It will be recalled that the point has been made that the majority have not carried out any examination of the text of the Notes or the "particular circumstances" or context in which they were drawn up.

50. In sum, the majority are correct in their conclusion that the two Notes do not constitute a Treaty, but on the basis of reasoning that is flawed. The 1950 Diplomatic Notes do not constitute a treaty, not because they do not meet the requirements for a traditional exchange of Notes, but more simply because Bolivia's non-acceptance of Chile's counter-proposal leaves the Notes without an essential ingredient for treaty making, that is, *consensus ad idem* or a mutuality of commitment between the Parties as to the content of their obligation.

51. Finally, it is observed that the approach taken by the majority of rejecting the two Notes as an exchange of Notes on the basis of Article 13 of the VCLT was not a point argued by the Parties. The Court is, of course, free to arrive at its findings on legal bases not argued by the Parties, but one cannot help but think that the Court would have profited from the views of the Parties on such a consequential determination.

## 1961 Trucco Memorandum and Bolivia's Response

52. The pleadings do not disclose any discussion or negotiations on the question of Bolivia's sovereign access to the Pacific between the Parties in the period from 1950 to 1961.

53. The opinion now proceeds to an analysis of the Trucco Memorandum and Bolivia's response to show how their content and the "particular circumstances" or context in which those instruments were made inescapably shows that the Parties intended to create an obligation on the part of Chile to negotiate Bolivia's sovereign access to the Pacific. More specifically, the analysis will show how Chile's expression of a willingness to negotiate Bolivia's sovereign access to the Pacific takes on the character of a binding legal obligation.

54. On 10 July 1961 Manuel Trucco, Chile's Ambassador to Bolivia, addressed a memorandum from his Embassy to the Bolivian Minister for

Foreign Affairs. Ambassador Trucco is the very same Chilean official who was so prominently involved in the 1950 Diplomatic Notes. He therefore not only had ample knowledge of the history of the negotiations, but more importantly, would have been predisposed to ensure that this new diplomatic discourse was marked by the same empathy, dynamism and energy that had characterized the earlier initiative. In the very first paragraph Chile states emphatically that it "has always been open . . . to study, in direct dealings with Bolivia, the possibility of satisfying its aspirations and the interests of Chile" and that it would "always reject the resort, by Bolivia, to organizations which are not competent to solve a matter which is already settled by Treaty and could only be modified by direct negotiations between the parties".

55. There are three points to be made on this paragraph. First, the use of the phrase "has always" confirms Chile's intention to negotiate, not only at the time of the Trucco Memorandum in 1961 but, importantly, as will be seen, at the time of the 1950 exchange of Notes. Second, in stating that it would always reject resorting to forums outside of direct negotiations, Chile emphasized the importance it attached to direct negotiations exclusively between the Parties. Here again, as in 1950, the background to the reference to "direct negotiations" is Chile's sensitivity to the involvement of international or regional bodies in the consideration of the question of Bolivia's sovereign access to the Pacific. In fact, the sending of the memorandum by Ambassador Trucco was prompted by the information Chile received that Bolivia intended "to raise the issue of its access to the Pacific Ocean during the Inter-American conference which was to take place later that year [1961] in Quito, Ecuador" (see Judgment, para. 55). Third, Chile's reliance on the legal situation created by the 1904 Treaty is not inconsistent with the obligation to negotiate. The Parties recognized that negotiations were the *sine qua non* for a change of the legal situation established by that Treaty.

56. In the second paragraph Ambassador Trucco indicates that Chile's Note of 20 June 1950 is "clear evidence" of that willingness and then recites the exact language of his Ministry's 1950 Note — [Chile] "is open formally [to] enter into a direct negotiation aimed at searching for a formula that could make it possible to give Bolivia its own sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests". There are four points to be made on this paragraph. First, by explicitly referring to the 1950 Note, the Chilean Note embraces and builds on the new energy that had been injected into the talks by that Note. Second, the context or "the particular circumstances" in which the words "open to" were used indicates that they connote a binding undertaking. That context or "the particular circumstances" is the same as that

in which the word "willing" was used in 1950, (see paragraph 32 above), that is, the length of time that had elapsed since the War of the Pacific, 78 years, and the Treaty of Peace and Amity, 57 years; frustration with the failure of political dialogue to resolve the problem of Bolivia's access to the Pacific and the resolve of Bolivia and Chile to elevate the talks to a different level, as evidenced by their joint decision on the formal initiation of negotiations. Third, there is a specificity in the language indicating the object of the negotiations, a formula that would enable Bolivia to have sovereign access to the Pacific and for Chile to be given compensation of a non-territorial character. By the inclusion of the phrase "has always been open", Chile must be seen as reminding Bolivia that it (Chile) had made a similar proposal before in 1950, and that Bolivia's non-response was the reason why a binding agreement had not been reached. In a real sense, Chile was throwing out a challenge to Bolivia to accept the proposal to which it had not responded in 1950. When subsequently Bolivia accepts Chile's proposal the deal would have been made and the pact sealed. Fourth, by the use of the phrase, "sovereign access to the Pacific", the Parties reaffirmed the sea change that had occurred when it was used for the first time in the 1950 Notes, obviously indicating Chile's willingness to cede territory for the purpose of giving Bolivia's sovereign access to the Pacific.

57. The Bolivian response to the Trucco Memorandum is instructive. On 9 February 1962 the Bolivian Ministry of Foreign Affairs sent a memorandum responding to the Trucco Memorandum of 1961.

58. In the first paragraph Bolivia indicates that it has "carefully considered" the Trucco Memorandum.

59. The second paragraph of the Memorandum refers to Chile's Note of 20 June 1950, indicating its willingness to enter into a negotiation concerning Bolivia's sovereign access to the Pacific and for Chile to obtain compensation of a non-territorial character.

60. In the third paragraph, Bolivia states that it "took note of Chile's point of view with regard to the inconvenience of going, in this issue, to international organisms [organizations] which are not competent, in case there is concurrence of criteria to overcome the current situation through a direct agreement of the parties"[16]. The significance of this statement is that it indicates a level of commitment on the part of Bolivia to respond to concerns expressed by Chile (*vide* the first paragraph of Chile's Note) in order to reach an agreement. The background to this paragraph (see paragraph 54 above) illustrates the significance of the position taken by Bolivia on the question of direct negotiations. It will be recalled that it was information received by Chile that Bolivia intended to take the matter to the Inter-American Summit in Quito, Ecuador that prompted Chile to send through Ambassador Trucco a memorandum indicating its will-

[16] Memorial of Bolivia, Vol. II, Part I, Ann. 25, p. 121.

ingness to negotiate Bolivia's sovereign access to the Pacific. In this paragraph, as well as the fourth, Bolivia demonstrates its willingness to be sensitive to Chile's concerns about recourse to the regional body by Bolivia. This element of "give and take" is the quintessence of treaty-making negotiations.

61. The fourth paragraph is also indicative of the kind of commitment that provides the foundation for treaty obligations. In that paragraph, Bolivia indicates that it is willing to initiate "direct negotiations" to satisfy its need for sovereign access to the Pacific Ocean on the basis of compensation of a non-territorial character for Chile. Bolivia's non-response to Chile's 1950 Note requesting compensation must be taken as a rejection of that proposal. That Bolivia was prepared 12 years later to reverse that position is a clear indication of the extent to which it was prepared to compromise to gain sovereign access to the Pacific. Such far-reaching and consequential undertakings are not consistent with mere diplomatic political aspirations. On the contrary, they bear the stamp of treaty negotiations and treaty making. It would not have made sense for Bolivia to make such a huge compromise regarding compensation to gain sovereign access to the Pacific, if the Parties were not satisfied that they were involved in undertaking legally binding obligations. The acceptance by Bolivia of negotiations on the basis of compensation means that the deal was made and the pact concluded. The transition from informal political talks to binding legal obligations is directly attributable to the new energy and dynamism instilled in the talks by the 1950 Notes and embraced by the Parties in 1961.

62. There is a symbiotic relationship between the 1950 Notes on the one hand and the 1961 Trucco Memorandum and Bolivia's response on the other. The failure of the 1950 Notes to achieve the status of a treaty explains the success of the Trucco Memorandum and Bolivia's response in achieving that status. Similarly, the success of the Trucco Memorandum and Bolivia's response in achieving the status of a treaty explains the failure of the 1950 Notes to achieve that status. The missing treaty link in the 1950 Notes, that is, the non-acceptance by Bolivia of Chile's counter-proposal, was supplied in 1962 by Bolivia's acceptance of that proposal. The intention of the Parties to be legally bound by the Trucco Memorandum and Bolivia's response is illustrated, *inter alia*, by the following factors:

(i) The stress placed by both Parties on the formality of the negotiations.
(ii) The identification by the Parties of a clear object for the negotiations, that is, the search for a formula that would give Bolivia sovereign access to the Pacific.

(iii) The commitment of the Parties to "direct negotiations", that is, negotiations that would not involve international or regional bodies.

(iv) The embrace of the loaded phrase "sovereign access", used for the first time in the 1950 Notes, indicating that Chile was considering cession of territory to Bolivia for that purpose.

(v) With Bolivia's acceptance of Chile's insistence on compensation of a non-territorial character, the Parties were agreed on the most important element of the negotiations, namely, the search for a formula that would give Bolivia sovereign access to the Pacific in return for compensation of a non-territorial character for Chile.

63. Ambassador Trucco prepared this Memorandum on instructions from the Chilean Ministry of Foreign Affairs. There is no merit in Chile's submission that the Trucco Memorandum was, in their words, only an "Aide Memoire". In the first place, it is by no means clear that the Trucco Memorandum was in fact an aide-mémoire. Secondly, the contention is not that the Trucco Memorandum constitutes a treaty. It is rather that the Memorandum — which is in fact a diplomatic Note — and Bolivia's response — also a diplomatic Note — constitute an agreement between the Parties to negotiate sovereign access. Moreover, the Court has made it clear that the form an agreement takes is irrelevant to the determination whether it establishes binding legal obligations. The language of the Memorandum and that of Bolivia's response indicate that the Parties intended to be bound.

64. It is surprising that the majority spend so little time by way of analysis on the Trucco Memorandum and, in fact none on the Bolivian response. This approach is so astonishing that citation of the single relevant paragraph is warranted. Paragraph 119 states:

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

65. Noticeably, there is in the majority's analysis not a single word about the Bolivian response to the Trucco Memorandum. There is however a very brief reference to it in the historical segment of the Judgment at paragraph 56.

66. In the majority's view therefore the Trucco Memorandum does not warrant more by way of analysis than this single paragraph, the second sentence of which is a misreading of the significance of the memorandum and the Bolivian response. Of course, the memorandum renews Chile's call for compensation of a non-territorial character, made in its 1950 Note. But the failure to examine Bolivia's response results in the majority disre-

garding the brand new element in the negotiations between the Parties, namely Bolivia's acceptance of the requirement for compensation, and the potential that that response had for creating a binding legal obligation on the part of Chile to negotiate Bolivia's sovereign access to the Pacific. This new element is the missing treaty ingredient in the 1950 Notes. It is clear that the Trucco Memorandum cannot be read on its own. It must be read together with Bolivia's response. Bolivia relied on both documents, which are really two diplomatic Notes. When they are read together against the background of the 1950 Notes it becomes clear that the Parties were operating on the basis of a *quid pro quo* — Chile's agreement to negotiate Bolivia's sovereign access to the Pacific in exchange for compensation of a non-territorial character. This kind of *quid pro quo* is at the heart of treaty making between sovereign States.

67. In light of the foregoing, the Trucco Memorandum of 10 July 1961 and the Bolivian response of 9 February 1962 are two related instruments, wherein the Parties have signified their intention to be legally bound and therefore constitute a treaty within the terms of Article 2 (1) *(a)* of the VCLT; more specifically they constitute two instruments in which Chile has undertaken a legal obligation to negotiate Bolivia's sovereign access to the Pacific.

68. Following the Trucco Memorandum and Bolivia's response, on April 1962 Bolivia severed diplomatic relations with Chile on account of its use of the River Lauca.

## The Charaña Declarations

69. The first Joint Declaration on 8 February 1975, by which the Parties resumed diplomatic relations, indicates that the two countries have decided "to continue the dialogue [although it does not appear that any real negotiations began before the Charaña process] . . . to search for formulas to solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia, taking into account the mutual interests and aspirations of the Bolivian and Chilean peoples" (see Judgment, para. 120). This declaration was published in Chile's Ministry of Foreign Affairs Treaty Series, and one would be forgiven for concluding that this was an indication that Chile considered it to be a treaty. However, Chile's response is that its Treaty Series consists of various instruments including documents which are not treaties. Presumptively, one may conclude that Chile considered the declaration to be a treaty. But ultimately it is for the Court to determine whether, based on its terms and the context or particular circumstances in which it was made, the declaration established an obligation to negotiate sovereign access to the Pacific Ocean. This declaration certainly established an obligation to negotiate sovereign access to the Pacific. A specific object is identified for

the negotiations, namely, the resolution of issues such as Bolivia's landlocked situation. Bearing in mind the history of negotiations between the two countries, it is entirely reasonable to conclude that the reference to Bolivia's landlocked situation was a reference to the question of Bolivia's sovereign access to the Pacific. It also becomes clear from that history that the phrase "continuing the dialogue" means continuing the negotiations. The binding character of the 1975 Declaration is wholly consistent with the binding character of the Trucco Memorandum and Bolivia's response. The Joint Declaration of 1977 places beyond doubt the conclusion that the 1975 Declaration related to negotiations in respect of Bolivia's sovereign access to the Pacific. Another important feature of the discussion is that through the 1975 Declaration the two Presidents decided to normalize relations between their two countries.

70. In the Joint Declaration of 10 June 1977 made in Santiago, the Foreign Ministers of both countries emphasized that the dialogue established through the 1975 Charaña Declaration reflected the desire of both countries to strengthen their relationship "by seeking concrete solutions to their respective problems, especially with regard to Bolivia's landlocked situation" (see Judgment, para. 68). The declaration goes on to recall that in that spirit "they initiated negotiations aimed at finding an effective solution that allows Bolivia to count on a free and sovereign outlet to the Pacific Ocean". This declaration in substance reiterates the commitments entered into in 1975.

71. The two declarations of 1975 and 1977 must obviously be read together. In these two declarations we have the necessary foundation for a consensual instrument expressing an obligation to negotiate Bolivia's sovereign access to the Pacific. The importance of the words in the first declaration "have decided" — typical treaty-making language — should not be overlooked. Chile argues that *"resuelto"* in the original Spanish text, is better translated as "have resolved". It makes no difference whether it is translated as "have resolved" or "have decided", because in either case what we have is a decision reflecting the intention to establish an obligation. Chile points out that had the Parties wished to use the language of "decision" they would have used *"decidido"*. On the other hand, Bolivia makes a valid point that the formulation used for the decision to resume diplomatic relations between the two countries in the same document and in the same year is the word *"resuelto"*.

72. In what has been called the Charaña process — commencing in 1975 after the first Charaña Declaration and ending in 1978 — Bolivia put forward two proposals in August and December 1975. Bolivia says that in December 1975 the Chilean Foreign Minister orally expressed Chile's willingness to cede a corridor of territory to Bolivia and that Bolivia accepted this within a few days. In a 19 December 1975 communication, Chile set out its terms for the negotiations which included the cession of a strip of territory to Bolivia in exchange for territorial com-

pensation. It then invoked the 1929 Treaty of Lima and its Supplementary Protocol and sought Peru's consent. Peru replied setting out its own terms which included as a condition tripartite sovereignty. According to Bolivia, Chile's rejection of that proposal complicated the negotiations.

### Chile's Argument on Incompatibility

73. Chile argued that if the Charaña Declaration creates an obligation to negotiate sovereign access to the Pacific Ocean it is, by virtue of Article 59 of the VCLT, incompatible with the 1950 Notes and hence it would be terminated. Chile contends that the incompatibility arises because, whereas the Charaña Declaration speaks of territorial compensation, the 1950 Notes addresses non-territorial compensation. There are two answers to that contention. In the first place, this opinion has not concluded that the 1950 Notes constitute an agreement, for the reason that Bolivia did not accept Chile's requirement of non-territorial compensation. What has been concluded is that the Trucco Memorandum and the Bolivian response thereto established an obligation to negotiate sovereign access to the Pacific and that the 1950 Notes provide a foundation for that conclusion. Consequently, the earlier instrument on which Chile relies, namely, the 1950 Notes, does not, in the view of this opinion, constitute a treaty and therefore a question of its incompatibility with a later treaty does not arise. Second, the later treaty on which Chile relies — that is, the Charaña Declarations — does not include as an element Chile's requirement of territorial compensation. That element was introduced in the Charaña process as a proposal by Chile. Chile's argument therefore fails because it is unable to pinpoint any later agreement between the Parties that includes territorial compensation as a precondition for Bolivia's sovereign access to the Pacific.

### The Content and Scope of the Obligation Incurred by Chile under the Trucco Memorandum and Bolivia's Response and the 1975 and 1977 Charaña Declarations to Negotiate Sovereign Access

74. This opinion has found that the Trucco Memorandum along with Bolivia's response and the Charaña Declarations establish an obligation on the part of Chile to negotiate Bolivia's sovereign access to the Pacific. The content and scope of the obligation incurred by Chile must be determined on the basis of the evidence before the Court. It is therefore neces-

sary to examine closely the language of the two instruments which establish Chile's obligation to negotiate sovereign access for Bolivia to the Pacific.

75. By the Trucco Memorandum Bolivia and Chile agreed to "formally enter into direct negotiations" "aimed at finding a formula that will make it possible to give Bolivia a sovereign access to the Pacific Ocean of its own". This obligation is specific in declaring the intent of the Parties to enter into formal negotiations. It is also specific in identifying as the object of the negotiations finding a formula that could give Bolivia sovereign access to the Pacific Ocean.

76. By the Charaña Declarations, Chile was obliged to negotiate to resolve issues, including the landlocked situation affecting Bolivia, and more specifically to negotiate "[to find] an effective solution that allows Bolivia to count on a free and sovereign outlet to the Pacific Ocean" (see Judgment, para. 68). This obligation is even clearer than that of the Trucco Memorandum and the Bolivian response.

77. Both the Trucco Memorandum and the Bolivian response as well as the Charaña Declarations show the commitment of the Parties to finding a strategy through negotiations that would produce the result sought by Bolivia: sovereign access to the Pacific. But it is not any strategy, any formula or any solution that the Parties desire; in the case of the Trucco Memorandum, it is one that "could make it possible" for Bolivia to have a sovereign access to the Pacific; in the case of the declarations it is one that "allows Bolivia to count on a free and sovereign outlet to the Pacific Ocean". Hence the Parties stress the importance of the efficacy and reliability of the strategy to achieve the result of giving Bolivia a sovereign access to the Pacific. Consequently, the obligation incurred by Chile is to negotiate directly with Bolivia to find a formula or solution that will enable Bolivia to have sovereign access to the Pacific.

## Obligations of Conduct and Result

78. A criticism of the classification of obligations into obligations of conduct and obligations of result is that it may not embrace the full range of obligations undertaken by States in their relationships. Classifications are constrictive and tend to oversimplify complex issues. The International Law Commission itself indicated that, although the distinction may be useful in determining when a breach of an international obligation takes place, it is not "exclusive"[17]. The classification is only an aid in

[17] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two), p. 56, para. 11.

determining the breach of an international obligation. The better approach is more simply to identify as accurately as possible the precise obligation incurred by a State as a result of its conduct, and then determine whether that obligation has been breached.

79. We have seen that the obligation incurred by Chile is to negotiate directly with Bolivia to find a formula or solution that will enable Bolivia to have sovereign access to the Pacific. The Court must determine whether Chile has breached that obligation. The obligation is to achieve the precise result of finding a formula or solution that will enable Bolivia to have sovereign access to the Pacific, by adopting a particular course of conduct, namely, the pursuit of direct negotiations between the Parties.

80. Therefore the Court should have granted a declaration to Bolivia that Chile is obliged to negotiate directly with Bolivia to find a formula or solution that will enable Bolivia to have sovereign access to the Pacific. If the obligation in that declaration is not as far-reaching as the declaration sought by Bolivia — an obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific — the Court is nonetheless empowered to grant it. As the Court said in *Libya* v. *Malta*, "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full[est] extent"[18].

## Have the Obligations to Negotiate Bolivia's Sovereign Access to the Pacific on the Basis of (a) The Trucco Memorandum and Bolivia's Response and (b) The 1975 and 1977 Charaña Declarations Been Discharged?

### *The Question of the Discharge of the Obligation under the Trucco Memorandum and Bolivia's Response*

81. Neither the exchanges between the Parties in the period between the first Charaña Declaration and the rejection by Chile of Peru's proposal to create an area of tripartite sovereignty in 1978 ("the Charaña process") nor any other exchanges thereafter, establish a comparable, binding legal agreement to negotiate Bolivia's sovereign access to the Pacific. However, these exchanges are examined to evaluate whether such communications between the Parties were sufficient to discharge the obligation undertaken by Chile to negotiate Bolivia's sovereign access to the Pacific Ocean under *(a)* the Trucco Memorandum and the Bolivian response and *(b)* the 1975 and 1977 Charaña Declarations.

[18] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 23, para. 19.

82. The 1975 and 1977 Joint Declarations did not discharge the obligation undertaken by Chile under the Trucco Memorandum and Bolivia's response as the declarations contained merely a reaffirmation of the obligation to negotiate under the Trucco Memorandum and Bolivia's response. However, the Parties did not attempt to find a formula that would enable Bolivia to have sovereign access to the Pacific.

83. In the Charaña process, Chile made it clear that it was not prepared to cede any territory that would interrupt its territorial continuity. It is recalled that the Court has held that if negotiations are to be meaningful, a party should not insist upon its own position without any contemplation of modification.

84. Following the failure of the Charaña process, Bolivia severed diplomatic relations with Chile. This event had no effect on the obligation to negotiate which was established by the 1961 Trucco Memorandum along with Bolivia's response, and the Charaña Declarations. This conclusion is consistent with the provisions of Article 63 of the VCLT and the Court's decision — in the *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* case[19] — that the rupture of diplomatic relations had left the applicability of the 1955 Treaty of Amity unaffected. The two events — the break of diplomatic relations and the obligation to negotiate — are separate and apart. Two countries do not need to have diplomatic relations in order to negotiate. Indeed, Bolivia again severed diplomatic relations with Chile in 1978 and during that break there were negotiations between Chile and Bolivia.

## OAS Resolutions

85. Of the 11 resolutions passed by the OAS General Assembly on which Bolivia relies, Chile voted against seven, did not participate in the vote on one resolution and participated in the adoption by consensus of three resolutions. Although, like United Nations General Assembly resolutions, OAS General Assembly resolutions may in certain circumstances impose binding obligations on Member States, there is nothing in these resolutions that provides a basis for concluding that Chile's obligation to negotiate directly with Bolivia to find a formula or solution that would enable Bolivia to have sovereign access to the Pacific was discharged.

## The Fresh Approach

86. A new bilateral approach was adopted by the Parties in 1986 when the Bi-National Rapprochement Commission as established. At meetings

[19] Case concerning *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 3.

held from 21 to 23 April 1987 Bolivia made it clear that the purpose of the meeting was to resume negotiations on Bolivia's sovereign access to the sea. Bolivia submitted two memoranda with proposals. The first was that Chile transfer a sovereign and useful maritime strip of land. The second was for an enclave in the north of Chile. However, no agreement was reached and, on 9 June 1987, the Chilean Foreign Minister said that any transfer of Chilean territory was not acceptable. According to Bolivia, one month later, Chile terminated the process with a press release stating that any transfer of territory was unacceptable. These negotiations can scarcely be described as discharging the obligation to find a formula or solution that would enable Bolivia to have sovereign access to the Pacific.

## Developments after 1990

87. None of the developments that followed the restoration of democracy in Chile in 1990, including the constitution of the mechanism of Political Consultation, the Algarve Declaration in 2000, the 13-Point Agenda and the last Joint Declaration of 7 February 2011, sufficed to discharge Chile's obligation to negotiate directly with Bolivia to find a formula or solution that would give Bolivia sovereign access to the Pacific.

88. The mechanism of Political Consultation set up in 1995 to deal with bilateral issues between the two States, held 22 meetings until its termination in 2010/2011, when it came to a halt as Chile again rejected further negotiations. For similar reasons, although the Algarve Declaration of 22 February 2000 contained a reaffirmation by both Parties of their will to engage in dialogue aimed at overcoming differences in their bilateral relationship, it did not suffice to discharge Chile's obligation to negotiate directly with Bolivia to find a formula or solution that would enable Bolivia to have sovereign access to the Pacific.

89. In 2006, the 13-Point Agenda, which included the question of Bolivia's sovereign access to the sea as Point 6, "the maritime issue" was adopted. By 2010, the consultations had only reached the stage of seeking "concrete, useful and feasible solutions" from both sides, and therefore, these consultations cannot be said to have discharged Chile's obligation to negotiate directly with Bolivia to find a formula or solution that would enable Bolivia to have sovereign access to the Pacific.

90. The Joint Statement of 7 February 2011 issued by the Presidents of Bolivia and Chile examined the progress of the 13-Point Agenda and set out future projects which would be aimed at "reaching results as soon as possible on the basis of concrete feasible and useful proposals for the whole of the agenda". On 17 February 2011, Bolivian President Morales

in a press conference appealed to Chile to present a concrete proposal that could act as a basis for discussion and stated that he would wait until 23 March 2011 for such a proposal to be put forward. On that date, having received no reply from Chile, Bolivia filed its Application before the Court.

91. Thus, there remains today an outstanding offer from the Bolivian President to his Chilean counterpart, to present concrete proposals that could form the basis for negotiations to grant Bolivia sovereign access to the sea. Therefore, Chile's obligation to negotiate directly with Bolivia to find a formula or solution that would enable Bolivia to have sovereign access to the Pacific Ocean under the agreements identified above still subsists.

## Conclusion

92. Chile has a legal obligation to negotiate directly with Bolivia to find a formula or solution that will enable Bolivia to have sovereign access to the Pacific Ocean. This obligation arises out of specific agreements between the Parties, namely, *(a)* the 1961 Trucco Memorandum and Bolivia's reply of 9 February 1962 as well as *(b)* Joint Declarations of Charaña signed between the Parties in 1975 and 1977. These exchanges read in light of their content, the "particular circumstances" or context in which they were drafted, evidence an intention of the Parties to create an obligation for Chile to negotiate Bolivia's sovereign access to the Pacific Ocean. The analysis in paragraphs 81 to 90 establishes that that obligation has not been discharged.

93. The Court should therefore have granted Bolivia a declaration that Chile has a legal obligation to negotiate directly with Bolivia to find a formula or solution that will enable Bolivia to have sovereign access to the Pacific Ocean.

*(Signed)* Patrick L. Robinson.

# DISSENTING OPINION OF JUDGE SALAM

*[Original English Text]*

*Vote against the operative part of the Judgment — Disagreement with the reasoning of the Court concluding that no obligation to negotiate can be inferred from the documents presented by the Parties — Agreement with the conclusion that the conditions for the application of the principles of estoppel, acquiescence and legitimate expectations are not satisfied — Existence of an obligation of conduct and not an obligation of result.*

1. I disagree with the Court's Judgment on fundamental aspects of its analysis of a number of documents presented by the Parties, and the conclusions it reaches concerning the "obligation to negotiate" which Bolivia claims to exist. It is therefore with regret that I am voting against the operative part of the Judgment, and I append this dissenting opinion to explain my position.

2. I should note first of all that, in my opinion, one of the main features of an "obligation to negotiate" is that it is, by its very nature, of a limited scope. As Michel Virally wrote, "in assuming an obligation to negotiate, a State reserves the right to disagree — and therefore the right to prevent a settlement — on the sole condition that it acts in good faith, which may be difficult to verify"[1]. Of course, this also explains the low threshold of persuasion which is required, in my opinion, to demonstrate the existence of an intention to be bound to negotiate. Such an intention may be inferred from a number of factors: first, the context and in particular the existence of a cause justifying the intention to be "bound to negotiate"; next, the actual terms of the various instruments which reflect that intention; and finally, the practice subsequent to those instruments.

3. As the Court has noted on numerous occasions, "international agreements may take a number of forms and be given a diversity of names" (see, for example, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 120, para. 23). The question whether Parties have concluded an international agreement is therefore one of substance rather than form. The Court has referred on this point to Article 2, paragraph 1 *(a)*, of the Vienna Convention on the Law of Treaties of 23 May 1969, which provides that for the purposes of that Convention, "'[t]reaty' means an international agreement concluded between States in written form and governed by international law,

[1] M. Virally, "Panorama du droit international contemporain: cours général de droit international public", *Collected Courses of the Hague Academy of International Law*, 1983, Vol. 183, p. 240.

whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". It is recognized in particular that an exchange of letters may constitute an international agreement creating rights and obligations for the parties involved (*I.C.J. Reports 1994*, p. 122, para. 30).

4. Bolivia has ascribed particular importance to the Notes exchanged by Alberto Ostria Gutierrez, the Bolivian Ambassador to Chile, and Horacio Walker Larrain, the Chilean Minister for Foreign Affairs, on 1 June and 20 June 1950, respectively. I disagree with the Court's analysis of those Notes, for the following reasons.

5. In his Note of 1 June 1950, the Bolivian Ambassador referred to a number of declarations by Chilean officials on the issue of negotiation with Bolivia and addressed the Chilean Minister as follows:

> "With such important precedents [ . . . ] that identify a clear policy direction of the Chilean Republic, *I have the honour of proposing to His Excellency that the Governments of Bolivia and Chile formally enter into direct negotiations to satisfy Bolivia's fundamental need to obtain its own sovereign access to the Pacific Ocean*, solving the problem of Bolivia's landlocked situation on terms that take into account the mutual benefit and genuine interests of both nations." (Judgment, para. 51; emphasis added.)

6. In his Note of reply of 20 June 1950, the Chilean Foreign Minister acknowledges receipt of Bolivia's Note and states the following:

> "From the quotes contained in the note I answer, it flows that the Government of Chile, together with safeguarding the *de jure* situation established in the Treaty of Peace of 1904, has been willing to study *through direct efforts with Bolivia* the possibility of satisfying the aspirations of the Government of Your Excellency and the interests of Chile.
>
> At the present opportunity, I have the honour of expressing to Your Excellency that *my Government will be consistent with that position and that, motivated by a fraternal spirit of friendship towards Bolivia, is open formally to enter into a direct negotiation aimed at searching for a formula [ . . . ] that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean, and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests.*" (*Ibid.*, para. 52; emphasis added.)

7. These Notes were drafted by persons who must be regarded as representing and capable of committing their State, merely by virtue of exercising their functions. They were subsequently published. We must therefore consider the ordinary meaning to be given to their terms in their

context, in accordance with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties.

8. It is evident from the wording of the Notes exchanged that, at the time they were drafted, the two States considered that negotiations with a view to concluding an agreement that would confer reciprocal benefits on both Parties were the only feasible way of attempting to satisfy Bolivia's aspirations. It is also clear from the terms of the Notes that they express the core of the undertaking to which the Parties had consented, namely to "formally enter into direct negotiations". The Notes identify the aim of the negotiations agreed on: to confer "mutual benefit" on both Parties. On this point, it was understood that the benefit sought by Bolivia — obtaining "its own sovereign access to the Pacific Ocean" — was identified in advance of the negotiations. In return, Chile would receive "compensation of a non-territorial character which effectively takes into account its interests". Let us here underline that Chile itself acknowledges that, in June 1950, it was "attracted by the possibility of an agreement with Bolivia in which Bolivia, in return for sovereign access to the sea, would allow the waters of Lake Titicaca and other highland lakes to be channelled into Chile to be used for irrigation and hydroelectric power production" (Rejoinder of Chile, para. 1.14). It was in this context and with a view to fulfilling this objective that Chile agreed to be bound to negotiate with Bolivia.

9. I would also point out that Chile's Note was itself a response to Bolivia's Note and, in so far as it reproduced the core terms of the undertaking proposed by Bolivia, it cannot be regarded, as Chile claims, as a counter-proposal requiring any response from the Applicant.

10. In light of the foregoing, I conclude that the passages cited from the Notes exchanged in 1950, taken in their ordinary meaning and in their context, and given that the persons who drew them up had the capacity to commit their respective States, should have been interpreted by the Court as establishing an agreement between the Parties on the need to negotiate on the question of granting Bolivia sovereign access to the Pacific Ocean.

11. In fact, in the context of the many exchanges on the subject of Bolivia's landlocked situation that have taken place between Bolivia and Chile since the 1904 Treaty, it is my view that it was with the 1950 exchange of Notes that an "obligation to negotiate" crystallized between the Parties.

12. This interpretation is confirmed by the Parties' subsequent practice, and in particular by the reference to the Note of 20 June 1950 made by the Chilean Ambassador in La Paz, Manuel Trucco, in a memorandum of 10 July 1961 addressed to the Bolivian Foreign Minister (Counter-Memorial of Chile, Vol. 3, Ann. 158). In this memorandum, the Chilean Ambassador says that "Chile has always been open (translated

by Bolivia as "been willing") . . . to study, in direct dealings with Bolivia, the possibility of satisfying its aspirations and the interests of Chile". He adds that

> "Note number 9 of [the Chilean] Ministry of Foreign Affairs, dated in Santiago on 20 June 1950, is a clear testimony (translated by Bolivia as "clear evidence") of those purposes",

and continues:

> "Through it, Chile states that it is 'open formally to enter into a direct negotiation aimed at searching for a formula that would make it possible to give Bolivia its own sovereign access to the Pacific Ocean (translated by Bolivia as "expresses having 'full consent to initiate as soon as possible, direct negotiations aimed at satisfying the fundamental national need of own sovereign access to the Pacific Ocean'"), and for Chile to obtain compensation of a non-territorial character which effectively takes into account its interests.'" (Judgment, para. 55.)

13. The Bolivian Minister for Foreign Affairs replied to this memorandum on 9 February 1962 (Memorial of Bolivia, Vol. II, Ann. 25). The Minister's reply states that, for Bolivia, the Trucco Memorandum confirmed that Chile's willingness to negotiate with Bolivia was based on "communication number 9, dated Santiago, 20 June 1950". Bolivia also added that, for the purpose of reaching an agreement, the Bolivian Government expresses

> "its full consent to initiate, as soon as possible, direct negotiations aimed at satisfying the fundamental national need of its own sovereign access to the Pacific Ocean, in return for compensation that, without being territorial in character, takes into account the reciprocal benefits and effective interests of both countries" (Judgment, para. 56).

The circumstances of the case are also significant here. Chile had a direct reason to renew its undertaking to negotiate with Bolivia: to dissuade Bolivia from raising the issue of its sovereign access to the Pacific Ocean in the context of a planned Inter-American Conference focusing on arms limitation (Counter-Memorial of Chile, para. 6.23).

14. Given the terms used and the context in which these texts were drafted, the exchange consisting of the Trucco Memorandum and Bolivia's response to it should be interpreted as renewing an agreement to negotiate between the Parties. I would point out here that Chile's arguments that the Trucco Memorandum was not an "official note" and was unsigned are unconvincing, since the Memorandum was communicated to Bolivia through official channels and contained "an exposition of Chile's views at that time" (Counter-Memorial of Chile, para. 6.25). I

would add that the fact that Bolivia took six months to send a Note responding to receipt of the Trucco Memorandum does not as such preclude a meeting of minds between the Parties. I consider that the Trucco Memorandum and Bolivia's follow-up Note constitute, in any event, relevant subsequent practice confirming the agreement to negotiate resulting from the 1950 exchange of Notes.

15. I would also note that on 8 February 1975, the Bolivian and Chilean Presidents met and agreed to a joint declaration (the so-called "Charaña Declaration"), where it is stated that

> "[b]oth Heads of State, within a spirit of mutual understanding and constructive intent, *have decided* (translated by Chile as "have resolved") *to continue the dialogue*, at different levels, in order to search for formulas (translated by Chile as "seek formulas") to solve the vital issues that both countries face, *such as the landlocked situation that affects Bolivia*, taking into account the mutual interests (translated by Chile as "their reciprocal interests") and aspirations of the Bolivian and Chilean peoples" (Judgment, para. 62; emphasis added).

16. The wording of this declaration shows that the two Parties did not consider, in 1975, that the negotiations between them had gone far enough. It shows their intention to continue the negotiations in order to resolve, among other things, "the landlocked situation that affects Bolivia".

17. In my opinion, Chile's undertaking to negotiate with Bolivia a solution to its landlocked situation is also confirmed by a number of unilateral declarations. And, it is recognized that declarations taking the form of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations (see *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43) where the person making the declaration is capable of committing the State (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 27, para. 46).

18. I will focus here on the declaration which I consider the most relevant, since it clearly asserts, or at the very least confirms, Chile's undertaking to negotiate with Bolivia. It is a letter sent by the Chilean President to his Bolivian counterpart. On 18 January 1978, the Chilean President, Augusto Pinochet Ugarte, wrote a letter to his Bolivian counterpart, President Hugo Banzer Suárez, in which he used particularly forceful language (Counter-Memorial of Chile, Vol. 4, Ann. 236). Seeking to reassure the latter following Peru's observations on Chile's proposition, President Pinochet writes to his counterpart: "I reiterate my Government's intention of promoting the ongoing negotiation aimed at satisfying the longings of the brother country to obtain a sovereign outlet to the Pacific Ocean." He reaffirms that what is at stake are "negotiations that we are

committed to". Referring to earlier negotiations, the President says that "[i]n all of those meetings an agreement to pursue negotiations was reached". He then underlines his "purpose to boost the negotiations aimed at granting Bolivia a sovereign outlet to the Pacific Ocean through the appointment of Special Representatives".

19. These words clearly reflect Chile's intention to fulfil its undertaking to negotiate with Bolivia, and show that negotiations have actually been ongoing. I would also point out that the language used by the Chilean President is both more precise and stronger than that used by the Norwegian Foreign Minister, Mr. Ihlen, in the case concerning the *Legal Status of Eastern Greenland (Denmark* v. *Norway)*, which the PCIJ deemed to be a "promise [that] was unconditional and definitive", and which led it to conclude that "as a result of the undertaking involved in the Ihlen declaration . . . Norway [wa]s under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland" (*Judgment, 1933, P.C.I.J., Series A/B, No. 53*, pp. 69-73).

20. However, the Chilean President was explicit about the — limited — scope of this undertaking to negotiate. He says that the view of his Government is that "the bases of the Chilean proposal and accepted in general terms by Bolivia, are the only viable and realistic way to satisfy the longing of the brother country", adding that he "could not, therefore, propose a different alternative[,] [b]ut [was] confident that on these bases it would be possible to achieve an agreement capable of being accepted by Peru" (Counter-Memorial of Chile, Vol. 4, Ann. 236).

21. Chile has continued, until recently, to negotiate with Bolivia in order to resolve the dispute over the latter's claim to sovereign access to the Pacific. Communications between the two States rarely broke down completely, even when Bolivia suspended diplomatic relations with Chile on 15 April 1962 and 17 March 1978.

22. In conclusion, it is my opinion that the 1950 exchange of Notes constitutes an agreement setting out an obligation for the Parties to negotiate. I also consider that the events which followed, in particular the Trucco Memorandum, the Charaña Declaration, the letter of 18 January 1978 from the Chilean President to the Bolivian President, and Chile's participation in further rounds of negotiations (in particular, the period of the so-called "fresh approach", the Chilean-Bolivian mechanism for political consultation introduced in the early 1990s, the 13-Point Agenda of July 2006 and the establishment in 2011 of a binational commission for ministerial-level negotiations) constitute a set of actions from which it may reasonably be inferred that Chile and Bolivia were bound by a consistent obligation to negotiate on granting the latter sovereign access to the Pacific Ocean.

23. Having failed to place the 1950 and 1961-1962 exchanges in their

historical context, and to give sufficient consideration to the existence of a reason underlying Chile's intention to be bound to negotiate, it is regrettable that the Court did not reach the same conclusion.

24. I consider that my analysis on the existence of an obligation to negotiate is all the more reasonable since the scope of such an undertaking is limited, as I stated in the beginning of this opinion. Moreover, the failure of a round of negotiations does not suffice in itself to infer that the obligation to negotiate is extinguished.

25. I would add that I have reached this conclusion without reference to the principles of estoppel, acquiescence and legitimate expectations, since I do not believe that the conditions for their application are satisfied in the present case and agree with the Court's reasoning on the matter.

26. Having found that the Parties had undertaken to negotiate, the next question is about the nature and scope of the undertaking given.

27. In this regard, I would note that Bolivia, first of all, claimed, in its written pleadings, that Chile was under an obligation that had all the features of an obligation of result. This is particularly evident from the Memorial, in which it clearly stated that Chile's obligation to negotiate sovereign access to the sea "is more exacting than a general obligation to negotiate under international law. In particular, Chile is under an affirmative obligation to negotiate in good faith in order to achieve a particular result; namely, a sovereign access to the Pacific Ocean for Bolivia." (Memorial of Bolivia, Vol. 1, p. 97, para. 221.) It later added: "It is a specific obligation under international law to agree upon a specific objective to achieve a particular result" (*ibid.*, p. 98, para. 225).

28. Bolivia also maintained that Chile's obligation to negotiate sovereign access to the sea for Bolivia "is of the same nature" as the obligation laid down in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, citing a passage from the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which the Court states that "[t]he legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result . . . by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith" (*I.C.J. Reports 1996 (I)*, p. 264, para. 99). The Applicant also referred to the following paragraph in the same opinion, where the Court talks about a "twofold obligation to pursue and to conclude negotiations", and contended that in the present case, "both Parties have agreed to negotiate over a sovereign access to the sea, and their obligation to negotiate will terminate only when an agreement is concluded materializing in concrete terms the sovereign access to the sea" (Memorial of Bolivia, p. 119, para. 287).

29. Bolivia did, however, somewhat backtrack on this approach as the proceedings continued, and particularly in its oral pleadings. It said in very clear terms in the first round of pleadings that "Bolivia's case is

remarkable in its modesty. All that it asks is for Chile to return to the negotiating table." (Verbatim record, CR 2018/6, p. 30, para. 30.) It even went a little further in describing the content of the alleged obligation to negotiate, and identified a series of "specific obligations" which that obligation entailed (*ibid.*, pp. 59-60, para. 9)[2]. It even stated that the obligation "does not require [Chile] . . . [to] reach an agreement with [it] at any cost" (*ibid.*, p. 60, para. 14).

30. However, the Applicant, referring to the exchanges and declarations attesting, in its view, to the existence of an obligation to negotiate, has affirmed that "[e]ach stage gave Bolivia renewed hope and confirmed that *the restoration of its status as a maritime State* was indeed something on which both States agreed" (*ibid.*, p. 39, para. 28; emphasis added). It also added that "the binary distinction between a simple obligation of means and an obligation of result seems inadequate to clarify the nature and scope of the obligation to negotiate" (CR 2018/10, p. 59, para. 7).

31. So although Bolivia softened its original position, it nevertheless remained. Deliberately? It would seem so, ambiguous about the scope of the obligation it invokes.

32. That said, it is indisputable that any obligation to negotiate that may be recognized as incumbent on Chile cannot be an obligation of result. This, moreover, is apparent from the Court's Judgment on the preliminary objection, in which it stated that "[e]ven assuming *arguendo* that the Court were to find the existence of such an obligation [to negotiate], it would not be for the Court to predetermine the outcome of any negotiation that would take place in consequence of that obligation" (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 605, para. 33).

*(Signed)* Nawaf SALAM.

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[2] "Bolivia submits that the duty to negotiate under international law entails, at a minimum, the following specific obligations:

*(a)* First, the duty to receive communications and proposals put forward by another State concerning the adjustment of any matters of serious concern to that State.

*(b)* Second, the duty to consider any such communications or proposals, taking into account the interests of the other State.

*(c)* Third, the duty to participate, in a considered and reasoned manner, in official meetings to discuss such communications and proposals, if invited to do so.

*(d)* Fourth, the duty to look for ways of overcoming any problems that stand in the way of resolution of the matter.

All this in good faith and in a timely manner."

# DISSENTING OPINION OF JUDGE *AD HOC* DAUDET

*[Translation]*

*Existence of an obligation to negotiate — "Acta Protocolizada" of 1920 — 1950 exchange of Notes — Charaña process — No contextualization by the Court of the obligation to negotiate — Effect of the accumulation of elements — Legal rule and moral rules — Excessive formalism — Obligation of means and obligation of result — Need for continuation of the dialogue between the Parties.*

1. I deeply regret that I was unable to vote in favour of the operative clause of the Court's Judgment; however, before I set out what I disagree with and why, I would like to state in paragraphs 5 to 7 below that I endorse several aspects of the decision not to find in favour of Bolivia's claim that Chile has an obligation to negotiate sovereign access to the Pacific Ocean.

2. The question of such access, of which Bolivia was deprived following the War of the Pacific, is a very old one: it is included in the 1895 treaties (which did not enter into force), thus even before the Treaty of 20 October 1904 fixed boundaries transforming Bolivia, which had previously had a coastline of over 400 km, into a landlocked nation, to the benefit of one State, Chile, which has a coastline of over 4,000 km. It is easy to understand why Bolivia feels that this situation is profoundly unjust. However, such was the law at a time when Abraham König, Chile's Minister Plenipotentiary in Bolivia, was able to declare on 13 August 1900, without fear of rebuff or criticism: "Our rights are the outcome of victory [in the War of the Pacific], the supreme law of nations."[1] The principles of intertemporal law apply to those rights. Such circumstances therefore preclude the Court from drawing any legal conclusions. The feeling of injustice is nonetheless not to be overlooked, since it explains the steadfastness of Bolivia's claim to recover its lost access and the multiplicity of its arguments, not all of which are necessarily legally founded.

3. The Court's Judgment sets out the various facts, which extend over more than a century. Although only a minor point, I would note here in passing that, to my mind, it would have been more appropriate to combine the factual elements in the first part of the Judgment ("Historical and factual background") with the arguments in the third part ("The alleged legal bases of an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean") which they serve to support, so as to avoid the — sometimes correct — impression that the facts are being repeated.

[1] Memorial of Bolivia, Ann. 39.

4. Over such a long period, those facts are, by force of circumstance, numerous and varied, and include bilateral and unilateral acts with different legal effects, and political statements and representations mixed up with legal acts; in short, a complex whole whose knotted threads had to be disentangled. This difficult exercise required separating what could be a matter of law from what were mere political or diplomatic representations, or references to moral principles unsanctified by law.

5. For example, it is clear that Bolivia's reliance on estoppel could not be upheld by the Court here. Although from a moral point of view I readily acknowledge that Chile has "blow[n] hot and cold" on a number of occasions, I share the views of the Court, which could not decide in favour of Bolivia, owing to that State's failure to fulfil the conditions set out in the jurisprudence recalled in paragraphs 158 and 159 of the Judgment. Bolivia did not change its position to its detriment, or to Chile's advantage, by relying on Chile's representations. Nor does it claim to have suffered "some prejudice" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 57), which might have been caused by, for example, economic, commercial or other measures taken by it on the basis of Chile's position and which would have been deprived of effect or thwarted following a change in the Applicant's conduct.

6. Similarly, with regard to legitimate expectations, Bolivia invokes a principle that is sometimes applied in investment law, but which has not entered general international law and which here is ultimately confined to the moral disorder created by the non-satisfaction of expectations that Bolivia had forged for itself outside any established legal framework.

7. Bolivia principally relied on material of a unilateral and collaborative nature. I share the position of the Court, which dismissed a number of those elements deemed to be lacking in legal relevance and therefore unable to create legal obligations incumbent on Chile.

8. On the other hand, I disagree with the decision of the majority not to uphold several other elements which, alone (and each on their own), would have been sufficient grounds for the Court to reverse its decision. I will first examine the elements in question before expressing my reservations about the spirit in which the Court conceived of the law it had to apply here.

## I. Existence of an Obligation to Negotiate Incumbent on Chile

9. In my opinion, there are three elements that create an obligation to negotiate incumbent on Chile in respect of which I disagree with the finding of the Court. They are the 1920 "Acta Protocolizada", the 1950

exchange of Notes, and the Charaña process of 1975 to 1978. I will examine them in turn.

*(a) The 1920 "Acta Protocolizada"*

10. The 1920 Act has its immediate origins in a Chilean Memorandum of 9 September 1919, in which Chile's Ambassador in La Paz writes: "Independently of what was established in the Peace Treaty of 1904, Chile accepts to initiate new negotiations aimed at satisfying the aspirations of the friendly country, subject to Chile's triumph in the plebiscite"[2]. The Act — or Minutes — that followed on 10 January 1920 gives an account of a series of meetings held in La Paz between the Minister for Foreign Affairs of Bolivia and the Minister Plenipotentiary and Special Envoy of Chile. The Chilean representative, "duly authorised by his Government[,] pu[t] forward suggestions, or key points . . . and propose[d] that they be the terms for an agreement between both parties"[3]. That Act was followed by other episodes, some of which were mere political statements, while others were political statements which included some legal content.

11. The Act itself contains specific facts, notably in point IV, where it is stated that Chile "is willing to seek that Bolivia acquire its own access to the sea, ceding to it an important part of that zone in the north of Arica and of the railway line which is within the territories subject to the plebiscite stipulated in the Treaty of Ancón"[4], thus using terms which, if given credence, suggest a negotiating position. These territorial questions were again addressed by Chile a short while later in a Note of 6 February 1923 from the Chilean Minister for Foreign Affairs, which mentions the conclusion, by means of "a direct negotiation", of "a new Pact . . . without modifying the Treaty of Peace and without interrupting the territorial continuity of the Chilean territory"[5]. That Note is supplemented by a second dated 22 February of the same year, which clearly sets out what is and what is not possible in the eyes of Chile. The author states that he is acting in accordance with the instructions of the President of the Republic. It is expressly stated in that Note that Chile will never agree to a solution that would interrupt the continuity of its territory. This implies, *a contrario*, that other solutions might be found, confirming a willingness to negotiate.

12. Thus, the language used by official authorities with the power to speak on behalf of the State they represent reflects a commitment by Chile to enter into negotiations with a view to granting Bolivia sovereign access to the sea, Chile going so far as to identify areas which might be

[2] Counter-Memorial of Chile, Ann. 117.
[3] Memorial of Bolivia, Ann. 101.
[4] Counter-Memorial of Chile, Ann. 118.
[5] Memorial of Bolivia, Ann. 48.

ceded to Bolivia. These are not merely statements of political intent, but the expression of an obligation that Chile imposed on itself.

13. Chile objects to this today on the grounds that, in any event and even supposing that there were parts of the 1920 Act capable of creating obligations incumbent on it, those obligations would be annulled simply by virtue of the fact that Bolivia's representative himself stated in that Act that the declarations made in it did not contain provisions creating rights or obligations for the States. Chile concludes from this that the 1920 Minutes cannot, as Bolivia claims, be the source of a legal obligation that the Parties did not intend to undertake, because that instrument is not legally binding. The Court endorses this position.

14. However, in this regard, unlike the Court, I believe that the Bolivian minister's declaration does not raise questions about the negotiation procedure itself, only its possible substance. As ever in this case, a clear distinction must be made between what would be a *substantive* commitment on the content of the negotiations on Bolivia's sovereign access to the sea (the area to be transferred, on what conditions, by what arrangements and other substantive aspects which, moreover, the Court need not entertain) and the negotiation *procedure* (which the Court must address), by means of which those substantive questions could be resolved. The substantive questions concerning the territorial sovereignty of the State are, of course, far too important and too delicate an issue for the States' representatives — at the time of the 1920 Act, which records the content of discussions of a preliminary nature — to have wished to commit themselves on those matters, without first having carefully secured the views of the highest executive and legislative authorities of their respective countries and the state of public opinion.

15. This explains the clarification given by Bolivia's Minister for Foreign Affairs, which I understand as referring only to the substantive aspects and not to anything else. Indeed, one might well ask why he would have made that clarification about the non-binding nature of the exchanges conducted, had he also intended to refer to the procedure, i.e. the very fact of having recourse to negotiation. This would have been unfathomable, since it would have been completely contrary to the interests of Bolivia.

16. In my view, therefore, there would appear to be grounds for finding in favour of Bolivia that the 1920 Act, in itself and without prejudice to its place in a series of other acts, is of a binding character.

### *(b) The Exchange of Notes of 1 and 20 June 1950*

17. I also disagree with the decision of the Court with regard to this exchange of Notes between the Ambassador of Bolivia and the Minister for Foreign Affairs of Chile.

18. Bolivia sees this exchange as "a treaty under international law, the terms of which are clear and unequivocal"[6], which commits Chile to enabling Bolivia to have sovereign access to the Pacific Ocean. This view is contested by Chile and the Court concurs with the Respondent. Chile is of the opinion that these Notes express only political or diplomatic representations and are not legal undertakings that are binding on it; that since the Parties do not state the same thing, there is no identity of subject-matter required for an agreement to be constituted; and, finally, that ultimately Bolivia did not follow the matter up since it did not respond to Chile's last Note.

19. However, to my mind, the 1950 Notes and ensuing documents appear on the contrary to have the characteristics of a legal act rather than a merely political or diplomatic one, in that they form a substantively well-developed whole and show a common intent expressed by individuals authorized to do so regarding a common object and purpose.

20. The Note of 1 June 1950[7] sent to the Chilean Minister for Foreign Affairs by the Ambassador of Bolivia to Chile recalls the successive episodes of the 1895 Treaty and the 1920 Act, Chile's statement before the League of Nations on 1 November 1920, the message from the President of Chile to the Chilean Congress in 1922, the Note of 6 February 1923, the Kellogg Proposal and the 1926 Matte Memorandum, as well as various other exchanges. The continuous character of Bolivia's claim and the link between the various acts expressing that claim are thus plain to see.

21. The Note goes on to set out a proposal of Bolivia, cited in paragraph 51 of the Judgment, to which I refer the reader.

22. The Chilean Minister for Foreign Affairs responded to the various points raised by Bolivia in a Note of 20 June 1950, as cited in paragraph 52 of the Judgment, to which I also refer the reader.

23. Chile's Note is perfectly clear in my view: Chile replies that it "is open *formally* to enter into a direct negotiation aimed at searching for a formula" (according to the English translation produced by Chile; "is willing to *formally* enter into direct negotiations aimed at finding a formula", according to the English translation produced by Bolivia; emphasis added)[8] that will make it possible to give Bolivia sovereign access to the Pacific Ocean. The "formula" was to include compensation for Chile.

24. The two Notes are from authorities competent to speak on behalf of the State, one being the Minister for Foreign Affairs of Chile and the other the Ambassador of Bolivia accredited to Chile. The Court states in paragraph 117 that, contrary to usual diplomatic practice, the two Notes

[6] Reply of Bolivia, para. 228.
[7] Memorial of Bolivia, Ann. 109A.
[8] *Ibid.*, Ann. 109B; Counter-Memorial of Chile, Ann. 144.

> "do not contain the same wording nor do they reflect an identical position, in particular with regard to the crucial issue of negotiations concerning Bolivia's sovereign access to the Pacific Ocean. The exchange of Notes cannot therefore be considered an international agreement."

I do not share this conclusion. While it is true that the texts are not exactly the same word for word, to use that as grounds for rejecting the Bolivian position is overly formalistic, in so far as the texts both mention an agreement to enter into direct negotiations and refer to the same object of the negotiation as sovereign access for Bolivia to the Pacific Ocean. Chile's position of "obtain[ing] compensation of a non-territorial character which effectively takes into account its interests" (see paragraph 52 of the Judgment) can be understood by reference to the concern expressed in Bolivia's Note that a solution be found "on terms that take into account the mutual benefit and genuine interests of both nations" (see paragraph 51 of the Judgment).

25. In my view it is therefore established that while these concordant acts may "not contain the same wording", they do create a legal obligation for Chile to negotiate sovereign access to the Pacific Ocean for Bolivia. Subsequent practice (in particular the 1961 Trucco Memorandum) was to confirm this.

26. It is to be noted, however, that the process did not ultimately succeed. Chile holds Bolivia responsible, claiming that it failed to respond to one of Chile's Notes, and Bolivia cites difficulties with public opinion in both countries that made it necessary to defer implementation of an agreement and the opening of negotiations — negotiations which it nonetheless does not seem to have given up on.

### *(c) The Charaña Process of 1975 to 1978*

27. The Joint Declaration of Charaña of 8 February 1975, signed by Presidents Banzer of Bolivia and Pinochet of Chile, was followed by a series of exchanges constituting the "Charaña process", which lasted until 1978. My reading of this episode is different from that of the Court.

28. Bolivia states that the declaration itself is an act which confirms the undertaking to negotiate, while Chile claims that it entails no legal obligation, noting that "an agreement or statement may impose a legal obligation only if the parties intend to create rights and obligations governed by international law", whereas, in this instance, a "record of a decision to continue discussions shows no intention to create a legal obligation to negotiate"[9].

[9] Counter-Memorial of Chile, para. 7.11 *(a)*.

29. It was further decided in the Charaña Declaration to restore diplomatic relations between the two countries. Bolivia made restoration of those relations conditional on Chile's compliance with an obligation to negotiate its access to the sea. Since diplomatic relations were resumed, the condition must have been met, and I therefore conclude that Chile accepted the obligation to negotiate.

30. The Charaña Declaration combines political, diplomatic and legal elements, which is perfectly natural, moreover, since it is a document signed by the two Presidents of the Republics which must also express general political views of mutual solidarity and understanding. At the same time, it is stated in paragraph 4 of the Declaration, as recalled in paragraph 62 of the Judgment of the Court, that "[b]oth Heads of State . . . *have decided* [according to the English translation produced by Bolivia; *"have resolved"* according to the English translation produced by Chile] to continue the dialogue" in order to "solve the vital issues that both countries face, such as the landlocked situation that affects Bolivia" (emphasis added). The issue of the landlocked situation is a reference to sovereign access to the sea which had been discussed at length in earlier stages.

31. The Charaña Declaration thus expresses a common will to negotiate on a clearly identified subject, which was to be confirmed in the months that followed. Indeed, Charaña is a process which must be read through the successive statements and representations made from 1975 to 1978, when diplomatic relations were once again broken off. Taken together, these exchanges and statements form a body of undertakings, even if, taken individually, they do not all have equal legal significance.

32. Of particular note are the guidelines for negotiations that Bolivia proposed to Chile on 26 August 1975, which included a proposal for the cession of territory to Bolivia; these are dealt with by the Court in paragraph 64 of the Judgment, where it recalls the extremely detailed counter-proposals of Chile, to which Bolivia agreed. These practical and specific proposals and counter-proposals should accordingly be understood as demonstrating a common will to negotiate, and not merely as general declarations of a political nature which were made with no intention of follow-up in a negotiation and which therefore had no legal significance. Further Notes were produced, details of which the Court provides in the subsequent paragraphs of its Judgment.

33. Under the Supplementary Protocol to the Treaty of Lima of 3 June 1929, however, Chile was obliged to seek Peru's consent to create a corridor for Bolivia in the province of Arica. Peru agreed on condition that the area thus created be placed under the joint sovereignty of the three States. Chile rejected this condition and the negotiations between Peru and Chile then stalled. Bolivia protested

that Chile had made no effort to obtain Peru's consent to a workable formula.

34. The Charaña process was thus complex. Taken as a whole, as it should be — and despite the fact that the successive episodes over those months produced a mix of specific legal formulations, on the one hand, and statements that were purely political, diplomatic and friendly, on the other — the process has obvious legal significance in that it unambiguously refers to Bolivia's sovereign access to the sea and a willingness to find the most appropriate means of making such access possible, by identifying territories for Bolivia as well as compensatory exchanges for Chile. There is thus an expression of willingness to negotiate which is binding on Chile. Overall, it was a time of intense negotiations, as Chile itself recognizes when it states that there were "sustained negotiations on the possible transfer from Chile to Bolivia of sovereignty over territory to grant Bolivia sovereign access to the Pacific"[10]; and in paragraph 127 of the Judgment, it is stated that the Parties "engaged in meaningful negotiations".

35. Consequently, even assuming that the Charaña Declaration did not by itself establish any binding legal commitment, in my view the subsequent practice consisting of negotiations — which Chile acknowledges to have taken place and whose significance is noted by the Court (though it draws no conclusions in this regard) — on the contrary justifies recognition of an obligation to negotiate incumbent on Chile.

36. The process failed of course, as did implementation of the 1895 Treaty, the exchanges in the 1920s and the 1950 Notes, but these failures do not extinguish Chile's legal obligation to negotiate with Bolivia, which remains in place. Subsequent events confirm that there were continuing exchanges up until 2011, when Chile adopted a radical stance and the President of the Republic declared before the United Nations General Assembly that "there [were] no territorial issues pending" between the two States, the situation having been settled once and for all by the 1904 Treaty[11]. Thereafter Bolivia seised the Court through its Application of 24 April 2013.

37. I am therefore of the view that the Court should have recognized that Chile has a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean, an obligation created by the three instruments and the negotiating process described above.

38. Aside from these factors which to my mind permit a finding that Chile has an obligation to negotiate, I have reservations about the spirit in which the Court conceived of the applicable law in the case in question. I see several dilemmas which I, for my part, would have addressed differently by endeavouring to contextualize the obligation to negotiate.

[10] Counter-Memorial of Chile, para 1.3.
[11] Memorial of Bolivia, Ann. 164.

## II. Contextualization of the Obligation to Negotiate

39. The main point of law in the Court's decision is preserving the integrity of the legal nature of negotiation, which, as the Court states in paragraph 91 of its Judgment, "is part of the usual practice of States in their bilateral and multilateral relations", and thus an essential, everyday tool, one of whose purposes is, in particular, the peaceful settlement of disputes. This concern underlies the Court's strict position that a State cannot be compelled to enter into international negotiations which do not stem from a legally binding commitment to do so, whether it arises out of an agreement, a unilateral act or a principle of international law. A commitment with such a legal basis ensures that a State does not find itself obligated to negotiate "by surprise", for example because of a statement made in circumstances or in a manner such that, from the State's standpoint, it was not expressing an objective intention to be bound but merely a political option.

40. It must be borne in mind that the Court is constrained by the future and by precedent. The Court is of course not bound by the *stare decisis* principle, but it is not easy for it to depart from past rulings. The Court must therefore be mindful of the fact that today's ruling may be echoed by counsel and advocates in a similar case tomorrow. These considerations lead the Court to exercise caution, and discourage it from straying from the beaten track, at the risk of opening up uncertain avenues in future cases. No one can deny the merits of this approach.

41. However, I believe such caution was unwarranted in this instance, since, as I stated earlier, the episodes of 1920, 1950 and 1975 demonstrated the existence of a legal commitment by Chile which was sufficient to establish its obligation to negotiate. In deciding otherwise, the Court based its reasoning on a particularly strict form of positivism that fails to take into account the cumulative effect of the successive elements relied on by Bolivia, and makes an overly rigid distinction between legal obligations and moral or political and diplomatic ones in a context where the nature of the obligation to negotiate invoked by Bolivia remained unclear.

### *(a) A Sequence or an Accumulation of Elements?*

42. During the hearings, Bolivia argued that "even if there is not a single decisive event — a magic moment when the obligation is created — cumulative historical practice may have a 'decisive effect'"[12]. As the Court observes in paragraph 174 of its Judgment, this argument "is predicated on the assumption that an obligation may arise through the cumulative effect of a series of acts even if it does not rest on a specific legal basis". I regret that, in this same paragraph, the Court rejected Bolivia's

[12] CR 2018/10, p. 15, para. 3 (Akhavan).

argument on the grounds that since no obligation has arisen from any of the invoked legal bases taken individually, "a cumulative consideration of the various bases cannot add to the overall result", thereby subscribing to Chile's position which one of its counsel imaginatively summed up as "0 + 0 + 0 = 0". Although the result of this sum is correct mathematically, it is not necessarily so in international law, which is not arithmetic. And it is precisely because international law is not an exact science but a social science that its rules are not applied mechanically. However, in its zeal to safeguard the integrity of the principles governing negotiations and the pure nature of obligations, so as to preclude any unintentional commitment, in this paragraph of its decision the Court chose to apply the rule of law in a way that is largely indifferent to the historical and political realities at issue and the moral imperatives that should have helped place the rule in context.

43. There is indeed no reason to sequence the acts in order to consider each one in isolation from the others, since they all concern the same subject and are all part of the same overall claim. There were of course breaks in that claim, but it will be readily conceded that, for Bolivia, which had become landlocked, a question as crucial as access to the sea was a recurrent one; given this context of accumulation and repetition, the Court's approach is not, in my view, self-evident. Bolivia has repeated the same claim for over a century. In the hope of achieving a favourable outcome, it has formulated its claim in different ways, in various circumstances and through a wide range of acts and conduct. These have, in turn, led to responses from Chile which have also varied in content and intensity and which have always originated from senior foreign policy officials. These representations must be considered as a whole and cannot be subject to the same régime as a single, isolated act that can be examined alone, out of context. The Parties were, moreover, well aware of this: Chile emphasizing the sequential nature of the various elements of this long process, while Bolivia sees them as a continuum. Yet international law does not disregard the effect of repetition, which is sometimes even a requisite element for an act to have legal effect (protests, for example).

### *(b) Legal Rules and Moral Rules*

44. In certain situations, legal rules and moral rules coincide, as is only natural in a system of law including principles which themselves derive from moral rules. Good faith is one such principle. Not that either Party has breached it. Besides, as the Court has stated on numerous occasions, quoting the arbitral award in the *Lac Lanoux* case (*(Spain, France)*, *Reports of International Arbitral Awards (RIAA)*, Vol. XII, p. 305), "there is a general . . . principle of law according to which bad faith is not presumed" (see *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267,

para. 150; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101; see also the dissenting opinion of Judge Yusuf in the case concerning *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 402, para. 54).

45. Bolivia frequently invoked good faith but — as we saw with estoppel and legitimate expectations — without any legal underpinning, it was by itself ineffective.

46. The question of good faith is different as regards the statements and representations which Chile now describes, in its written pleadings and oral arguments before the Court, as mere political and diplomatic discourse intended to maintain good relations between the two States. I am not certain that Chile could seriously have thought it was improving relations and being a good neighbour by deliberately raising hopes which, since not part of a binding obligation, would only be dashed — as indeed they were. I believe that, on the contrary, a State that was acting in good faith, as Chile undoubtedly was when it made those statements, expected that sooner or later they would lead it to the negotiating table, and that it was only much later, before the Court and *ex post*, that they would be regarded as mere diplomatic courtesies.

47. It is regrettable that the Court did not address these moral aspects. Perhaps, as I believe, Chile was sincere in expressing its willingness to find a solution to the problem of Bolivia's landlocked situation, although such a sensitive issue involving questions of territorial sovereignty could clearly not be resolved quickly. Thus, any delays or difficulties were probably material in nature, and did not call into question any willingness to negotiate. Or perhaps — a second possibility which I readily exclude — Chile has, for over a century, carefully walked the fine line between political and diplomatic promises and legal promises, taking care never to slip into the legal side. Accepting this possibility would raise the question whether safeguarding the legal integrity of the negotiation process, a prime tool in international relations, is sufficient justification for those same international relations to be safely founded on morally questionable behaviour, and thus unreliable bases, at a time when good conduct and relationships of trust are being promoted in international relations.

48. Although, as has been pointed out, an intention to negotiate is not an obligation to do so, I regret that the Court did not consider whether, when an intention is repeated over the years, and frequently by a State's senior officials, the line between intention and obligation becomes blurred. The nature of that obligation, as invoked by Bolivia, must of course be clear.

*(c) Obligation of Means or Obligation of Result?*

49. Did the ambiguity of Bolivia's position on this point possibly complicate the handling of the present case by introducing some uncertainty about the nature of the alleged obligation? The initial claim, as set out in Bolivia's Application and Memorial, asserts that "Chile has the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean"[13]. According to Bolivia, the legal nature of the obligation, as described in greater detail in its Memorial, is that of an "affirmative obligation to negotiate in good faith in order to achieve a particular result"[14], and thus "[t]he requirement that the Parties in this case negotiate to secure a specified result gives a special feature to this obligation: it survives until the reaching of that result"[15], and "it is an obligation to negotiate in order to achieve a specific result"[16]. Clearly, the obligation referred to here is an obligation of result.

50. In its Reply, Bolivia tempers its position and, dismissing the binary distinction between an obligation of means and an obligation of result, refers to the notion of an obligation that is "conditional" or "qualified" in that "the obligation to negotiate is entered into within a predetermined framework imposed upon the Parties for the duration of the negotiations. The precise result of the negotiations, however, is not predetermined, because a wide margin of discretion is left to the Parties."[17] In short, "[i]t differs from an obligation of result, but it is an obligation to negotiate with a view to reaching an agreement regarding the objective that has been agreed upon by the Parties (a Bolivian sovereign access to the sea)"[18]. The idea of a middle ground in between an obligation of means and an obligation of result is an interesting one, especially from a doctrinal point of view, but it fails to shed any light on the present instance. Indeed, during the oral proceedings, Bolivia subsequently — and wisely — took the line of least resistance when its counsel stated on the first day of oral argument: "Bolivia's case is remarkable in its modesty. All that it asks is for Chile to return to the negotiating table."[19] In concluding Bolivia's oral arguments, another counsel nonetheless developed the above-mentioned argument from the Reply, and the final submissions presented by Bolivia's Agent "remained unchanged since the Application", as the Court notes in paragraph 85 of the Judgment[20].

[13] Application of Bolivia, para. 32 *(a)*; Memorial of Bolivia, para. 500 *(a)*.
[14] Memorial of Bolivia, para. 221.
[15] *Ibid.*, para. 289.
[16] *Ibid.*, para. 290.
[17] Reply of Bolivia, para. 118.
[18] *Ibid.*, para. 119.
[19] CR 2018/6, p. 30, para. 30 (Akhavan).
[20] CR 2018/10, pp. 59-60, paras. 7-8 (Chemillier-Gendreau).

51. Yet it is abundantly clear that the more the claim tends towards an obligation of result, the lower the chances are it will be satisfied, because it must be ascertained beyond doubt that such a binding obligation was indeed undertaken.

52. In its 2015 Judgment on the preliminary objection, the Court stated that if, *arguendo*, it were to find that an obligation to negotiate existed, "it would not be for the Court to predetermine the outcome of any negotiation that would take place in consequence of that obligation" (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 605, para. 33). However, if an obligation is definitely not an obligation of result, is it simply an obligation of means?

53. Like Bolivia, I am not convinced that matters must be seen from this alternative angle. The obligation borne by Chile is more than a simple obligation of means, in view of the clearly defined purpose of providing Bolivia with sovereign access to the sea, which has always been at the heart of the discussions between the two States.

54. Paul Reuter's doctrinal notion of a "fixed obligation"[21] falls in between an obligation of means and an obligation of result, in line with what he calls the obligation's "context". In the present case, disparate elements of differing legal value occurring over a long period of time have created a context that could have allowed for the recognition of a "fixed obligation", which would have enabled the Court to consider that there was an obligation whose *object* was to hold negotiations with the clearly defined *objective* of (or negotiations *aimed at*): sovereign access to the Pacific Ocean for Bolivia, and fair compensation for Chile. The negotiations aimed at achieving this objective would have to be conducted in good faith, such that they "are meaningful" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85) and are pursued "as far as possible" (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 131, para. 150, quoting the Advisory Opinion on *Railway Traffic between Lithuania and Poland* (*Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116)). Yet as the Permanent Court of International Justice found in its above-mentioned Advisory Opinion, and as this Court found in 2010 in the case concerning *Pulp Mills on the River Uruguay* (*(Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 68, para. 150), "an obligation to negotiate does not imply an obligation to reach an agreement".

55. Besides, can we even speak of "negotiations" when it comes to an

[21] Paul Reuter, "De l'obligation de négocier", *Il processo internazionale: studi in onore di Gaetano Morelli,* Milan, Giuffré, 1975, pp. 711 *et seq.*

obligation of result? The Court does find in paragraph 86 of its Judgment that States "may agree to be bound by an obligation to negotiate", but when that obligation incorporates a predetermined result, does the notion of negotiation still carry any meaning? Can this situation be considered to be consistent with the characteristic of negotiations whereby parties are free to suspend them or break them off at any time, or to ultimately "not reach an agreement"? Aside from the requirement that good faith be respected and applied during negotiations, it is freedom which prevails. But freedom is curbed if it is limited to discussions on the means of obtaining a result fixed in advance. All things considered, apart from exceptional circumstances such as negotiations on nuclear disarmament — the Court having noted in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons set out an "obligation to achieve a precise result" (*I.C.J. Reports 1996 (I)*, p. 264, para. 99) — is an obligation of result compatible with negotiation? I regret that the Court did not avail itself of this opportunity to give these delicate and unclear questions greater consideration than it has done, as its view on them was highly anticipated.

## Conclusion

56. I deeply regret the overwhelming rejection of the positions of Bolivia which, alongside its sense of injustice, has now seen its hopes dashed that a decision of the Court would compel Chile to come to the negotiating table with a view to providing it with a portion of coast that would be the lifeline of any landlocked State. These effects are obviously not lost on the Court, but need I recall that Article 38 of the Court's Statute requires it to decide in accordance with the law? Conceptions of the law and of its requirements may of course not be uniform, leading to different options and sometimes dissenting opinions, but the law must be applied in all its rigour in every instance.

57. With this in mind, paragraph 176 of the Judgment merits close attention. It shows that the question of Bolivia's sovereign access to the sea has not been closed by this ruling, which is anything but a shut door. While Bolivia's arguments failed to convince the majority, with this paragraph the Court clearly wanted to do more than simply offer Bolivia a "consolation prize": it in fact reflects the limits of the courses of action open to the Court, which decides disputes on the basis of international law alone, unless the parties ask it to decide *ex aequo et bono* (which might have been a wise choice for States with a genuine desire to put a definitive end to the difficult legacy of the historic conflict known as the War of the Pacific). With the limits thus defined, the Court's concern is that the dispute should not persist and that its decision should not be understood as being the end of the matter, allowing things to remain as they are.

58. In this regard, while hard for Bolivia, the Judgment could, if the Parties so wish, prompt a return to negotiations, which would not be imposed but desired by both sides with a renewed spirit. Indeed, it is questionable whether negotiations entered into on the basis of coercion would succeed. However, once the initial disappointment and frustration have passed on one side, and the joy of winning has faded on the other, I hope that calmer minds will be able to appreciate fully what is at stake. This is not the place to discuss that. It is for the States themselves to do so, by making the more measured claims required on the one hand, and by putting forward means of satisfying them on the other, through a balance of mutual concessions and with an awareness that good neighbourly relations between States is one of the keys to ensuring happy populations thanks to the progress fostered by economic, commercial and cultural co-operation between players able to draw on common action to drive their development. That is how I understand paragraph 176 of the Court's Judgment, and, in particular, the last sentence of that paragraph. I attach the utmost importance to this text, and hope my viewpoint will be shared by Bolivia and Chile, who will then, quite rightly, be able to satisfy the former's claim for sovereign access to the sea while granting the latter the legitimate compensation it is entitled to receive.

*(Signed)* Yves DAUDET.