

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

Judgment of 1 October 2018

On 1 October 2018, the International Court of Justice delivered its Judgment in the case concerning *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*. In its Judgment, the Court found 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 rejected consequently the other final submissions presented by the Plurinational State of Bolivia.

The Court was composed as follows: 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.

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Procedural background (paras. 1-15)

The Court recalls that, 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”. On 15 July 2014, Chile raised a preliminary objection to the jurisdiction of the Court. 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. Public hearings were held from 19 March to 28 March 2018.

I. Historical and factual background (paras. 16-83)

Due to the importance of the historical context of this dispute, the Court begins by examining certain events that have marked the relationship between Bolivia and Chile.

1. Events and treaties prior to 1904, including the 1895 Transfer Treaty (paras. 19-24)

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. On 10 August 1866, Chile and Bolivia signed a Treaty of Territorial Limits, which established a demarcation line between the two States, separating their Pacific coast territories. The boundary was confirmed by the Treaty of Limits of 6 August 1874. 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 coastal region of Bolivia. The Treaty of Peace between Chile and Peru signed on 20 October 1883 (also known as 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. 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 these two territories, Article IV of the Treaty on the Transfer of Territory provided that Chile would cede certain territory to Bolivia. These three treaties were followed by four protocols. 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 the protocol on the scope of the obligations in the treaties of 18 May 1895 which clarified the obligations undertaken by the Parties. As this condition was never met, the three treaties of 18 May 1895 never entered into force.

2. *The 1904 Peace Treaty* (para. 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. 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, at the expense of Chile, of a railroad between the port of Arica and the plateau of La Paz, 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* (paras. 26-46)

A. *The 1920 "Acta Protocolizada"* (paras. 26-31)

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".

B. Follow-up exchanges (1920-1925) (paras. 32-41)

Beginning in November 1920, Bolivia sought the revision of the 1904 Peace Treaty through the League of Nations, in accordance with Article 19 of the Treaty of Versailles which provides that the “Assembly may . . . advise the reconsideration by Members of the League of treaties which have become inapplicable”. The request was deemed inadmissible by a Commission of Jurists because only the contracting States, not the Assembly, were competent to modify treaties. On 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”. 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. 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.

C. The 1926 Kellogg Proposal and the 1926 Matte Memorandum (paras. 42-46)

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. According to the proposal, Chile and Peru would cede to Bolivia, in perpetuity, all right, title and interest which either may have in the Provinces of Tacna and Arica, 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. 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. By a memorandum of 4 December 1926 (known as the “Matte Memorandum”) addressed to the United States Secretary of State, the Minister for Foreign Affairs of Chile stated that the Kellogg Proposal went much farther than the concessions which the Chilean Government was willing to make, since it involved the cession of Chilean territory. By a memorandum dated 12 January 1927, the Minister for Foreign Relations of Peru informed the United States Secretary of State 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 (paras. 47-49)

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. 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.”

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 (paras. 50-53)

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. In a Note dated 1 June 1950, the Ambassador of Bolivia to Chile made a formal proposal to the Minister for Foreign Affairs of Chile to enter into 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”. In a Note of 20 June 1950, the Minister for Foreign Affairs of Chile responded that his Government accepted that proposal to enter into negotiations. The negotiations between Chile and Bolivia did not make any further progress in the following years.

6. The 1961 Trucco Memorandum (paras. 54-59)

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. 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, Chile’s Ambassador in Bolivia, Mr. Manuel Trucco, handed to the Minister for Foreign Affairs of Bolivia a memorandum, known as the “Trucco Memorandum”. It emphasized that Chile was open to entering into direct negotiations 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. 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”.

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

7. The Charaña process (paras. 60-70)

On 8 February 1975, a Joint Declaration was signed at Charaña by the Presidents of Bolivia and Chile, known as the Charaña Declaration, in which they committed to continue a dialogue, at different levels, in order to search for formulas to solve the vital issues that both countries faced, such as the landlocked situation that affects Bolivia. In pursuance of the dialogue, 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. 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, Bolivia confirmed that it was willing to consider transferring certain areas of its territory for an equivalent portion of Chilean territory. On 19 December 1975, 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. On 24 December 1976, the President of Bolivia 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, reaffirming the need to pursue the negotiations. 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 in the Charaña Declaration, 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. 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 (paras. 71-75)

On 6 August 1975, the Permanent Council of the Organization of American States (hereinafter 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. 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.

9. The “fresh approach” of 1986-1987 (paras. 76-77)

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. In a meeting between Bolivia and Chile held from 21 to 23 April 1987 in Montevideo, Uruguay, Bolivia presented two alternative proposals to gain access to the Pacific Ocean, both involving the transfer of a part of Chilean territory. 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 consequence of their inability to reach agreement based on its proposals of April 1987.

10. The Algarve Declaration (2000) and the 13-Point Agenda (2006) (paras. 78-83)

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”. 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. 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. 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. On 7 February 2011, the Bolivian and Chilean Ministers for Foreign Affairs issued a joint declaration stating that

“[t]he 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.”

On 17 February 2011, the President of Bolivia 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 reiterated to his Bolivian counterpart 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.

II. Preliminary considerations (paras. 84-90)

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 analyses the meaning and scope of Bolivia's submissions. The Court recalls that, in its submissions, which have remained unchanged since the Application, Bolivia 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". The Court observes that, 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 has recalled, 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". Each of them "should pay reasonable regard to the interests of the other".

The Court notes that negotiations between States may lead to an agreement that settles their dispute, but, generally, "an obligation to negotiate does not imply an obligation to reach an agreement". 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". Bolivia's submissions could be understood as referring to an obligation with a similar character. As the Court observed in its Judgment of 24 September 2015 on the preliminary objection raised by Chile, "Bolivia does not ask the Court to declare that it has a right to sovereign access to the sea". 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". The Court recalls that, 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". As the Court observed, this alleged obligation does not include a commitment to reach an agreement on the subject-matter of the dispute.

The Court further observes that 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 (paras. 91-174)

The Court explains that, 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.

The Court observes that 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 Court states that it 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 (paras. 94-139)

The Court recalls that 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. 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 compelling".

A. The diplomatic exchanges of the 1920s (paras. 98-107)

The Court analyses the diplomatic exchanges between the Parties in the 1920s, in particular the "Acta Protocolizada", i.e. the minutes of a meeting held in January 1920 between the Minister for Foreign Affairs of Bolivia and the Minister Plenipotentiary of Chile in La Paz, as well as the follow-up exchanges to that meeting. The Court recalls that in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and 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". 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. The Court further 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.

B. The 1950 exchange of Notes (paras. 108-119)

The Court then turns to a 1950 exchange of diplomatic Notes between the Parties regarding Bolivia’s access to the sea, as well as to a 1961 memorandum by Chile’s Ambassador in Bolivia, Mr. Manuel Trucco, which was handed to the Minister for Foreign Affairs of Bolivia, referred to by the Parties as the “Trucco Memorandum”. It states that the Notes exchanged 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. Therefore, the exchange of Notes cannot be considered an international agreement. The Court also observes that the Trucco Memorandum does not create or reaffirm any obligation to negotiate Bolivia’s sovereign access to the Pacific Ocean.

C. The 1975 Charaña Declaration (paras. 120-127)

With regard to a Joint Declaration signed by the Presidents of Bolivia and Chile at Charaña on 8 February 1975, the Court states that 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. The Court concludes that an obligation for Chile to negotiate Bolivia’s sovereign access to the sea cannot be inferred from the Charaña Declaration or the statements that followed the adoption of that instrument.

D. The communiqués of 1986 (paras. 128-132)

The Court next examines communiqués issued by the Ministers for Foreign Affairs of Bolivia and Chile in November 1986. It recalls that in the *Aegean Sea Continental Shelf* case (*Greece v. Turkey*), 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”. The Court notes that the two communiqués 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) (paras. 133-135)

With respect to the “Algarve Declaration” issued by the Ministers for Foreign Affairs of Bolivia and Chile on 22 February 2000, the Court considers that it does not contain an agreement which imposes on Chile an obligation to negotiate Bolivia’s sovereign access to the Pacific Ocean. The Court reaches the same conclusion with respect to a Joint Communiqué issued by the Presidents of Bolivia and Chile on 1 September 2000.

F. The 13-Point Agenda (2006) (paras. 136-139)

The Court then analyses the “13-Point Agenda” drawn up during a July 2006 meeting of the Bolivia-Chile Working Group on Bilateral Affairs and publicly announced by the Vice-Ministers for Foreign Affairs of Bolivia and Chile. It 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.

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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 (paras. 140-148)

With respect to Bolivia’s argument that declarations and other unilateral acts of Chile create an obligation to negotiate Bolivia’s sovereign access to the Pacific Ocean, 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”. 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”. 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. 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* (paras. 149-152)

The Court next considers Bolivia's assertion that Chile has acquiesced to negotiating Bolivia's sovereign access to the Pacific Ocean. It notes that Bolivia has not identified any declaration requiring 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 the United Nations Convention on the law of the sea, 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* (paras. 153-159)

Concerning Bolivia's contention that an obligation of Chile to negotiate Bolivia's sovereign access to the Pacific Ocean may be based on estoppel, 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". It 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* (paras. 160-162)

The Court then examines an argument by Bolivia that Chile's denial of its obligation to negotiate and its refusal to engage in further negotiations with Bolivia "frustrates Bolivia's legitimate expectations". 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* (paras. 163-167)

The Court then considers whether an obligation to negotiate could be based on Article 2, paragraph 3, of the United Nations Charter or Article 3 of the OAS Charter. It recalls that, according to Article 2, paragraph 3, of the United Nations Charter, "[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". For the Court,

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. The Court holds that no obligation to negotiate Bolivia's sovereign access to the Pacific Ocean arises for Chile under the United Nations Charter. Concerning the OAS Charter, the Court recalls that its Article 3 (*i*) provides that "[c]ontroversies of an international character arising between two or more American States shall be settled by peaceful procedures". The Court also does not consider that this provision could be the legal basis of an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

7. The resolutions of the General Assembly of the Organization of American States (paras. 168-171)

The Court next turns to Bolivia's argument that 11 resolutions of the OAS General Assembly which dealt with the issue of its sovereign access to the Pacific Ocean confirm Chile's commitment to negotiate that issue. It notes that none of the relevant resolutions 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. 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 (paras. 172-174)

Finally, the Court examines Bolivia's argument that, even if there is no instrument, act or conduct from which, if taken individually, an obligation to negotiate its sovereign access to the Pacific Ocean arises, all these elements may cumulatively have "decisive effect" for the existence of such an obligation. 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 Court's 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 (paras. 175-176)

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”. Accordingly, the Court cannot accept the other final submissions presented by Bolivia, which are premised on the existence of such an obligation, namely that the Court adjudge and declare that Chile has breached that obligation and that Chile must perform that obligation in good faith, promptly, formally, within a reasonable time and effectively. The Court adds that its 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 which both have recognized to be a matter of mutual interest. With willingness on the part of the Parties, meaningful negotiations can be undertaken.

Operative clause (para. 177)

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.

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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.

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Declaration of President Yusuf

1. President Yusuf agrees with the Court's Judgment on the merits that led the Court to its decision. Nevertheless, he is of the view that the background and circumstances of the present dispute call for certain observations to be made.

2. 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. On the basis of the evidence made available by the Parties, the Court was unable to find that Chile had undertaken a legal obligation to negotiate Bolivia's "sovereign access" to the Pacific Ocean.

3. This, however, may not put to an end the issues which divide the Parties or remove all the uncertainties affecting their relations. Indeed, the law cannot claim to apprehend all aspects of disputes or the reality of all types of relations between States. There are certain differences or divergence of opinions between States which inherently elude judicial settlement through the application of the law.

4. In such circumstances, it is not inappropriate 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 para. 176 of the Judgment).

5. According to President Yusuf, this means that the Court 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. In that respect, the Court's work facilitates the peaceful settlement of disputes above and beyond the realm of the strictly legal.

Dissenting opinion of Judge Robinson

In this opinion, Judge Robinson explains his vote against the Court's finding 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 the Court's rejection of the other final submissions of Bolivia.

Judge Robinson has identified the Trucco Memorandum 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 his view, 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 Ocean.

In his opinion, 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. For Judge Robinson what is important 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* as "the particular circumstances in which [the particular instrument] was drawn up".

For Judge Robinson an expression of willingness to negotiate can take on the character of a legal obligation if the particular circumstances or the context in which the words are used evidence an intention to be legally bound.

He disagrees with the majority's approach to the 1950 Notes for the following reasons. The majority have failed to carry out any meaningful examination of the content of the 1950 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. While agreeing that the 1950 Notes are not binding, he does so on the basis of Bolivia's failure to accept Chile's offer of compensation of a non-territorial character, rather than for the reason that they are not an exchange of Notes within the meaning of Article 13 of the VCLT. 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.

Turning to the Trucco Memorandum and the Bolivian response, Judge Robinson observes that the majority have spent little time analysing the Trucco Memorandum and, in fact, have not analysed the Bolivian response at all. Judge Robinson then conducts an examination of the content and particular circumstances in which they were made. In his view, in the Trucco Memorandum and the Bolivian response, the intention of the Parties to be legally bound 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.

In his opinion, the Trucco Memorandum cannot be read on its own. It must be read together with Bolivia's response. Consequently, by not analysing Bolivia's response, the majority disregarded the brand-new element of 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.

Judge Robinson therefore concludes that 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) VCLT; more specifically they constitute two instruments in which Chile has undertaken a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

Judge Robinson concludes that under the 1975 and 1977 Charaña Declarations, Chile has incurred an obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.

Judge Robinson holds that the obligation incurred by Chile is to find a formula or solution that will enable Bolivia to have sovereign access to the Pacific.

The exchanges between the Parties from 1962 to 2011 demonstrate that Chile's obligation has not been discharged and still exists today.

Therefore, the Court should 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.

Dissenting opinion of Judge Salam

In his dissenting opinion, Judge Salam expresses his disagreement with the Court's Judgment on key aspects of its analysis of a number of documents presented by the Parties.

First, noting that an exchange of letters may constitute an international agreement creating rights and obligations for the parties involved, he observes that the Notes exchanged in 1950 by the Bolivian Ambassador to Chile and the Chilean Minister for Foreign Affairs were drafted by persons who were capable of committing their respective States. In his view, Chile's Note reproduced the core terms of the undertaking proposed by Bolivia, namely to "formally enter into direct negotiations" on the question of granting Bolivia sovereign access to the Pacific Ocean, with the aim of conferring "mutual benefit" on both Parties. Judge Salam also draws attention to the reason underlying Chile's commitment and considers that these points should have led the Court to interpret the exchange of Notes as establishing an obligation to negotiate between the Parties.

He adds that 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 in a Memorandum of 10 July 1961 addressed to the Bolivian Foreign Minister. In that Memorandum, Chile states that it is still "willing . . . to examine directly with Bolivia, the possibility of satisfying" the latter's aspirations. In its reply, Bolivia expresses its "full consent to initiate, as soon as possible, direct negotiations aimed at satisfying the fundamental national need for its own sovereign access to the Pacific Ocean". Judge Salam concludes that, given the terms used and the context in which these Notes were drafted, this exchange should be interpreted as renewing the Parties' 1950 agreement to negotiate.

Judge Salam then notes that Chile's obligation to negotiate with Bolivia a solution to its landlocked situation is also confirmed by unilateral declarations made by Chile. He points, in particular, to the letter sent by the Chilean President to his Bolivian counterpart, in which the former writes of his 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". Recalling that declarations taking the form of unilateral acts may have the effect of creating legal obligations where the person making the declaration is capable of committing the State, Judge Salam considers that these words clearly reflect Chile's intention to fulfil its undertaking to negotiate with Bolivia.

Thus, in Judge Salam's opinion, the events which followed the 1950 exchange of Notes, and 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 subsequent 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 continuing obligation to negotiate the question of granting Bolivia sovereign access to the Pacific Ocean. He adds that the failure of a round of negotiations does not suffice in itself to infer that such an obligation is extinguished.

Judge Salam reaches this conclusion without reference to the principles of estoppel, acquiescence and legitimate expectations, however, since he does not believe that the conditions for their application are satisfied in this case.

Lastly, Judge Salam examines the nature and scope of the undertaking given, and recalls that this undertaking is limited and cannot be an obligation of result, as frequently claimed by Bolivia.

Dissenting opinion of Judge *ad hoc* Daudet

The Court did not uphold any of the grounds claimed by the Applicant to be capable of creating an obligation for Chile to negotiate sovereign access to the sea for Bolivia. In his dissenting opinion, Judge *ad hoc* Daudet considers that at least three elements should nonetheless have been regarded as constituting such an obligation, namely the 1920 "Acta Protocolizada", the 1950 exchange of Notes and the Charaña process of 1975-1978, each of which he examines in turn. However, he agrees with the Court's finding that Bolivia's reliance on other elements, and on estoppel and the principle of legitimate expectations, cannot be upheld.

More generally, Judge *ad hoc* Daudet is of the view that the main point of law in the Court's decision concerns preserving the integrity of the legal nature of international negotiation, which, according to the Court, "is part of the usual practice of States in their bilateral and multilateral relations". The concern to preserve that integrity underlies the Court's position that a State cannot be compelled to enter into international negotiations which do not arise from a legally binding commitment to do so, but from a mere political option.

Judge *ad hoc* Daudet believes that, in applying this principle to the case in hand, the Court has not taken due care to contextualize the rule of law, failing to take into account the cumulative effect of the successive elements invoked by Bolivia and making an overly rigid distinction between legal obligations and moral or political and diplomatic ones. A significant part of his dissenting opinion explores how, on the contrary, when taken cumulatively, legal elements produce legal effects.

As regards the moral aspects, Judge *ad hoc* Daudet is of the view that they have not been satisfactorily addressed through a closer consideration of the effects of the principle of good faith, which is another fundamental component of international negotiations. Judge *ad hoc* Daudet observes that 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. Although a mere intention to negotiate is not an obligation to do so, Judge *ad hoc* Daudet questions whether, when an intention is repeated over the years, and frequently by a State's senior officials, the line between moral intention and legal obligation becomes blurred.

Judge *ad hoc* Daudet adds that it would undoubtedly have been helpful to further clarify the measure of ambiguity surrounding Bolivia's position on the nature of the obligation to negotiate, a notion which, moreover, has specific characteristics and raises questions.

Finally, Judge *ad hoc* Daudet welcomes the fact that, in the last paragraph of its Judgment, the Court does not draw a line under the question of Bolivia's sovereign access to the sea, stating that its decision must be understood as signifying that the Parties may continue their negotiations on a question which they have both recognized to be a matter of mutual interest and thereby bring an end to this dispute.
