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/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.

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