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 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 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 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 Preliminary Objections Judgment 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 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: "'Treaty' 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.

---

[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.

[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.

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* 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 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)*. 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* 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*, 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* as "the particular circumstances in which [the particular instrument] was 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 President was sworn into office."[8]

---

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

[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.

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

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*, 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 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.

---

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

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.

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 July 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.

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

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

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 to 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].

---

[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, Ann. 143; 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.

[14] Counter-Memorial of Chile, Ann. 144.

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 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. 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 Bolivian 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 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

[15] CR 2018/7, p. 10, para. 26.

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 proceeds 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* 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 comes 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 the 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 is correct in its 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 "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 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 [organisations] 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 willingness 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.

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

(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 disregarding 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 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 compensation. 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 necessary 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 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

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

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.

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* 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.

---

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

[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.

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 Binational Rapprochement Committee was established. At meetings 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 for 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 for 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 ROBINSON.