DISSENTING OPINION OF JUDGE SALAM

[Original English Text]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and continues:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Signed) Nawaf SALAM.

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

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

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

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

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

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