DISSENTING OPINION OF JUDGE *AD HOC* DAUDET

[Translation]

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

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

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

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

[1] Memorial of Bolivia, Ann. 39.

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

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

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

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

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

I. Existence of an Obligation to Negotiate Incumbent on Chile

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

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

(a) The 1920 "Acta Protocolizada"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) The Charaña Process of 1975 to 1978

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Contextualization of the Obligation to Negotiate

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

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

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

(a) A Sequence or an Accumulation of Elements?

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

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

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

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

(b) Legal Rules and Moral Rules

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

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

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

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

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

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

(c) Obligation of Means or Obligation of Result?

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

(Signed) Yves DAUDET.