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THE ATACAMA DISPUTE:
The legal proceedings between Chile and Bolivia regarding the resources present in the area

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Introduction

South American history is a complicated and fascinating concept. Since its discovery, America has been a land of exploration and study for Europeans who, willingly or not, forever shaped the destiny of the continent.

It was 1492 when the Italian explorer Christopher Columbus reached the coasts of El Salvador with three small ships, waving the Spanish flag. He believed he had reached India, while in fact he would soon understand that he had discovered a whole new part of the globe, which would soon become one of the world's richest and most complex areas.

While the northern part of the continent was being colonized by the French and the English, South America caught the eye of the Portuguese and Spanish empires.

Many were the populations who lived in the center and southern part of America. In the area between the modern countries of Bolivia and Chile, there were three main cultures. In the region of Camarones a population of fishers and hunter-gatherers developed since 800 B.C., called the Chinchorros by the surrounding populations. Later, the Tiwanaku population developed. In the oasis surrounding the rivers Silala and Loa, the populations of the Atacama desert developed a regional identity and a complex political as well as economic system.

The first European to reach Chile was not Colombus but Magellan, after completing the first circumnavigation of the globe. It was in 1540 that Pedro de Valdivia came back to the area with the objective of conquering the territory[1].

The Atacama region is the area between modern Bolivia and Chile, which was scarcely populated due to its lack of resources and extreme aridity. Therefore, the processes of conquest and colonization in the region were delayed, as colonizers were more oriented to taking control of zones with more attractive characteristics. The region, not yet divided by the Spaniards, saw the opportunity to unite and fight the invaders[2].

History teaches that the fight was eventually unsuccessful, but that it was fundamental to define the area as belonging to a myriad of proud clans and populations eventually defeated by a larger, technologically advanced, empire.

As a matter of fact, the region of the Atacama desert was the protagonist of conflicts, both physical and forensic, the consequences of which are still present in modern-day society. Chile and Bolivia are in fact divided by a century-long rivalry which finds its roots in the events linked to this region.

The desert of Atacama develops mostly in the region of Tarapacá, situated in the northernmost part of Chile and sharing boundaries with Peru and Bolivia.

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[1] *Descubrimento y colonizacion* española, This is Chile, https://www.thisischile.cl/historia/descubrimiento-y-colonizacion-espanola/

[2] J. Lehuedé *Atacama Colonial, de la Conquista a la Colonia*, Museo Chileno de Arte Precolombino, 2012, p. 112.

In 1704, the area was scarcely populated, as it was considered lacking of resources. It was around that year that mineral goods were found in the region. As a consequence of the discovery of copper, silver and gold and the subsequent booming of mines, the population grew larger and larger, making mining the principal economic activity of the area[3] and intimately shaping the culture of the area

In the 19th century however, the fate of the region was changed forever as nitrate deposits were discovered, provoking a boom in both the population and economic growth of the region[4].

After the colonization of the Americas by the European powers, the Atacama Desert was incorporated in the Spanish empire. After the declaration of independence made first by Chile in 1818 and later by Bolivia in 1925, the region was shaped by new boundaries. However, because the desert had not yet been completely mapped and was believed to hold no economic interest, the limit between the two countries was never officially set. Moreover, during the creation of boundaries between the two countries the territorial reach of Bolivia expanded towards the sea. However, considering the natural characteristics of the territory, Bolivia often found it easier to reach the port of Arica, at the time belonging to Peru, rather than using its national port of Antofagasta

When nitrate deposits were discovered in 1842[5], the boundaries between the two countries became of paramount importance, as Chile almost immediately started organizing expeditions to find and exploit these newly discovered resources. Often times, these explorations led Chilean vessels beyond State lines. The grievances regarding the Chilean raids became the *casus belli* for the beginning of the so-called War of the Pacific which saw Peru and Bolivia allied against Chile. The war was eventually won by Chile who, in the Peace Treaty signed in 1874, declared that its territory would include the Bolivian littoral, therefore transforming Bolivia in a landlocked State.

Since then Bolivia has continuously fought to regain its lost sovereign access to the sea. Due to the unviability of dividing the Chilean territory, Bolivia directed its efforts towards obtaining sovereignty over the city of Arica, which was first under Peruvian rule and is now the northernmost city in Chile.

Natural resources continue to be a cause for litigations between Chile and Bolivia. Luckily, since 1874, disputes are solved in courthouses and not on the battlefield. This analysis will focus on the legal battles which stemmed from the desire to control the natural resources of the area.

In 2013 Evo Morales, the Bolivian President, declared the beginning of legal procedures to ask the International Court of Justice[6] to deliberate over the existence of a Chilean obligation to negotiate a Bolivian sovereign access to the Pacific Ocean.

The first section of this analysis explains the armed conflict between Bolivia and Chile, while the second and the third will focus on the legal battles.

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[3] *Región de Atacama, síntesis regional*, Departamento de Estudios de Chile, 2015, p. 8.
[4] *Historia de la region de Tarapacá*, Gobierno Regional de Tarapacá, https://www.goretarapaca.gov.cl/nuestra-region/historia/
[5] J. Valega, *Causas i Motivos de la Guerra del Pacífico*, Imprenta La Moderna, Chile, 1917, p. 32.
[6] Hereinafter ICJ

The second part will be dedicated to the Bolivian request to the ICJ to recognize the duty Chile has to negotiate a sovereign access to the sea for Bolivia. Bolivia based its claim on a modern point of view which considered the constant dialogue between the two countries on the issue as the start of an obligation from Chile.

The proceeding, which came to an end on October 1st 2018, found the Bolivian claim unfounded, as the conversations held by the two countries since the end of the Pacific War are to be considered as customary diplomatic practices of modern States and cannot be recognized as foundation for an obligation.

The Bolivian effort to gain a sovereign access to the sea originates from a variety of reasons. One of the causes can be found in the Bolivian perception of the defeat at war and the subsequent Treaty as a humiliation imparted by Chile. The majority of the population sees the Treaty as an unjust punishment, forced upon the nation in a time of weakness. Accordingly, the Chilean population does not recognize the consequences being a landlocked State brings, and sees the Bolivian claim as purely unjustified and closer to a whim than to an actual grievance. As a matter of fact, the landlocked status of Bolivia is causing great damages to the nation, as it now depends almost completely on Chile to export its products. Moreover, even if Chile granted the provision of numerous infrastructures to allow Bolivia to reach the coast, they are often inefficient or subjected to delays and strikes, caused by the response of Chilean workers to privatization measures.

Given these premises, the analysis will explain the decision of the ICJ making reference to previous cases, in order to better clarify the position of the Court. Attention will also be given to the legal documentation submitted by both the parties and the Court. The Bolivian Application was in fact followed by a Memorial, contested by Chile in a Preliminary Objection. In 2014, however, the Court explained that the case could not be solved in a preliminary study, and requested a Counter Memorial from Chile which demonstrated its opinion on the matter. The decision of the Court in 2018 was taken considering all the previously mentioned documents. It maintained that Chile had demonstrated its willingness to negotiate a transformation of its boundaries through its extensive diplomatic exchange, but that these declarations could not be held as the beginning of an obligation.

Lastly, the analysis will focus on the legal procedure, this time started by Chile, which regards the use of the river Silala. The river holds a particularly important role for Chile, as it is the main watercourse passing through the Atacama Desert. The root of the complaint can be found in the beginning of some projects by Bolivia located near the watercourse. Bolivia on the other hand declares that as the springs of the river are part of its territory and the watercourse has been artificially diverted, the Silala does not have an international nature and is therefore not subjected to the obligations deriving from the concept of international river.

The proceeding is still in its initial phases, as the Court has yet to develop a judgement. However, many scholars have developed theories over the rights and duties of States regarding international rivers. Moreover, taking example from previous cases it can be possible to understand the tendencies of international law regarding these issues.

The relations between the two countries have been cold and tense for more than a century due to events taking place in the Atacama region. Bolivia has been celebrating for years the Day of the Sea[7], when the Bolivian Navy parades through the streets of the Bolivian Capital of La Paz. Neither State has a national Embassy in the other's territory. Most of the Chilean population dismisses the issue considering it the meaningless complaint of a jealous country.

Given these premises, it is easy to see how the cases taken into consideration are paramount to understand the future of the relations between the countries. Depending on how the institutions and media of both countries will present the issue once the Court will have given its Judgement, the relations between Chile and Bolivia, strained by the 2018 verdict, might become warmer and less tense in future years.

[7] In Spanish *Dia del Mar*.

Chapter I
Historical Context

The focus of this chapter will be on the historical events which brought the region housing of Atacama, the driest area on Earth, to become interesting both in the economic and political sphere.

The region taken into consideration is Tarapacá, placed in the far north part of Chile and sharing boundaries with Peru and Bolivia.

The culture of the region is intimately related to the mining activity, the principal economic activity of the area[8], discovered around the year 1700[9]. During that time, the region started to slowly populate as a consequence of the recently found mineral resources comprising of copper, silver and gold. It was in the 19th century however, that the discovery of nitrate deposits provoked a boom in both the population and the economic growth of the region[10].

This chapter will develop the events which eventually caused the century-long rivalry between Chile and Bolivia, in order to clarify the causes of the concluded legal proceeding before the International Court of Justice regarding the Chilean duty to cooperate to guarantee a sovereign access to the Pacific Ocean to Bolivia.

An historical point of view will also be useful to understand the reasons which brought Chile to ask for the judgement of the ICJ regarding the use of the waters of the river Silala.

The chapter will initially focus on the Spanish rule over the area and the creation of what we now know as the Region of Tarapacá. It will later describe how the region was divided after both Bolivia and Chile declared their independence from Spain, and how the discovery of guano and nitrate deposits sparked the interest of Chile.

Later, the chapter will describe the conflict sparked from the frequent Chilean raids in the Tarapacá region, which became the *casus belli* for the so-called War of the Pacific. The analysis will show how the war changed the fate of Bolivia, as the Treaty signed after the end of the conflict in 1874 indicated that Bolivia would lose its littoral and become a landlocked state.

The last part of the chapter will be destined to explaining how the Bolivian legal battle started, and the many attempts made to regain a sovereign access to the sea, the latest of which was the 2013 application for a Judgement of the ICJ.

1. Spanish Colonization

In the beginning Chile and Bolivia were united under one ruler: the Spanish Empire.

[8] *Región de Atacama, síntesis regional*, Departamento de Estudios de Chile, 2015, p. 8.
[9] *Monografía histórica del liceo de Copiapó desde su fundación hasta si estado actual por el consejo de profesores del mismo liceo*, Copiapó, 1902.
[10] *Historia de la región de Tarapacá*, Gobierno Regional de Tarapacá, https://www.goretarapaca.gov.cl/nuestra-region/historia/

Francisco Pizarro, the man who conquered Peru, obtained a concession of territories as early as 1529. This first piece of land was soon united to the one obtained by Almagro, Pizarro's lieutenant, who obtained the right to discover another 200 leagues. A third concession was granted to Pedro de Mendoza, who obtained another 200 leagues[11].

Pedro de Valdivia, the man who founded of the Chilean capital Santiago, was appointed Governor and Captain-General of the whole Chilean Province[12].

This newly acquired territory would come to be known as the Viceroyalty of Peru. In a report dated 1806, Viceroy Abascal writes "the Viceroyality of Peru, after the last dismemberments and annexations, has the following limits: on the north, the province of Guayaquil; on the south, the desert of Atacama comprising in all its territory from 32' to the north of the equinoxial line to 25° 10' of south latitude[13].

Since its independence, all Chilean constitutions have followed the geographic division that determined the Northern Chilean boundary to be Copiapó:

There are a multitude of documents which declare the northern border to be the desert of Atacama. In 1822, the Political Constitution of the State of Chile declares that: "the Territory of Chile recognizes as its natural boundaries, on the south, Cape Horn; on the north, the desert of Atacama[14]. The document was the predecessor of what would have been known as the Political and Permanent Constitution of the State of Chile. The text maintained that "the territory [of Chile] comprises from Cape Horn to the Desert of Atacama"[15]. 1828 was the year the so-called Liberal Constitution was drafted. Article 2 of the document stated that: "the Chilean nation extends in a vast territory, limited on the north by the desert of Atacama"[16].

In 1833, after the Civil War that had taken place between 1829 and 1830, a new Constitution was drafted. As expected, regarding the boundaries of Chile the Constitution maintains that: "The territory of Chile stretches from the desert of Atacama to Cape Horn"[17]

Straying from the constitutional texts, another demonstration of the Chilean intention to make Atacama their northern border, in 1823 the first department was created, covering an area delimited by the desert of Atacama and the Choapa river. In 1826 the division was declared a province, extending in the same area. It was given the title of Province of Coquimbo and La Serena was declared its capital.

In 1842, the Congress of Chile, under the presidency of Mr Bulnes, promulgated the so-called "ley de los guanos", which recognized the Bay of Mejillones (23° S) as the Chilean northern border[18]. In 1844, at the

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[11] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 5.
[12] Ibidem, p.6.
[13] Ibidem, p.7.
[14] Chilean Constitution, art. 3 1822. https://www.leychile.cl/Navegar?idNorma=1005168&idParte=.
[15] Ibidem.
[16] Chilean Constitutionm art 2. 1828.https://www.leychile.cl/Navegar?idNorma=1005225&idParte=.
[17] A. Brofman. *Constitutional Documents of Chile 1811-1833.* Berlin: De Gruyter p. 199.
[18] E. Skuban, *Lines in the Sand: Nationalism and Identity on the Peruvian-Chilean Frontier*, UNM Press, 2007, p. 7.

dawn of Chilean independence from Spain, its boundaries were described as "all the territory which extends from the desert of Atacama to Cape Horn"[19].

It can be clearly seen that the northern boundary of this district, and subsequently province, were never precisely defined. The desert of Atacama was always considered to be some kind of "no man's land" due to its aridity and extension.

What is now known to be Bolivia, before the war of Peruvian Independence was recognized as "Upper Peru". This part of the Viceroyalty of Peru was permanently made independent by Simon Bolivar, who emancipated this area. He declared Peru as a republic characterized by its freedom and independence. He also constituted the Republic of Bolivia liberating the territory of Upper Peru and declaring it an independent state.

The first president of this newborn Republic was General Sucre, who in 1825 appointed Francisco B. O'Connor with the position of Colonel and instructed him to explore the Province of Atacama, make a survey of its coast and set up a seaport.

O'connor reported: "there are three ports, and of these you may select the best. The said ports are: Atacama, Mejillones and Loa; the two first have no water, and the third is the one the Liberator prefers, although it does not afford good anchorage, but solely on account of its close proximity to Potosi and of its river. Should it not be desirable, you will survey the other two, or any other, with a view of establishing thereat a large city"[20].

Figure 1: The boundaries between Bolivia and Chile before the War of the Pacific.

Source: S. Ramirez, "An analysis of the ICJ decision", 2018.

2. The first aggression

The beginning of the aggressive actions from Chile was dated 1842, when guano was discovered in the desert of Atacama. Guano was a powerful fertilizer, very much an asset for the agricultural-based economies of South

[19] W. Robertson, *The Recognition of the Spanish Colonies by the Motherland*. The Hispanic American Historical Review, no. 1, 1918, p. 70-91.
[20] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 8.

America. Guano was so highly valued that between 1842 and 1845 a multitude of expeditions were carried out by Chilean vessels to locate the deposits and exploit them.

President Bulnes' son Gonzalo, pursuing the career of historian, wrote about his father that "[he had] established the northern and southern boundaries of the Republic [and prepared] for the future Chilean race a territory adequate to their aspirations of industry and expansion"[21]

Bolivia vehemently protested the unilateral redrafting of the limits between the two countries, even if it is believed that it had not done everything in its power to secure the claim for the Atacama[22]. The States' other grievances regarded the guano deposits in its territory. In fact, even if the limit had been set, often Chilean vessels would venture beyond the national territory. The episode which most clearly demonstrated the Chilean behavior towards deposits outside its limits happened in 1845, when the Consul of Bolivia at London filed a lawsuit against a ship belonging to the Chilean Navy for clandestinely misappropriating guano from the coast. The Chilean Minister in Great Britain did not protest the accusation nor the sentence that followed[23].

Since the reserves of guano were discovered, the movements towards Bolivian reserves by Chilean vessels was so incessant that Bolivian authorities agreed to fight the incursions and capture and arrest Chileans who were illegally retrieving guano from Bolivian territories. To this the Chilean war vessel "Chile" responded freeing the crew of the Chilean frigate that was taking advantage of the reserves of guano and landed a force at Mejillones near the location where the guano was being extracted and built a small fort, setting the Chilean flag.

When the Bolivian Minister in Chile presented his Government's claims against this and other acts of aggression, The president of Chile Mr. Montt said "inasmuch as the usefulness of the substance known as "guano" has been recognized in Europe, although from time to time immemorial it has been used as a manure for fertilizing the land on the coast of Peru, I deemed it advisable to send a commission to explore and examine the seaboard from the port of Coquimbo to the head of Mejillones, for the purpose of discovering if any guano deposits existed in the territory of the Republic, which, properly worked, might furnish a new source of revenue to the treasury; and notwithstanding that the result of the expedition has not come up to our expectations, guano has been discovered from 29° 35' to 23° 6' of south latitude".[24]

The Presidential Message was used to introduce the bill that was debated and accepted by Congress the day of October 31st 1842, which stated: "all the guano deposits which exist in the Province of Coquimbo, in the littoral of Atacama, and in the adjacent islands, are hereby declared as national property".

This Presidential Message was contested by the Bolivian Plenipotentiary in Chile Mr. Olañeta, but was eventually declared law on the bases that the Province of Coquimbo had been recognized as part of the Chilean territory years before[25].

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[21] G. Bulnes, *Guerra del Pacifico*, Editorial del Pacifico, Santiago, 1955, vol. 3, 1:34-35.
[22] E. Skuban, *Lines in the Sand: Nationalism and Identity on the Peruvian-Chilean Frontier*, UNM Press, 2007, p.7.
[23] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 9.
[24] E. Borchard, *The Tacna-Arica Controversy.* Foreign Affairs. October 7, 2011. https://www.foreignaffairs.com/articles/chile/2011-10-07/tacna-arica-controversy
[25] A. Estefane, *Imperial Uncertainties and Republican Conflicts: Archives, Diplomacy, and Historiography in Nineteenth-Century Chile*. Early American Studies 11, no. 1, 2013: 192-207. http://www.jstor.org/stable/23546710.

This was the moment when the spark of controversy appeared, causing a conflict that would have been present for over a century and that would take the form of both a physical war and a legal confrontation.

To respond to this provocation, the Bolivian Government sent Mr. Santivañez to debate a boundary treaty, accepting to open the discussion about its territorial rights when there were no precedents that justified Bolivian doubts about its sovereignty.

Santivañez proposed the 25° of south latitude to be the common frontier. Chile opposed this decision proposing the 23° of south latitude as the division between the two countries[26]. The debate was deemed to be blocked by the unwillingness of either nation to renounce, until the proposition appeared to submit the arbitration to a third country. Great Britain was chosen, but Chile refused to participate in the discussion.

In 1864 the Spaniards decided to invoke the Principle of Revindication on the possession of the Chincha Islands and their deposits of guano[27]. Chile took this aggression as an opportunity to broaden its expansionistic policies and invaded Chacaya, erecting the Chilean flag norther than Mejillones.

3. The boundary treaty between Chile and Bolivia

August 10th, 1866 the Mutual Benefits Treaty between Chile and Bolivia was signed.

Article I stated that: "the line of demarcation of the boundaries between Chile and Bolivia, in the desert of Atacama, shall be hereafter the parallel 24° of south latitude, from the Pacific coast to the eastern boundaries. Chile to the south, and Bolivia to the North, shall have the dominion and possession of the territories extending as far as the above mentioned parallel 24, with power to exercise therein all and every act of jurisdiction and sovereignty pertaining to the owner of the land. The exact fixing of the line of demarcation between both parts shall be undertaken by a commission formed by experts and properly qualified persons, named in equal proportion by each one of the high contracting parties. As soon as this line shall have been fixed upon, it shall be marked on the ground by means of regular and permanent landmarks; the expense which their erection entails shall be divided between the Governments of Chile and Bolivia in equal proportion"[28].

The dispute of the guano deposits in Mejillones was addressed in article IV of the same treaty, stating that "all the products of the territory comprised between 24° and 25°, and exported from the port of Mejillones, should be free of duty"[29].

Article VI contained the stipulation that "the high contracting parties bind themselves not to transfer their rights to the territory divided, in favor of another state, society or private individual; and that in the event that either of them should desire to make such a transfer, the purchaser may only be the other contracting party"[30].

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[26] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 7.
[27] S. Collier, W. Sater, *A history of Chile, 1808-1994*, Cambridge University Press, 1996, p. 117
[28] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* Memorial of the Government of the Plurinational State of Bolivia, Volume II, I.C.J. Reports 2014, annex 96, art. 1
[29] *Ibid.* annex 96, art. 5.
[30] Treaty of Limits between Chile and Bolivia, signed at Santiago on 10 August 1866 (the 1866 *Treaty of Limits),* CCM, Annex 80, Article 6.

Chile performed a series of acts of hostility towards Bolivia, both diplomatic and aggressive. Bolivia, recognizing the fragile situation and its military inferiority in case of a war, decided to concede parts of its territories for the sake of cooperation[31].

This appeasing tendency was mainly seen by Chile as weakness, and by the Bolivian population as a sacrifice of their rights and power.

4. The Treaty of 1874

The tensions between the two nations were finally represented in a protocol developed between the two nations on December 5th, 1872. The protocol claimed to effectively determine the frontier between the two parties: "the eastern boundaries of Chile and Bolivia in the 24° of south latitude, from the Pacific Ocean to the summit of the cordillera of the Andes"[32]. This protocol was accepted neither by the Chilean congress nor by the Bolivian Assembly, provoking further discussions and that eventually led to the stipulation of a final understanding in 1874. The first article of the Treaty reaffirmed that "the parallel of the 24° from the Ocean to the Cordillera of the Andes. In the *divortia aquarum*, is the boundary between the republics of Bolivia and Chile"[33]. The document went on expressing that the guano deposits should be divided between the two countries and that the way of working, managing and marketing guano should be decided in common[34]. Article 4 of the same document fixed the export duties at the limits imposed during that time and declared that no industries should be subjected to more taxes than the ones which were already in existence. It was also asserted that the conditions would be valid for twenty-five years[35].

The Chilean pressure for this article was justified by the explanation that it had ceded a territory that was lawfully under its jurisdiction in 1866. It will later be shown that the fixing of taxes was the base of the accusation made by the Chilean Minister at the dawn of the war[36].

Article IV of the Treaty was particularly beneficial for Chile because in a territory in the heart of the desert of Atacama, which had been previously considered to be of little importance, was found a nitrate deposit. Nitrate was a fundamental ingredient in the production of nitroglycerine. This deposit had been mainly exploited by the Chilean corporation known as "la Compañia de Salitres y Ferro-carril de Antofagasta".

The United States Minister residing in Chile wrote to the Secretary of State about the controversy between Chile and Bolivia, stating that: "it is claimed in behalf of the company that it had full authority from the Bolivian Government for the prosecution of its business, and that it relied upon the good faith of Bolivia in

[31] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 18.
[32] Loveman, B. (1979) *Chile: The Legacy of Hispanic Capitalism, New York: Oxford University Press*. p. 157-158.
[33] Supplementary Protocol to the 1874 Treaty of Limits between Chile and Bolivia, signed at La Paz on 21 July 1875. Ministry of Foreign Affairs of Chile, *Treaties, Conventions and International Arrangements of Chile 1810-1976, Vol. II* (1977).
[34] It was later stated that the common guano deposits should be those between parallels 23 and 24, and that any doubt about the aim and the interpretation of the deal should be acquiesced by an arbiter.
[35] Martúa, Victor M. *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 19-21.
[36] R. Burr, *By reason or by force: Chile and the balancing of power in South America, 1830-1905,* University of California Press, 1965 p. 143.

making its investments. In February of the last year the Bolivian Congress enacted a law exacting a tax of ten cents a quintal on all exportations of nitrate, and from this has arisen the present difficulty with Chile. The Chilean Government promptly protested against the execution of this law, claiming that It was in direct conflict with the guarantees of the treaty of 1874 […]. The Chilean Government protested anew, and caused Bolivia to be informed that if she insisted upon executing the law, Chile would regard the Treaty as abrogated, and would proceed to assert her right of dominion to the territory claimed by her prior to 1866"[37]. The communication ended with the prediction that Chile was preparing for war by sending its troops to the North.

To this aggression the Bolivian Government responded that the tax had been imposed in concordance with the company, but the Chilean Minister stated in a note to the Bolivian Government that he declared the treaty of 1874 abrogated.

5. The Secret Treaty

The United States Minister at Lima wrote a letter to the State Department, stating that he had heard rumors about a secret treaty for an alliance between Argentina, Bolivia and Peru against Chile[38].

This treaty, which some historian believed Chile was aware of[39], is largely believed to have been created because of the precarious state these countries, especially Bolivia and Peru, were in. Peru and Bolivia were unstable nations, shook by social and political conflict and financially unpredictable[40]. On the other hand, the Chilean state and especially its military power were superior and more organized.

In fact Chile, even having to fight countries that combined had populations more than twice the size of its own, could count on a training, organization and equipment structured in the same way a European army would have been. This had allowed the nation to hold the status quo against the same nations in the past and that had convinced it that one of its soldiers was worth many Peruvians or Bolivians[41].

Even if the Peruvian army was greater in resources, Chile was used to discipline, be it military or civil, and had built through the years a sense of national pride that Bolivian and Peruvian citizens still didn't have. The Chilean military also had a concrete objective to fight for, while the allied countries didn't experience a strong propaganda campaign, making them fight without a clear vision of the future.
Chile also had a well-organized central administration, and could claim a traditional stability formally unknown to Peru and Bolivia.

Since its creation, Chile believed that in order to maintain its position of power over Latin- America it had to keep the status quo constant. However, as it say that all the neighboring countries were uniting against it,

[37] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 36.
[38] Ibidem, p. 38.
[39] V. O'Hara, *Ironclad Huáscar's mastery in the Guano War,* Autumn 2006, p. 84-93. https://www.vohara.com.
[40] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 38
[41] R. Burr, *By Reason or by force: Chile and the balancing of power in South America, 1830-1905*. University of California Press, 1965. p. 143

Chile chose to change strategy and aimed to annihilate the Peruvian forces, therefore shifting the power dynamics in the region.[42]

Even if pro-Bolivian and Peruvian forces were strong in Argentina, they weren't successful in convincing the country to take part to the litigations, to the point that the country declared military neutrality. Many were in favor of neutrality because they thought it best to reach a peaceful boundary treaty. Many others on the other hand believed that Chile would have never won the impending war, and thought that it would have been a great opportunity to redefine the boundaries while the neighbor was distracted. In fact, Argentina took advantage of the conflict to occupy the Chilean part of Patagonia.

Moreover, Chile protested the use of Argentinian territory for the passage of war supplies directed to Bolivia. This formal neutrality performed by the Argentinian Government, and at the same time its alleged support to the allied forces, encouraged Peru and Bolivia to believe that Argentina would eventually take part to the conflict, and kept the resistance of those countries alive well beyond the time military consideration would have suggested[43].

6. The War of the Pacific

On the 1st of April 1879, the press declared that the Chilean Government had had a consultation with the Council of State, considering the possibility of going to war against Peru. Four days later, on the 5th, a formal declaration of war was asserted.

It was immediately clear that it was fundamental to take control of the sea in order to transport of supplies and ammunition avoiding the Atacama Desert or the high plateau of Bolivia[44].
As the Chilean Navy began an economic and military blockade of its enemies' ports, Peru used its smaller but very efficient navy as attack force, making Chile delay the field offensive for months.

However, the superiority of the Chilean Navy was inevitably stronger and more mobile. Having more power to attack and raid the enemy territory, Chile forced Peru and Bolivia to fight a defensive war.
Having a strong Navy proved to be one of the key elements of the Chilean victory, as while the Allies had to fight in the desert thousands of kilometers away from anything they were used to, the offenders were faster and better rested having lived through a less hostile trip to the battlefield[45].

Many European countries' interests were at stake with this war, specifically British, so for a while Prime Minister Gladstone was seriously considering participating in the conflict. This plan did not go as planned because German Chancellor Otto von Bismarck considered it too expensive and decided not to participate in South American conflicts.

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[42] R. Burr, *By Reason or by force: Chile and the balancing of power in South America, 1830-1905*. University of California Press, 1965.
[43] Ibidem. p. 145.
[44] V. Vascotto, *La Guerra del Salnitro 1879-1884*. p. 3.
[45] R. Burr, *By Reason or by force: Chile and the balancing of power in South America, 1830-1905*. University of California Press, 1965. p. 155.

However, the deliberations that were being made in the Old Continent about the possible intervention in the war were being closely watched by Washington, that wouldn't allow European countries to take part in matters regarding the American continent. Therefore, the US started working towards the end of the war by their own means trying to open peace communications between the two parties.

1880 was the year battlefields were still, but diplomatic confrontation about the war was at its peak[46]. However, the political confrontation did not give the results wished for. Peruvian leaders opposed any possible solution for peace proposed by Chile. The outcome was that by the end of the year the main trend was to still to force Peru into a position where it could only surrender[47].

1880 was also the year Tacna was conquered[48]. This victory allowed Chile to blockade Peruvian ports and make Colombia's neutrality less fundamental. Because of that, the Chilean diplomats ordered their forces in Colombia to relax their remonstration and to see if the central office would agree on an arbitration to limit the Chilean-Colombian disputes. Colombian Ministers knew that Chile's irritation towards the neutrality of their country could lead to a termination of relations, so they suggested that Bogota responded favorably.

Therefore, the first days of September 1880, Chile and Colombia signed a convention on arbitration that allowed the former to relax hostilities and the latter to end frictions with Chile.

It is important to remember that all this was happening while Bogota was having severe struggles with neighboring countries and with the United States. This convention then was also a strong demonstration that Chile was willing to end disputes with its enemies diplomatically rather than by force.

7. The conference of Arica

In October 1880 the United States achieved the beginning of negotiations between the conflicting parties of the War. Chile had a list of extremely hard demands, among which the payment of 20 million dollars and the annexation of the entire Bolivian littoral, spanning from the norther border to the Camarones River. Moreover, it demanded to occupy Tacna and Arica until the complete payment of the war debts by the allies, and that the port of Arica remained unfortified. These demands were rejected in full, even if the allies started considering arbitration over the payment. At the same time they began a marketing operation designed to provoke the outrage of their population by revealing the Chilean terms for the achievement of peace[49].

8. Argentina's diplomatic efforts against Chile

[46] Martúa, Victor M. The question of the Pacific. Philadelphia: Press of G.F. Lasher, 1901. p. 89-109.
[47] R. Burr, *By Reason or by Force: Chile and the balancing of power in South America, 1830-1905,* University of California Press, 1965, p. 153.
[48] W. Sater, *Andean Tragedy: Fighting the War of the Pacific, 1879,* 1884, University of Nebraska Press, 2007, p.217
[49] R. Burr, *By Reason or by Force: Chile and the balancing of power in South America, 1830-1905,* University of California Press, 1965, p. 157.

After the disappointments of the Conference of Arica, Buenos Aires began to worry about the increasing power Chile was gaining. Argentina's strategy was to keep Bolivia and Peru as allies without entering the war and to wait until Chile would be so debilitated by it to accept a new border treaty. The recent successes of the Chilean army however started to concern Buenos Aires, that now had to consider the possibility of a defeat of the allies[50].

And so began the Argentinian diplomatic struggle to limit Chilean expansion. As a first step, Buenos Aires asked for the mediation of Brazil to end the conflict.

Secondly, it accepted Colombia's invitation to the congress that would have been taken part in Panama regarding arbitration. This was a strategic step to expand the campaign against Chile even further. Declaring Argentina's desire for a peaceful situation in Southern America, the Foreign Minister of Argentina, Irigoyen, was able to once again express his Nation's interest in the resolution of the war without employing the army or excessive amounts of capital.

Peru was occupied between 1881 and 1884. The territory of the Peruvian Sierra was particularly favorable for the defender as it was close to major cities, which meant that they could have access to supplies and resources without having to rely on their sea transportation.

On the other hand, because they were fighting on a more extensive ground the Chilean Army had been divided into smaller units, making them faster and probably more efficient, but surely less powerful.

This meant that the Peruvian forces could keep carrying on with their resistance for a long time, as the Chilean forces were unable to efficiently hunt down the *guerrilleros*.

After months of occupation Chile recognized this situation to be one that they couldn't dominate, and started looking for an exit strategy.

The opportunity arose in the aftermath of the Battle of Huamachuco, which lead to the signing of a peace treaty, ending the war and the rebellion.[51]

9. The peace treaty

On October, 1883, Chile and Peru agreed to sign what would soon be known as the Treaty of Peace between the Republics of Peru and Chile, or the Treaty of Ancón[52].

Of this treaty the two most interesting articles are Art II and Art III. Article II required Peru to give to the Chilean Republic "in perpetuity and unconditionally the territory of the littoral province of Tarapaca, the boundaries of which are, on the north the ravine and river Camarones, on the south the ravine and river Loa, on the east the Republic of Bolivia, and on the west the Pacific Ocean"[53]. This allowed Chile not only to acquire more littoral, but more importantly to completely rule out Bolivian access to the sea apart from through Chilean territory. It must also be noted that the province of Tarapaca was rich in natural resources, especially in nitrate.

[50] Ibidem, p. 158.
[51] New World Encyclopedia, s.v. "War of the Pacific". http://www.newworldencyclopedia.org/entry/War_of_the_Pacific
[52] L. Clayton, M. Conniff, S. Gauss, *A new History of Modern Latin America,* University of California Press, 2017, p. 188.
[53] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* Memorial of the Government of the Plurinational State of Bolivia, Volume II, I.C.J. Reports 2014, annex 97, art. 2.

Another fundamental article was Article III, which cited "the territory of the province of Tacna and Arica, bounded on the north by river Sama from its source in the Cordilleras on the frontier of Bolivia to its mouth at the sea, on the south by the ravine and river Camarones, on the east by the Republic of Bolivia, and on the west by the Pacific Ocean, shall continue in the possession of Chile subject to Chilean laws and authority during a period of ten years, to be reckoned from the date of the ratification of the present treaty of peace. After the expiration of that term a plebiscite will decide by popular vote whether the territories of the above-mentioned provinces will remain definitely under the dominion and sovereignty of Chile or continue to form part of Peru. Either of the two countries to which the provinces of Tacna and Arica may remain annexed will pay to the other ten million of Chile silver dollars or Peruvian soles of the same weigh and fineness."[54]

The incorporation of the Tarapaca province to Chile allowed a sensible increase of the country's wealth, as the it was now able to commerce nitrate and iodine. As it was already stated, the mineral resources present in the area were in strong demand. Having access to this new source of income helped Chile further develop its economy, becoming one of the undiscussed hegemonic countries of that area.

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Figure 2: The boundaries between Bolivia and Chile after the War of the Pacific

Source: Bolivia Sea Dispute: UN Rules in Chile's favor, 2018.

10. Tacna and Arica

[54] Ibidem, art. 3.

As previously mentioned, the peace treaty of Ancón had affirmed that the city of Tacna and Arica, previously under the sovereignty of Peru, would have been now administered by Chile for ten years, at the end of which a referendum would have been drafted to decide whether to remain under the control of Chile or to go back to Peruvian domination.

Ten years after the signature of the Treaty, a long and treacherous process began aimed to develop a convention or protocol to decide the fate of the two cities[55].

With 1893 as a starting point, five attempts were made to solve the Tacna and Arica situation. After a long process to determine the process to undertake regarding the two towns, Chile's Minister of Foreign Affairs Silva Cruz made an effort to settle the dispute directly through a cession of the two cities as part of the Chilean territory, in exchange for a rise of amount of payment that had been previously stated in the Treaty. Guillermo Billinghurst, who was the first Vice-president of Peru at that time, refused flatly. Therefore, Silva Cruz subsequently suggested to separate the government of the two cities and allocate Arica to Chile and Tacna to Peru, without paying any indemnity. To this proposition Mr Billinghurst stated that it was unreasonable to proceed with this agreement, not to mention unfair towards Tacna.

A breakthrough was made when Protocol Billinghurst-Latorre was redacted[56]. This document was fundamental to avoid a war with Argentina, which consequently would have forced Peru to leave its neutrality. The protocol described most of the conditions for a plebiscite. If some points were presents which did not satisfy the parties, the Queen of Spain would have been chosen as arbitrator to determine the way to go[57]. the question of the two cities was to be proposed to a third party in order to arrive at a solution that conformed with the spirit of the Treaty and strengthened the relation of friendship between the two Nations.
Unfortunately, constant diplomatic conflict between the two nations slowed the process of building a long-lasting friendly relation.

In 1894 Chile would have stopped legal sovereignty over Tacna and Arica anymore. As a matter of fact, the Treaty of Ancón accounted for ten years of Chilean jurisdiction over the provinces, at the end of which a plebiscite would have taken place to decide the sort of the area. Therefore, it was plausible to believe that its influence over the territory would have faded with time. In order to avoid this risk, the Chilean Republic decided to adopt a strategy which would have proved to be successful.

The discussion regarding the territories was slower and more difficult than it had ever been. This situation of indecisiveness and uncertainty was seen as an opportunity by Chile, which took advantage of the time to start a colonization campaign[58].

This colonization is not to be considered as a violent, explicit process. Rather, it was more of a subtle way to infiltrate society in that area and keep Chilean influence strong. Chile promoted a strong migration of its population towards Tacna and Arica. The documents that were published in those years showing the extent of

[55] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 165-169.
[56] Ibidem, p. 241.
[57] E. Skuban, *Lines in the Sand: Nationalism and Identity on the Peruvian-Chilean Frontier*, UNM Press, 2007, p.19.
[58] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901. p. 251.

the deposit of nitrate and their richness provoked firms to be more interested than ever in that zone. Therefore, the Chilean Republic started, explicitly and secretly, to sustain agencies that treated that material, in order to cause the movement of Chilean goods and services to those areas and subsequently increasing their influence in a manner that did not contravene the words of the Ancón Treaty.

These measures were not welcomed by the Peruvian Government. In fact, Cesareo Chacaltana, who was the Minister from Peru transferred to Chile to discuss the issue of the Protocol Billinghurst-Latorre, explicitly protested the new strategy adopted by Chile, a strategy that some writers call "chileanization"[59]
In a communication made in 1900 and aimed to the Government of Chile he objected the measures that his hosting country was undertaking, stating that they represented an infraction of the Treaty. In his communication he declared that: "the Government of Chile, as if wishing to repair inexplicable omission, has adopted a series of measures, some of which have been carried out, while others are about to be carried out, in regard to the political and administrative status of the provinces of Tacna and Arica, with a view of inducing the inhabitants of these Peruvian territories to follow new channels in their aspirations for the future, and this notwithstanding that they have shown themselves refractory to any change of nationality. […] the government of Your Excellency appears to have decided to accomplish in a few months that which it did not attempt or could not accomplish in the space of twenty years"[60]

And so began a series of communications and exchanges between the Peruvian Minister in Chile and the Foreign Affairs Minister Bello Codecido. The long and intense interchange was carried on by the accusations Mister Chalcatana directed to the Chilean Government of breaking the implications of the Ancon Treaty. To these allegations Mister Codecido provided his explanations to why this was not the case, stating that those measures were not to be implied as excuses to promote hostility. Indeed, Mister Codecido underlined the utility of the measures, that resulted in the well-being of the population and in the advancement of the territory[61].

In that exchange began also the discussion over a possible arbitration to solve the matter of the territory. To this end Mister Chalcatana quoted the statement of Admiral Latorre, who had helped settle the issue of the protocol. In 1898 he had addressed the issue to the Congress, saying that "arbitration has always met with sincere favor in the Chilean Foreign Office in such a manner that it has come to be one of the most honorable traditions of its diplomatic practices. To recur to it would be, on the part of Chile, equally a means of guaranteeing her own rights, as to offer a new proof of the spirit of justice that inspires her actions, and of her respect for the lofty and conciliatory measures that modern civilization recommend".[62]
To this discussion Mister Codecido answered in a letter dated February 18th of the same year: "there is no justice whatever in the charge that Your Excellency makes by attributing to Chile the purpose of frustrating

[59] V. Martúa, *The question of the Pacific,* Philadelphia: Press of G.F. Lasher, 1901, p, 251, and R. Rodríguez, *La chilenización de Tacna y Arica, 1883-1929,* Editorial Arica, Arica, 1974.
[60] V. Martúa, *The question of the Pacific,* Philadelphia: Press of G.F. Lasher, 1901, p. 279.
[61] R. Rodríguez, *La chilenización de Tacna y Arica, 1883-1929,* Editorial Arica, Arica, 1974, p. 78.
[62] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 1901, p. 285

every agreement directed to obtain a prompt, friendly and equitable solution so as to leave to time the work of definitely incorporating with Chile the territories in question"[63]. Rather, he proceeded to underline the feelings of community and calmness necessary for the reaching of a peaceful agreement.

This discussion was destined to continue until 1925. That was the year the United States, under the mediation of Secretary of State Charles E. Hughes, negotiations started to out an end to the conflict. The arbitration regarded two principal matters: the question of the Plebiscite and the conditions of the Plebiscite. As for the first issue, the arbitration listed all the matters in which the Peruvian Government had accused Chile of "chileanization"[64] . Then, it stated that it did not find any reason why the Plebiscite should not be maintained. Regarding the second matter, the arbitration looked into the conditions the Plebiscite should follow. It analyzed the qualification of voters, the supervision of the plebiscite, the registration and election boards, the time the Plebiscite should be held and the expenses it should have among other things.

Unfortunately, this project was doomed to fail, as only a year later the nations' representatives declared the plebiscitary processes void, as "a free and fair plebiscite as required by the award is impracticable of accomplishment"[65].

In 1926 in the United States Mr Kellogg was appointed Secretary of State from the US. Mr Kellogg presented a statement suggesting that there could be three paths to follow in order to solve this conflict: the assignment of the whole territory to one Nation; the splitting of the area among the contestants; and, finally, the elimination of the contestants' claims to that territory, therefore not giving it to either Nation.

The initial idea was to cede those territories to Bolivia, but both Peru and Chile rejected it. However, this process turned out to be useful as Kellogg was able to bring the countries together in 1928. The long process of deciding the fate of the area was coming to an end. The nations exchanged diplomats, starting a discussion that solved most of the problems related to the issue; moreover, if some difficulties arose, the mediation of the United States was employed.

The final decision was taken in 1929. Chile would keep Arica while Tacna was to be given back to Peru. In addition, the former would give the latter an indemnity of 6 million with the addition of other concessions.

Furthermore, because Bolivia had become a landlocked State, Chile agreed to pay for the construction of a railroad to connect La Paz, the capital, with Arica, the Bolivian natural port[66]. Chile also agreed to grant free transit to Bolivian imports or exports in its territories.[67]

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[63] V. Martúa, *The question of the Pacific*. Philadelphia: Press of G.F. Lasher, 190. p. 289

[64] the closing of Peruvian schools; the expulsion of Peruvian priests; the suppression of Peruvian newspapers; the deprivation of Peruvians of the right to assemble and display the Peruvian flag; the boycott of Peruvian labor; the application of conscription laws to isolate Peruvian citizens; the expulsion of Peruvian citizens; the general persecution of Peruvians through mob violence and otherwise.

[65] *American Journal of International Law*. Cambridge University Press, 1927, Volume 21, p. 11.

[66] The concept of natural port explains that even if Arica was never under Bolivian jurisdiction it was the main port for that nation as it was the easiest to reach. Proof of that is the fact that it was used as the principle access to the sea even before Bolivia lost its littoral.

[67] Council on Hemisferic Affairs, "Bolivia-Chile Pacific Access", coha.org, link: http://www.coha.org/boliviachile-pacific-access/

11. The start of diplomatic negotiations

As previously mentioned, the Treaty of Peace and Friendship signed in 1904 granted some good outcomes for Bolivia as well. However, the loss of the sovereign access to the sea had a very strong impact on Bolivian national pride.

Since the end of the war, regaining access to the sea has become a matter of principle to the point that most of the relation between the two countries revolves around this subject matter.

Furthermore, multiple studies[68] have shown that a landlocked nation grows at inferior rates compared to those of countries with sovereign access to the sea. This has further consolidated the sentiments of hate and distrust Bolivia has for its neighbor.

In fact, Bolivian-Chilean relations have never eased. In 1962 a new dispute arose. It still concerned waters, but in this case the subject matter was the use of the river Lauca. If Bolivia accused Chile of redirecting waters towards its territory, Chile replied that as the river was considered to be international waters the rights of usage were the same. Uniting this subject matter to the conflict regarding sovereign sea access, Bolivia brought the matter to the attention of the OAS – Organization of American States. This conflict was resolved as Chile succeeded in passing a resolution that required the equal division of the river[69].

Another noteworthy event was the so-called Charaña Hug in 1975. In order to solve the ever-lasting issue of sovereign access to the sea, Chilean dictator Augusto Pinochet and Bolivian president Hugo Banzer started drafting a deal that would grant Bolivia sovereign access in the port of Arica in exchange for territories from Bolivia[70]. This deal satisfied both parts. However, a clause present in the 1929 Treaty between Chile and Peru forbade the cession of one country's territory without the consent of the other party. Therefore, Peru used its veto power to impede the trade-off. As a solution, Peru proposed the sharing of sovereignty in the Arica province between Chile and Bolivia. This solution was not accepted by Chile, therefore bringing an end to the discussion on the possible annexation of Arica by Bolivia.

In 1979 Bolivia decided to symbolically tackle the issue in front of the OAS again, as that was the 100th anniversary of the War of the Pacific. The OAS then proceeded to solicit Chile to find a non-violent solution to the century-long conflict, specifying that it could not take the form of a territorial trade-off. Chile found this request unacceptable.

In 1987 dialogue started again between Jaime del Valle and Guillermo Bedregal Gutiérrez, respectively Chile and Bolivia's Foreign Ministers. Mister Gutiérrez suggested to create a corridor under the sovereignty of Bolivia that ran north of Arica[71]. However, this proposition was abandoned too after Chile

[68] D. Agramont, and J. Peres-Cajías, *Bolivia, un país privado de Litoral*. La Paz, OXFAM/ Plural Editores, 2016. p. 16, para 1.
[69] W. Grabendorff, *Interstate Conflict Behavior and Regional Potential for Conflict in Latin America*, Journal of Interamerican Studies and World Affairs 24, no. 3 (1982): 267-94.
[70] R. St. John and B. Ronald*, Same space, different dreams: Bolivia's quest for a Pacific port*. The Bolivian Research Review, 2001, 1(1). http://www.bolivianstudies.org/revista/2001_07.html.
[71] Ibidem.

discarded the possibility. This defeat, fueled by the fact that an agreement appeared to be close, provoked a boycott of merchandises coming from Chile[72].

Since then talks on the Bolivian right to a sovereign access to the sea have become one of the most prominent concepts in Bolivian – and Chilean – politics. Bolivia's claims are supported by the population through a constant reminder of what can be considered as a national trauma, which is shown in the form of the creation of a Bolivian navy and the institution of the "day of the sea", a yearly festivity that fuels the rivalry towards Chile. On the other hand, the Chilean average vision constantly dismisses Bolivian claims, failing to recognize how much being landlocked hinders its neighbor's economy and development.
In 2006 a meeting between Presidents Evo Morales and Ricardo Lagos took place, on which the two representatives drafted a 13-point agenda to relax relations between the two countries.

In this framework, it was in 2013 that Bolivia started legal proceedings against Chile asking for a genuine and honest dialogue to achieve a sovereign access to the Pacific Ocean[73]. This application claims an obligation for Chile to negotiate a settlement granting sovereign sea access to Bolivia "promptly and in good faith"[74].

[72] R. Hudson and D. Hanratty. *Bolivia: a country study*. Washington, D.C. : Federal Research Division, Library of Congress, 1991.
[73] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* Application of the Government of the Plurinational State of Bolivia, I.C.J. Reports 2014, p. 20, para. 32.
[74] *Ibidem.*

CHAPTER II

OBLIGATION TO NEGOTIATE SOVEREIGN ACCESS TO THE PACIFIC OCEAN (BOLIVIA V. CHILE)

While chapter one analyzed the historical background in an effort to explain the deep-rooted and strong conflict between Bolivia and Chile, this chapter will focus primarily on the legal proceedings that Bolivia has started in 2013 to prove the Chilean obligation to negotiate a Bolivian sovereign access to the Pacific Ocean.

The proceeding came to an end on October 1st 2018, when the International Court of Justice declared that such a duty was not present for Chile.

For the sake of clarity, the legal aspect of the litigations was not analyzed in depth in the previous chapter. However, it is important to focus on that topic after explaining the historical context.

Therefore, this chapter will begin with an overview of the case that will explain the general background in which legal the action took place. Subsequently, attention will be brought to Bolivia's reasons for legal action. The reasons will be analyzed both from a legal point of view through a study of its Memorial, and from an economical logic. As a matter of fact, the chapter will describe how the lack of littoral harms the Bolivian growth, as it now almost completely depends on Chile to export its products. Moreover, even if Chile granted the infrastructure to allow Bolivia to reach the coast, they are often not completely efficient or are subjected to strikes and delays, caused by the response of Chilean workers to privatization measures.

To explain the decision of the International Court of Justice, the chapter will also explore how international law was applied in the past to address similar grievances.

The study of the Memorial of Bolivia will also be accompanied by an analysis of the Chilean Preliminary Objection and a study of the Court's reasons to proceed with legal actions. Therefore, the chapter will analyze the Chilean Memorial and its responses to the Bolivian accusations.

Finally, the Judgement of 2018 will be presented, together with an analysis of the arguments which brought about the decision of the Court.

1. Overview of the case

On 24th of April 2013 the President of Bolivia Evo Morales declared the start of legal proceedings before the International Court of Justice (ICJ or "the Court") against Chile with the aim of enforcing, as he said, "Chile's

obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean"[75].

The legal basis for the Court's jurisdiction, can be found, according to Bolivia, in the Pact of Bogotá, more precisely in article XXXI[76].

Months later, the Chilean Government drafted a preliminary objection, arguing that the Court did not have jurisdiction over the subject matter[77]. This claim was later overruled by the Court on September 24th of 2015, agreeing with the Bolivian government that jurisdiction was found in article XXXI of the Bogotá Pact.

The Judgement made by the Court on October 1st 2018 explained that Chile was not legally bound to negotiate with Bolivia in regard to a sovereign access to the sea and that in International Law there is no norm that implies that legitimate expectation is a viable claim for an obligation.

2. The Bolivian Position

2.1. Chapter I of the Bolivian Memorial

The Treaty of Peace and Friendship signed on October 20th 1904 was the act that officially ended the war between Chile e Bolivia.

The three most important articles for this analysis are Article II, Article III and article VI. In the settlement, Article II set the boundaries between the two parties. The first sentences explain that: "By the present treaty, the territory occupied by Chile by virtue of Article 2 of the truce agreement of April 4, 1884, is recognized as belonging absolutely and *in perpetuo* to Chile[78]. The provision is particularly important because it officially declares the landlocked condition of Bolivia.

Article III is also fundamental as it officially states the Chilean commitment to creating a passageway for Bolivian products. Quoting directly: "with the object of strengthening the political and commercial relations between the two Republics the high contracting parties agree to unite the port of Arica with the plateau of La Paz by a railroad for the construction of which the Government of Chile shall contract at its own expense within the term of one year from the ratification of this treaty. […]. Chile undertakes to pay the obligations which Bolivia may incur"[79].

This Article was the explanation of the compromise reached in order to guarantee an access to the Pacific Ocean to Bolivian products.

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[75] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Application (Apr. 2013), http://www.icj-cij.org/docket/files/153/17338.pdf [hereinafter Application].

[76] Pact of Bogotá, art 3: "In conformity with Article 36, paragraph 2, of the statute of the international Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory ipso facto, without the necessity of any special agreement so long as the present Treaty s in force, in all disputed of a juridical nature that arise among them concerning: a) The interpretation of a treaty; b) Any question of international law; c) the existence of any fact which, if established, would constitute the breach of an international obligation; d) The nature or extent of the reparation to be made for the breach of an international obligation". https://www.oas.org/sap/peacefund/resolutions/pact_of_bogotá.pdf

[77] Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection (July 2014), https://www.icj-cij.org/files/case-related/153/18616.pdf [hereinafter Preliminary Objection].

[78] Treaty of Peace and Friendship between Chile and Bolivia and Convention for the Construction and Operation of a Railroad from Arica to La Paz. Santiago, March 28, 1905
http://images.library.wisc.edu/FRUS/EFacs/1905/reference/frus.frus1905.i0011.pdf

[79] Ibidem, Art. 5

It is possible to think that because Bolivia has free access to the Pacific Ocean, this means that it has a sovereign right of access. However, this article clarifies any possibility of error. Bolivian cargo can freely transit through the railway funded by the Chilean Government, and more recently through a highway constructed for the same reasons. This does not mean that Bolivia has a sovereign right of access to the Pacific Ocean[80].

Bolivia is not completely autonomous in handling its stock. In fact, both the railway and the highway are part of the Chilean territory, as is the port where they ship the products.

If the treaty did not expand further, the lack of autonomy from Bolivia would be even more acute. In fact, its goods would still be subject to Chilean custom laws; for this reason, to avoid hindering the situation of Bolivia as a landlocked state, article VI was drafted. It explains that: "The Republic of Chile grants to that of Bolivia in perpetuity the amplest and freest right of commercial transit in its territory and its Pacific ports. Both governments will agree in special acts upon the method suitable for securing, without prejudice to their respective fiscal interests, the object above indicated"[81].

With this article the Treaty addressed the important concern for Bolivian goods not being able to transit freely.

Already in 1910 problems were emerging with the treaty. It was said that Bolivia needed sovereign access to the Pacific Ocean; it was also made very clear that the country would have done anything possible to obtain a sovereign access to the sea.

This grievance was addressed by the Chilean Plenipotentiary in Bolivia in 1920. Representatives of the two countries gathered to discuss a Bolivian sovereign access to the sea separate from what had already been established in the Treaty. After negotiation a document was drafted, called "Acta Protocolizanda".

In this document Chile stated that in its vision the Treaty fully addressed the sources of the conflicts between the two nations, and solved them[82]. It was also affirmed that the Chilean Government had fully satisfied the obligations delineated at the end of the war. These obligations were drafted for the sole reason of having sovereignty over Tacna and Arica[83]. Bolivia had willingly committed to this agreement, that was created specifically to substitute the Bolivian objective to have sovereignty over a port [84]

Furthermore, the war had changed the boundaries of the countries that took part in it. The port that was under the jurisdiction of Bolivia before the conflict, which was never the main passageway for its products, had now been united to the territories taken from Peru. To split the Chilean territory in the middle was unthinkable.

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[80] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile*), Judgement to the Preliminary Objection, 2015, p. 603, para. 28.
[81] Ibidem, Art 6.
[82] Protocol ("*Acta Protocolizanda*") Subscribed between the Foreign Affairs Minister of Bolivia, Carlos Gutiérrez, and the Extraordinary Envoy and Pleniponentiary Minister of the Republic of Chile, Emilio Bello Codesido, Article 1. 10 January 1920 [hereinafter Acta Protocolizanda].
[83] Ibidem, Article 2.
[84] Ibidem, Article 3.

However, Chile announced the initiation of discussion for a Bolivian sovereign access to the sea[85].

This new approach between the countries however did not last long. In 1920, Bolivia asked the League of Nations to revise the Peace Treaty drafted in 1904, following the Versailles Treaty that in one of its articles stated that "the Assembly may […] advise the reconsideration by Members of the League of treaties which have become inapplicable"[86].

Almost a year later Bolivia revoked its application, as it was found that the League did not have the authority to modify treaties[87].

In 1926 Mr. Kellogg, Secretary of State of the United States, directed a proposal to the representatives of Peru and Chile regarding the Bolivian littoral problem[88]. The Kellogg proposal then proceeded to explain Chile and Peru could cede to Bolivia the provinces of Tacna and Arica. This could be done both by the States either working together or autonomously[89].

Bolivia expressed its complete agreement with the proposition made by the Secretary of State, and stated its willingness to be contemplated as a party in the negotiations regarding the two cities[90].

The Chilean Government answered to this proposal in a memorandum dated December 4th, 1926. The so-called "Matte Memorandum" stated that Chile had never excluded the idea of ceding a belt of land to Bolivia and granting it a sovereign access to the sea. However, it continued, Bolivia recognized that the cession of the two cities was a delicate point, and that the Treaty of Ancón unequivocally stated that the issue had to be solved through plebiscite[91].

In any case, it was recognized by the Bolivian Government that Chile was actively making an effort to find a solution that would change the situation of the landlocked State[92].

However, the possibility of Tacna or Arica falling under the jurisdiction of the Bolivian Government was eliminated by Peru, which refused the proposition made by Mr. Kellogg based on the rights granted by the Treaty of Lima.

The Treaty, drafted in 1929, addressed the strong complications regarding the conditions of the plebiscite: because of the existing difficulties, Chile and Peru decided to solve the question of the two cities through legal action rather than by vote.

It was then declared that Tacna would be part of the Peruvian territory while Arica was to be put under the jurisdiction of Chile.

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[85] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Memorial of the Government of the Plurinational State of Bolivia, I.C.J. Reports 2014 https://www.icj-cij.org/files/case-related/153/153-20140417-WRI-01-01-EN.pdf [hereinafter Bolivian Memorial], Vol. 2, Annex 43, Article 5.

[86] Treaty of Versailles, 1919, Article 19: "The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world".

[87] ICJ, *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia* v. *Chile*), Judgment, Merits, 1 October 2018, p. 16, para. 33.

[88] Bolivian Memorial, Vol. 2, Annex 21.

[89] Ibidem

[90] Ibidem, Annex 52

[91] Ibidem, Annex 22.

[92] *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia* v. *Chile*), Judgment, p. 20, para. 45.

Furthermore, the Treaty was also accompanied by a Supplementary Protocol, that among other things stated that: "[T]he Governments of Chile and Peru shall not, without previous agreement between them, cede to any third Power the whole or a part of the territories which, in conformity with the Treaty of this date, come under their respective sovereignty, nor shall the, in the absence of such an agreement, construct through those territories any new international railway lines"[93].

The article made it extremely clear that the landlocked situation of Bolivia would not be easy to change. Even if Chile declared to be favorable to the cession of territories for Bolivia's benefit, the discussion had to necessarily involve Peru.

Peru, as it was shown by its previous behavior, would have proven to be difficult to convince.

The Peruvian veto temporarily paused the discussion, but it did not stop the Bolivian effort to obtain a sovereign access to the sea.

It was in June of 1950 that the discussion was formally opened again. The Bolivian Ambassador to Chile addressed a note to the Chilean Minister for Foreign Affairs, proposing a new negotiation between the two countries for what he stated to be "Bolivia's fundamental need to obtain its own sovereign access to the Pacific Ocean, solving the problem of Bolivia's landlocked situation in terms that take into account the mutual benefit and genuine interest of both nations"[94].

This note was positively received. In fact, the Minister of Foreign Affairs of Chile drafted an answer later the same month accepting to collaborate with Bolivia in the matter of the sovereign access to the Pacific. The answer affirmed that "[the Chilean Government] 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"[95].

However, negotiations between the two nations did not reach the hoped results, as Chilean authorities expected proposals from the other party that offered a fair compensation to the cession of the coastal territories. The Chilean government did not consider the submissions proposed to be acceptable[96].

The situation did not evolve from that point, as a decade later a Memorandum was drafted by the Chilean Ambassador in Bolivia after discovering that Bolivia wanted to bring the issue to the Inter-American Conference of 1961. This Memorandum would have been known as the Trucco Memorandum stated that "Chile has always been open […] to study, in direct dealings with Bolivia, the possibility of satisfying its aspirations and the interests of Chile. Chile will always reject the resort, by Bolivia, to organizations which are not competent to resolve a matter which is already settled by Treaty and could only be modified by direct agreement of the parties"[97].

[93] Bolivian Memorial, Vol. 2, Annex 107, Article 1.
[94] Bolivian Memorial, Vol. 2, Annex 109 A.
[95] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgement, p. 21, para. 52.
[96] Ibidem, p. 22, para. 53.
[97] Ibidem, para. 55

It further stated that Chile had always made it clear that it was willing to negotiate a cession of part of its littoral to the Bolivian Government, but that the decision to resort to an international organization would not be accepted[98].

This Memorandum provoked a stiffening of the relations between the two nations. The rise of the level of tension was already perceivable, but it was made unequivocally clear when diplomatic relations were disconnected. In fact, on April 15, 1962 Bolivia accused Chile of misusing the Lauca river, and broke diplomatic relations[99]. The reaction is clearly a consequence of this action; however, it can be argued that such an extreme act from the Bolivian Government might have been connected to the exasperated situation between the two countries.

Tension remained high between the two countries for more than a decade. It was only in 1974 that communications started again with the intention of addressing the matters that had created a division between the neighbors for a century.

During the month of March, General Pinochet came together with General Banzer to sign what would have been known as a Joint Communiqué. Later that year the two military leaders in the capacity of Heads of State participated in the ratification of the so-called Declaration of Ayacucho.

Among the issues taken into consideration in the Declaration there was also the Bolivian situation. In this regard the document reiterated the willingness of the two States to collaborate in friendship[100]. The document represented a milestone in the history of the relations between the two countries. In fact it was the first step of a process that, even if eventually fruitless, came closest to an understanding between the two countries on the matter.

The dialogue between the two Generals continued in the same year, as they later drafted a Joint Declaration where they once again stated their intentions to develop a solution to the matter following the spirit of fraternity and cooperation[101].

The following December, Chile offered its views on the guidelines, and stated among other things that "Chile would be willing to negotiate with Bolivia the cession of a strip of territory north of Arica up to the Concordia line"[102], later going on to state the delimitations that the neighboring countries would have if negotiations succeeded. Chile also declared that "the cession to Bolivia described in section (*d*) would be subject to a simultaneous exchange of territories, that is to say, Chile would at the same time receive in exchange for what it hands over a compensatory area at least equal to the area of land ceded to Bolivia"[103].

The counter-proposal was recognized as valid by Bolivia, which agreed to consider it as a starting point for negotiations. However, it stated, the exchange of zones would have had to be negotiated before being ceded.

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[98] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgement p. 23, para. 3.
[99] R. Tomasek, *The Chilean-Bolivian Lauca River Dispute and the O.A.S*, Journal of Inter-American Studies 9, no. 3, 1967: 351-66.
[100] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgement, p.24, para. 61.
[101] Ibidem.
[102] Bolivian Memorial, Vol. 2, Annex 73, para. d).
[103] Ibidem, para f).

To decide on the exchange of territories however, the negotiation also had to pass through the authorization of Peru, following the rules established in the 1929 Supplementary Protocol to the Treaty of Lima[104]. The Chilean representative consulted the Peruvian Government on the matter and received an alternative view. This counter-agreement was refused both by Peru and by Chile.

Peru however, maintained its stance and did not alter its opinion.

In 1977 the Bolivian President wrote a letter addressed to its Chilean counterpart, expressing the idea that without a change of stance on the conditions of a sovereign access, negotiations on the issue would remain stagnant. He suggested to completely change approach, withdrawing both the idea of a trade of lands and the one of a common land between countries. However, Chile replied that the guidelines that had previously been drafted and accepted would have to continue to be followed.

Thus, Bolivia accused Chile to have lacked spirit of flexibility and declared a new interruption of diplomatic relations.

Propositions followed during the years, but after the refusals from Chile all bilateral dialogues deferred, due to the impossibility of the two countries to cooperate in regard to the issue[105].

A turning point for the matter taken into consideration in this analysis happened in 2006 with the drafting of the so-called 13-Point Agenda from the Bolivian Vice-Minister for Foreign Affairs. Point six of the document regarded "all issues relevant to the bilateral relationship" among the neighboring countries, incorporating most of all the "maritime issue"[106].

A discussion arose from the thirteen points that lasted until 2010.

In February of 2011 the Presidents respectively of Bolivia and Chile, Mr. Evo Morales and Mr Sebastián Piñera, met to discuss many points of the relations between the nations they represented. Among them there was the fulfillment of the Treaty of 1904 and the agreement over a Bolivian sovereign access to the Pacific.

The discussion did not obtain the hoped results. Therefore, in 2013 a legal procedure started from Bolivia to solve the discussion. The basis of this process was Chile's alleged obligation to discuss with Bolivia and find an agreement.

2.2. Chapter II of the Bolivian Memorial: The Chilean obligation

After the recap of the historical events, the Bolivian Memorial dedicates three sections of its second chapter to the obligation towards Chile to negotiate a sovereign access to the Pacific Ocean with Bolivia.

[104] It was in fact stated that neither one of the two countries should cede territories under their sovereignty without a previous discussion and permission of the other party

[105] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgement, p. 30, para. 77.

[106] Bolivian Memorial, Vol. 2, Annex 120.

It first states the definition of negotiation to use in this subject matter[107]. It explains that in this case the duty of negotiation takes the form of a specific responsibility to concur upon a goal to obtain a specific outcome, following the principles of International Law[108]. In this regards the Memorial points out how the 1982 United Nations Convention on the Law of the Sea[109] compels the States to find an agreement upon the conditions and modalities for the passage of goods coming from land-locked States[110].

It also gives much attention to the substance of Chile's duty to negotiate. The memorial states that negotiations should be carried out in good faith[111] and that they must be meaningful[112].

To express the importance of good faith, the Memorial indicates the statement of the Court made during the *Nuclear tests* (*New Zealand* v. *France*) case. Directly quoting: "one of the basic principles governing the creation and performance of legal obligation, whatever their source, is the principle of good faith. […] Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected"[113]. To justify the second principle, meaningfulness in negotiations, the Memorial takes inspiration from the *Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece):* "the meaning of negotiations for the purposes of dispute settlement, or the obligation to negotiate, has been clarified through the jurisprudence of the Court and that of its predecessor, as well as arbitral awards...States must conduct themselves so that the 'negotiations are meaningful'"[114].

The memorial then goes on to explain the precise properties of the duty to negotiate. First of all it restates the importance of making proposals in good faith. To better explain the concept it then goes on to indicate that the proposal must be reasonable[115]; it has to consider the interests of the other faction[116] and that it has to tackle the topic the parties have decided to negotiate[117].

Furthermore, the act of making proposals is not the only act that should be made in good faith. According to the memorial, it is also important that good faith should be employed also in the reception and contemplation of proposals. The document exemplifies the concept with the help of the *North Sea Shelf Cases* (1969). In that context, the Court stated that: "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement […]. They are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position

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[107] In fact it takes under consideration the *Air Service Agreement of 27 march 1946 between the United States of America and France* (RIAA, Vol. XVIII, p. 484) to explain that "the duty to negotiate may, in present times, take several forms and thus have a greater or lesser significance".
[108] *Bolivian Memorial,* p. 99, para. 225.
[109] 1833 UNTS 3. Also in [1994] ATS 31, and 21 ILM 1261 (1982).
[110] UNCLOS, Art. 125.
[111] Bolivian Memorial, p. 100, para. 230.
[112] *Ibidem,* p. 103, para 235.
[113] *Nuclear Tests* (*New Zealand* v. *France*) Judgment, I.C.J. Reports 1974, p. 473, para. 49; and *Nuclear Tests* (*Australia* v. *France*) Judgment, I.C.J. Reports 1974, p. 268, para. 46.
[114] *Application of the Interim Accord of 13 September 1995* (*the former Yugoslav Republic of Macedonia* v. *Greece*), Judgment of 5 December 2011, *I.C.J. Reports 2011*, p. 685, para. 132.
[115] Bolivian Memorial,, p. 106, para. 247.
[116] *Ibidem* p. 107, para. 249.
[117] *Ibidem* p. 108, para. 252.

without contemplating any modification of it"[118].

The duty to negotiate also concerns the legal modalities that may be propositioned[119]. There must also not be any unreasonable delay[120].

The duty to negotiate is also continuing. It stops only when discussions have been completely finalized or have become pointless. The fact that negotiations have been going on for a long time does not represent a valid reason to put an end to them[121].

Lastly, the second chapter is concluded with an analysis of how the Chilean duty to negotiate was created. After defining the meaning of treaty[122], the memorial quotes one of the fundamental principles of international law, declared in Article 26 of the VCLT (*Pacta sunt servanda*): "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". The document also focuses on the duties formed by conduct or unilateral declarations[123].

2.3. Chapter III of the Bolivian Memorial: Chile's Breach of its Obligations

Section one of the third chapter expresses the deterioration of the terms for negotiation. It does so by expressing the Chilean failure to apply good faith in the negotiations for a sovereign access to the Pacific Ocean. The document lays out the many agreements and commitments expressed by the Chilean government to negotiate with Bolivia[124], but shows doubts over the Chilean good faith and promise to obtain viable solutions, as none of the attempts had a successful conclusion.

The Memorial exemplifies this statement listing the failed attempts at restoring the Bolivian littoral[125], with the aim to show the carelessness of the Chilean government in regards to the Bolivian situation.

Section two further develops the Bolivian thesis stating that Chile was always formally open to negotiations, but never in good faith. It also tickles the issue of the Chilean point of view about the duty to negotiate. Moreover, in 1987 the Chilean government declared that no ground was present to negotiate such an access to the Ocean[126]. This statement was modified many years later, in 2007, when the Foreign Minister of Chile answered to a question regarding the importance of the Bolivian issue in the so-called 13 points

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[118] *North Sea Continental Shelf Case,* Judgment, I.C.J. Reports 1969, p. 47, para. 85(a); cited also in *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010, p. 47, para. 146.
[119] *Bolivian Memorial,* p. 113, para 269.
[120] Ibidem*,* p.114, para. 275.
[121] *Legal Consequences for States of the Continued Presence of South Africa In Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion I.C.J. Reports 1971*, p. 44, para. 85. See also *Government of Kuwait v. American Independent Oil Company 66 I.L.R. 518, 578 (Int'l Arb. Trib. 1982)* which indicated to "sustained upkeep of the negotiations over a period appropriate to the circumstances."
[122] Vienna Convention on the law of treaties. Vienna, May 23, 1969. Article 2(1)(a): "For the purposes of the present Convention: (a) "Treaty" is 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; https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf
[123] Bolivian Memorial*,* p. 125, para. 304.
[124] Bolivian Memorial, p. 157-159, para 400-406.
[125] Chile's reversals concerning the 1895 Transfer Treaty; Chile's conduct in the Period of the 1950 exchange of notes; Chile's conduct in 1975. Bolivian Memorial*,* p. 160-166
[126] Ibidem, Vol. II, Annex 149.

Agenda. He answered: "Yes, it is point 6. […] We do not want to set deadlines; we have an educational task at hand to explain to people that in the 21st century, countries have to integrate genuinely, not only rhetorically"[127].

To summarize, according to the Bolivian view Chile sustained two different views. At one end it declared it would negotiate a Bolivian sovereign access to the Pacific Ocean, acknowledged the issue of the sea and started discussions to settle it. At the other, it rejected the statement that a duty to negotiate is present and that there is a need to maintain negotiations. In support of this Chile sustained that after the drafting of the Treaty of 1904 the issues between the two countries are to be considered concluded.

In light of this, the second section continues with the consequences of the Chilean infringement of its duty. The memorial sustains that international law expresses a duty to discontinue a wrongful behavior[128].

It also maintains that in the case of omission this duty to halt becomes a duty to act. This is explained with the help of a previous Court decision in the *Belgium v. Senegal* case. The judgement in that case stated that: "in failing to comply with its obligation under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts"[129].

Therefore, the conclusion of the Memorial shows the Bolivian point of view on the Chilean obligation to discuss a sovereign access to the Pacific Ocean with the neighbor, with a particular focus on the importance of good faith in the issue. The Bolivian requests in the submission are 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; that Chile has breached the said obligation and that Chile must perform the said obligation in good faith, promptly, formally, within a reasonable time and effectively, to grant Bolivia a fully sovereign access to the Pacific Ocean"[130].

3. Economic reasons of Bolivia

It has been said that Arica is the natural port of Bolivia. This means that, even if originally Bolivia had a sovereign access to the sea, the preferred point to export the national goods was still outside of the borders of the country. This is true now more than ever, as Bolivia has lost its littoral and globalization has made it necessary to have a port to be able to commerce with the world.

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[127] Bolivian Memorial, Vol. II, Annex 136.

[128] See *Articles on Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR. Supp. (No. 10) 43, UN Doc. A/56/10 (2001) Article 30, and its Commentary, in *YILC*, 2001, Vol. II (2), pp. 88-91, in particular para. 4 of the Commentary: "Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act".

[129] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), Judgment, *I.C.J. Reports 2012*, p. 422, para. 121. See also *Jurisdictional Immunities of the State* (*Germany* v. *Italy*: *Greece intervening*), Judgment, *I.C.J. Reports 2012*, p. 99, paras 137 and 139 (4).

[130] Bolivian Memorial, p.195, para 500.

The Faye *et al.* model of 2004 shows that the main issue landlocked countries must face is their dependency on the countries where the products must transit[131]. Research has shown that in the case of Bolivia, Arica holds 45% of Bolivian exports and 65% of imports[132]. Other fundamental ports for Bolivian commerce are Antofagasta with 35% of exports[133], and Iquique with 18%[134].

It has also been found that there are some factors that cause a raise of costs for Bolivia to export with the world. On the one hand, there are the constant quarrels between the country and its main exporter to the world, Chile. This analysis has extensively treated that factor. On the other hand, there is the Chilean internal conflict between sectors which directly affects Bolivian commerce in ports and customs. Together with other countries in the South-American region, Chile has seen many social protests arise in reaction to the growth of the private sector[135]. Since the beginning of the process of privatization of Chilean ports, workers strikes have been constant. Chile has been shown to have the highest percentage of port strike days from 2010 to 2014[136], ranking first with 46% of the total in South America. To this, one has to add the strikes of the workers of the Chilean Custom, which have been growing in the last years in reaction to privatization[137].

More generally, it has been found that Bolivian commerce is very much affected as it depends on Chilean times and political conflicts. It has to be said that, were Bolivia to obtain a sovereign access to the Pacific Ocean, there would still be considerable costs to face. Strikes and slow bureaucracy are a reality that is not only relative to Chile; furthermore, to obtain sovereign access to the sea would also mean that Bolivia should build and take care of new infrastructure, as well as well as taking care of the human capital, the *know how* and the social peace necessary to assure the efficiency of commercial exchange[138]. However, it is also true that the dependency on the Chilean economic and political situation does not allow Bolivia the possibility to autonomously control its commerce.

4. Rights of access of landlocked states to and from the sea and freedom of transit

The LOSC determines the rights of access of landlocked States. Because of their geographical disadvantage, international law grants many rights to those states in order to balance as much as possible the benefits.

The main article regarding this issue is Article 125: "1. Landlocked States shall have the rights of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, landlocked

[131] Faye *et al. The challenges facing landlocked developing countries*. Journal of Human Development, 2004, 5(1), pp. 31-68.
[132] D. Agramont and J. Peres-Cajías, *Bolivia, un país privado de litoral*. Oxfam, 2016. p. 100
[133] Which is only used to export minerals, Ibidem, p. 101.
[134] *Ibidem*.
[135] E. Taddei, *Crisis económica, protesta social y "neoliberalismo armado" en América Latina*. CLACSO, Buenos Aires, 2002
[136] J. Sánchez. et al. *Transporte marítimo y puertos. Desafíos y oportunidades en busca de un desarrollo sostenible en América Latina y el Caribe*. CEPAL, 2015
[137] *Aduaneros chilenos levantan paro en la frontera tras nueve días,* Pagina siete, found at http://www.paginasiete.bo/economia/2015/5/28/aduaneros-chilenos- levantan-paro-frontera-tras-nueve-dias-58122.html
[138] D. Agramont and J, Peres-Cajías,, *Bolivia, un país privado de litoral*, p. 94.

States shall enjoy freedom of transit through the territory of transit States by all means of transport"[139]. In this article it is unmistakably expresses the landlocked states' freedom of transit, leaving no doubt of that [140].

Furthermore, the Article follows giving exact instructions on the exercise of that freedom: "the terms and modalities for exercising freedom of transit shall be agreed between the land-locked states and transit States concerned through bilateral, sub regional or regional agreements"[141]. However, this freedom is not dependent on special agreements and does not exist "on the basis of reciprocity"[142].

Moreover, the third paragraph of the Article compels transit States to safeguard the legitimate interests of their country, but forbids them from taking measures which hindered the transit of the land-locked States.

Another important Article that sets out the conditions of transit of landlocked states is article 130. Its first paragraph explains that the transit States should ensure with all the necessary measures the reduction of all delays and technical complications[143].

5. The Chilean position

5.1. Chilean Preliminary Objection to the Bolivian Memorial

On July 15 2014, Chile answered to the Bolivian Memorial with a preliminary objection which focused mainly on the lack of jurisdiction on the part of the International Court of Justice. The document is structured in five chapters, explaining the various legal proceedings between the two countries and maintaining that the precedents do not set the basis for an intervention from the International Court of Justice.

The main thesis of the Chilean preliminary objection is that there is no jurisdiction of the Court regarding issues that had already been settled. They base their assumption on Article VI, which omits jurisdiction of the Court over topics that have already been settled.

The preliminary objection also recognizes that the basis of the Bolivian claim of the Court's jurisdiction is Article XXXI of the Bogotá Pact[144], which might be undermined by exceptions like article VI of the same Treaty, which states that: "The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are

[139] UNCLOS, article 125 (1).
[140] L. Caflish, *la convention du 21 mai 1997 sur l'utilisation des cours d'eau internationaux à des fins autres que la navigation*, Annuaire Français de Droit International, 1997, p. 97.
[141] UNCLOS, Article 125 (2).
[142] J. Monnier, *Right of Access to the Sea and Freedom of Transit*, in R.J. Dupuy and D. Vignes, *A Handbook on the New Law of the Sea,* vol. 1, Dordrecht, Nijhoff, 1991, p. 519.
[143] UNCLOS, Article 130 (1).
[144] *American Treaty on Pacific Settlement*, signed at Bogotá on 30 April 1948 (*Pact of Bogotá), Article VI*, 30 *United Nations Treaty Series 83* p. 231: "in conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the Jurisdiction of the Curt as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning a) the interpretation of the Treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute the breach of an international obligation; d) the nature or extent of the reparation to be made for the breach of an international obligation".

governed by agreements or treaties in force on the date of the conclusion of the present Treaty"[145].

The document states that the Bolivian claim would bring to a revision or an annulment of the Peace Treaty of 1904. There is then an explanation of this intention through the quote of a press release made by the Bolivian President: "maritime claim pending at The Hague prevails over the 1904 Treaty which, in any event, it condemned as unfair, forced, and broken"[146].

The Preliminary Objection refuses to accept article XXXI as a valuable basis to re-evaluate the treaty, as it maintains the statement that this article is overruled by Article VI. The document then goes on to explain the nature of the objections of the Bolivian claim, focusing on the fact that Bolivia initially wanted to apply a reservation[147] to Article VI, which was later withdrawn as it would have kept negotiations going for an excessive amount of time and would have prevented the Treaty from entering into force[148].

After going over the historical events and declaring that Chile has done everything it needed to do to satisfy the Bolivian need to a sovereign access to the Pacific Ocean during the drafting of the 1904 Peace Treaty, the document expresses once again that the issue of the access has been settled with the compliance of the Chilean government to the terms of freedom of transport and provision of infrastructure declared in the Treaty[149].

Chapter IV of the Preliminary Objection explains the Bolivian efforts to bypass the Treaty, and why those attempts cannot determine jurisdiction. It takes into consideration the 1895 Treaty on Transfer of Territory[150], the post-1904 exchanges of notes[151] and Article VI itself, to demonstrate the fact that it also relates to the jurisdiction over Tacna and Arica[152].

After considering all these factors, the document asks the Court to recognize that there it has no jurisdiction to deliberate in this matter.

5.2. The Bolivian Written Statement about the Objection

Chile's Preliminary Objection was rejected by the Bolivian government, which then proceeded to explain why it was a right granted by international law to obtain a judgement by the International Court of Justice.

As a first proof of this right, the written statement reminds the Court of the fact that "[It] shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the

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[145] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948 (*Pact of Bogotá),* Article VI [hereinafter Pact of Bogotá]
[146] Official Bolivian Press Release, "Morales calls on Obama to show Chile how treaties may be revised and territories returned", Bolivian Information Agency, 30 June 2014
[147] "The Delegation of Bolivia makes a reservation with regard to Article VI, inasmuch as it considers that pacific procedures may also be applied to controversies arising from matters settled by arrangements between the Parties, when the said arrangement affects the vital interests of a State". Bolivia's Reservation to Article VI of the Pact of Bogotá.
[148] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Preliminary Objection of the Republic of Chile, vol. 1, I.C.J reports 2014, p. 16, para. 3.18 [hereinafter Chilean Preliminary Objection]
[149] *Chilean Preliminary Objection,* p. 26, para. 3.33.
[150] *Ibidem,* p. 33, Section 1.
[151] *Ibidem,* p. 37, Section 2.
[152] *Ibidem,* p. 39, Section 3.

objection does not possess, in the circumstances of the case, an exclusively preliminary character"[153]. It then proceeds to state that if the objection was to be rejected or declared as not having preliminary character, it would establish a time-limit aiding efficiency in the legal procedure.

The document later declares its intention to demonstrate that the Chilean claims, based on Article VI of the Peace Treaty, does not have any merit. It maintains that the main claim of Bolivia is that Chile had arranged to discuss a sovereign access to the Pacific Ocean regardless of the 1904 Peace Treaty and had repeatedly failed to do so. The accusation then lied on the fact that Chile had breached an international duty. That according to Article XXXI, paragraphs b), c), and d), Chile should recognize the breach of international law, negotiate a sovereign access to the sea and find the best way to make amends[154].

It also declares that in none of the previous documents filed by Bolivia on the particular subject matter there was an intention to revise or nullify the Peace Treaty of 1904. The document then goes on to show the many efforts made by the two countries to cooperate in the issue and the constant failures to do so[155]. A section of the document is also dedicated to the detailed explanation of Article VI of the Pact following the view of Bolivia[156], and further explains why according to the Bolivian government Chile misunderstands the interpretation of the Article and, therefore, the Bolivia's claim.

After explaining the motives that allow Bolivia to claim that Chile fails to acknowledge the right condition of the negotiations between the two States[157], the document expresses the argument that the negotiation over a sovereign access to the Pacific Ocean must happen regardless of the 1904 Treaty. Furthermore, it asks the Court to acknowledge the Chilean duty to cooperate in the issue of a Bolivian sovereign access to the sea and command Chile to comply with its obligations following the *pacta sunt servanda* principle.

Accordingly, the Bolivian government requires the Court to reject the Chilean Preliminary Objection and declare that the Bolivian claim is within the limits of its Jurisdiction.

On September 24th, 2015 the Court rejected the objection made by Chile and approved the view of the Bolivian application that granted the Court the ability to deliberate over the matter.

In its Judgement, the Court brought to mind the fact that the Bolivian Application did not consider the Peace Treaty of 1904 as a source of duties and rights for either State. The Application, continued the Court, presents the grievance about the presence of a duty to negotiate a sovereign access to the sea, which supposedly Chile is breaching. The Court agreed with Bolivia on the subject matter expressed by the Application. If such duty would exist, the Court would later determine if Chile is effectively breaching it[158].

In its conclusion, the Court stated that "the matters in dispute are not matters 'already settled by

[153] Rules of Court 79 (9).
[154] *Written Statement of the Plurinational State of Bolivia on the Preliminary Objection to Jurisdiction filed by Chile,* p. 8, para 22.
[155] *Ibidem,* p. 10, para 29-37.
[156] *Ibidem,* p. 16-18.
[157] *Ibidem,* p. 21-25.
[158] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgement to the Preliminary Objection, I.C.J reports 2015, p. 609, para. 50.

arrangement between the parties, or by arbitral award or by decision of an international court' or 'governed by agreements or treaties in force on the date of the conclusion of the [Pact of Bogotá]'. Consequently, Article VI does not bar the Court's jurisdiction under Article XXXI of the Pact of Bogotá. Chile's preliminary objection to the jurisdiction of the Court must be dismissed"[159]. This was a clear demonstration of the agreement between the Court and Bolivia over the claim to request a Judgement, as the issues brought to attention had not been solved through previous negotiations.

Agreeing with the Bolivian Memorial, the Court declared that the case needed to be further studied and could not stop at a preliminary stage. Therefore, it requested a Counter-Memorial by Chile in order to be able to reach a final judgement.

5.3. The Chilean Counter-Memorial

The ruling of the International Court of Justice to the Chilean Preliminary Objection and the subsequent Bolivian comment about that was that the Court had in fact jurisdiction over the matter.

Therefore, the legal proceeding required Chile to draft its Counter-Memorial stating its defense.

In its Counter-Memorial, Chile declares its statement that there is no obligation dictated by law that would require the State to negotiate an access, and that the exchanges to which Chile takes part are made only in the spirit of friendship and collaboration with the neighboring country[160]. There are two main arguments found in the document. The first one is that the Peace Treaty of 1904 did not leave any issues pending. The second is the recognition that there were some moments when the two States negotiated a sovereign access to the sea for Bolivia; these negotiations however did not take place under any binding legal obligation.

The document begins with an historical overview[161], the main points of which have been previously stated, to then dedicate a chapter to the intrinsic meaning of the Peace Treaty of 1904. It declares the three main aspects that determine the importance of the treaty in the subject matter at hand. First and foremost it established the conditions that Bolivia had to follow regarding its access to the sea. Then it determined the basis for the Bolivian free access to the sea, which would take place through Chilean territories and ports. Lastly, the Peace Treaty explained the background for future negotiations regarding the issue.

The Counter-Memorial expressly states that sovereignty over an access to the sea must not be part of the Bolivian claim, as it is an issue solved in the Treaty, which had been sighed by both States. Therefore, it cannot be disputed in front of a Court[162]. Regarding the Peace Treaty the document also explains once again its terms and rulings[163].

Chapter 4 of the Counter-Memorial discusses the various issues of international law raised by the

[159] Ibidem, p. 610, para. 54.
[160] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* Counter-Memorial of the Republic of Chile, I.C.J reports 2016, [hereinafter Counter Memorial of Chile], p. 1, para. 1.2.
[161] Ibidem. p 17-32.
[162] Counter Memorial of Chile, p. 33, para 3.3.
[163] Ibidem, p. 38-54.

dispute.

The first issue taken into consideration is the duty to negotiate. Chile states that Bolivia did not consider the distinction between the willingness to create a legal duty and the political expression of the inclination to act in a specific way. To clarify the concept, the document quotes Sir Hersch Lauterpacht, who in his role of International Law Commission (ILC) Special Rapporteur said that: "there exists formal international instruments […] which […] are in the nature of statements of policy rather than instruments intended to lay down legal rights and obligations"[164]. To this the ILC also added that those instruments "merely contained declarations of principles or statements of policy, or expressions [of] opinions or *voeux*"[165]. The Counter-Memorial also states that according to leading scholars "an international agreement is not legally binding unless the parties intend it to be"[166]. During the correspondence between the two States Bolivia never claimed the existence of an obligation.

Even supposing that the obligation existed, continues the Counter-Memorial, it would have to have a limited scope and period. If the obligation had started in a particular point in time it could be against the custom and the law to make it a duty that would last for an unlimited time. The obligation to negotiate entails that the negotiations must be in good faith, but would not obligate a state to accept the propositions of the other and to go against its own interests; following the same reasoning and in absence of specific proof of the opposite, the duty to cooperate would not oblige to keep negotiations going indefinitely until an agreement is reached. The document clarifies this argument by taking as example the case *Railway Traffic between Lithuania and Poland*. In that instance, the Permanent Court said that "an obligation to negotiate *does not imply an obligation to reach an agreement*, nor in particular does it imply that Lithuania, by undertaking to negotiate, has assumed an engagement, and is in consequence obliged to conclude the administrative and technical agreements indispensable for the re-establishment of the traffic on the Landwarów-Kaisiadorys railway sector"[167]. To follow the Bolivian claim that negotiation should be permanent would include a duty of result. The Polish-Lithuanian case fully explains how this would not be true. Moreover, the same example directly explains that negotiations have to be pursued only "as far as possible"[168] and negotiations will have to end if the two parties

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[164] *Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur*, Yearbook of the International Law Commission, 1953, Vol. II, UN Doc A/CN.4/63, pp 96-97, para 4.

[165] *Report of the Commission to the General Assembly*, Yearbook of the International Law Commission, 1959, Vol. II, UN Doc A/4169, p 96, commentary to draft Article 2, para 8(b). See also C. Eckart, *Promises of States under International Law* (2012), p 38: "The element of a manifested will to undertake a *legal* commitment first of all distinguishes legal action from 'merely' politically relevant state conduct. Drawing the line between the two is often difficult in practice; nevertheless, the international legal order assumes a clear difference to exist between the display of political goodwill through statements of intent, on the one side, and undertakings which will create a legal tie, on the other" (emphasis in original). The importance of distinguishing between provisions containing hortatory aspirations "not considered to be legally binding except by those who seek to apply them to the other fellow" and "definite legal obligations" was remarked upon in the Separate Opinion of Judge Dillard, *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p 107, footnote 1.

[166] O. Schachter, *The Twilight Existence of Nonbinding International Agreements*, 1977, 71 American Journal of International Law, pp 296-297 (footnotes omitted). See also S. Rosenne, *Developments in the Law of Treaties 1945-1986* (1989), p 86; R. Jennings and A. Watts, Oppenheim's International Law (9th edn, 1996), p 1202; A. McNair, *The Law of Treaties* (1961), p 15; and J.E.S. Fawcett, *The Legal Character of International Agreements,* 1953, 30 British Yearbook of International Law, p 385.

[167] *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów- Kaikiadorys)*, Advisory Opinion, 1931, P.C.I.J. Series A/B, No 42, p 116 (emphasis added).

[168] Ibidem.

find themselves at an impasse[169].

The document later proceeds to state all the exchanges that happened among the years, maintaining that in none of the cases it created a legal obligation. One of the points where the Counter-Memorial focuses the most is on the guidelines laid down for negotiation in 1975 following the Declaration of Charaña. The principal statement of the section is the fact that no legal obligation arose from the guidelines and that they merely set out the willingness to cooperate on the matter.

1986 was the year a "fresh approach" was taken by the Bolivian President to develop a stronger relation with Chile, especially economically[170]. This approach was based on a list of topics to discuss together with the Bilateral Rapprochement Committee[171]. The particularity of this document was that it did not focus specifically on the maritime issue but on a multitude of topics. The approach was warmly welcomed by Chile as well as by the Organization of American States General Assembly and restored hopes on a betterment of relations. The document shows this as a very clear example of the good faith demonstrated by Chile with regards to the negotiations with its neighbor[172].

Many propositions were made by Bolivia regarding the maritime issue, which were considered by Chile. The Counter-Memorial displays the additional information requested by Chile as a demonstration of good faith. The propositions were eventually discarded, but the document reminds the Court that countries taking part in negotiations have the right to dismiss all proposals that go against national interest.

The last chapter of the Counter-Memorial explains the process of reconstruction of friendship on the part of Chile once democracy was restored. The document suggests that, since there was no official suggestion of a duty to negotiate, in that period of time the two States were actually able to develop beneficial agreements[173].

In fact, in 2000 the two countries were able to work together and draft the Algarve Declaration which had as a central point the intention to create and agenda to reach an agreement. The declaration expressed once again the "good disposition of the parties" and their "willingness for the dialogue that has been launched"[174].

The agenda took form under the Presidency of the Chilean Mrs. Bachelet and the Bolivian Mr. Morales. It was called the 13-point Agenda and it was finalized in 2006. The discussion continued with the successor of Mrs. Bachelet, Mr. Piñera, who made two propositions to solve the matter. Negotiations followed until in 2011 the Bolivian President gave an ultimatum to Chile to develop a concrete proposal that could count as a basis for negotiation[175]. On the last day of the ultimatum, which fell on the Bolivian festivities of the "Day of

[169] "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion would have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitively declares himself unable, or refuses, to give was". Mavrommatis Palestine Concessions, Judgment No 2, 1924, P.C.I.J. Series A, No 2, p 13 .See also United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p 27, para 51.
[170] Counter Memorial of Chile, Vol. 5, Annex 283.
[171] Ibidem, Vol. 5, Annex 284 pp. 1 and 2.
[172] Counter Memorial of Chile, Vol. 1, p. 117, para. 8,36.
[173] Counter Memorial of Chile, Vol. 1, p. 185, para. 9.7.
[174] Ibidem, Vol. 5, Annex. 318.
[175] Ibidem, Vol. 6, Annex 354.

the Sea", Mr. Morales declared that Bolivia would start legal procedures against Chile.

The Chilean belief is that there is not any legal obligation to negotiate with Bolivia[176]. The claims of absence of good faith have been addressed and clarified by the document, which therefore asks the Court to reject them.

6. The Judgement of October 1st, 2018

Bolivia's claim aims to recognize that Chile is obligated to negotiate a sovereign access to the Pacific Ocean. According to the Court, the duty to negotiate does not contain an obligation to reach an agreement as well[177].

Furthermore, in its judgement, the Court recognizes that States might decide to create a duty to negotiate. Taking inspiration from the Judgement given in 2010 for the case "Argentina v. Uruguay", the Court recalls that "an obligation to negotiate does not imply an obligation to reach an agreement" unless expressly stated otherwise[178].

Bolivia argues that all kinds of agreements, written or oral, can create legal effects which are binding for the parties. Chile on the other hand replies that the willingness to be bound by an obligation to negotiate has to be stated in a language which is legal. In addition, only in very unique cases a tacit arrangement has been considered valid by the Court.

To the Chilean comment the Court replies that Article 3 of the Vienna Convention expresses how agreements that have been made in an unwritten form can have legal importance and command the parties to be bound by the legal duties. To exemplify this statement, the document brings to mind the case *Nicaragua v. Honduras*. In that instance, the two States were conflicting over the boundaries between neighboring maritime zones. In its judgement, the Court stated that "Evidence of a tacit legal agreement must be compelling"[179].

Regarding the 1920 diplomatic exchanges, the Court comments that Chile showed willingness to cooperate in finding a solution for the Bolivian maritime situation. Moreover, it is found that in the *acta protocolizada* it was never shown an intention to create any rights or duties for the countries that signed them[180].

Another point where the Memorial and Counter-Memorial focused was the 1950's exchange of Notes.

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[176] Ibidem, Vol. 1, p. 201, para. 10.1.

[177] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Judgement (hereinafter 2018 Judgement), p. 32 para. 89.

[178] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, I.C.J. Reports 2010 (I), p. 68, para. 150. The decision of the Court in the instance of 2010 was influenced by the fact that Uruguay, failing to respect its duties of information, had begun procedures to build mills before the end of the negotiation period. The Statute drafted between the two Parties in 1975 required a co-operation mechanism. The Court stated that such Statute would have had no use if the mechanism was not to be enforced. Therefore, remembering the Advisory Opinion regarding a conflict between Lithuania and Poland[178], it decided to reiterate the statement.

[179] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras*), Judgment, I.C.J. Reports 2007 (II), p. 735, para. 253. During the legal process, Honduras had stated that there was a delimitation that, even if not officially, had traditionally been considered as the maritime limit between the two countries. Nicaragua on the other hand, stated that it had never officially recognized the boundary line. The decision of the Court was brought about by the clarification that there was no boundary officially established *uti possidetis juris*. The Court also stated that, as it had never been expressly stated, the existence of a tacit agreement on an important concept such as a boundary line could not be presumed.

[180] 2018 Judgement, p. 36, para. 105.

Bolivia's claim on the subject is that the Notes can be considered as creating a double agreement. According to the Court, it is true that "two or more related instruments" can be considered as a treaty[181]. However, this can only be true if the states give their consent to be bound; this can happen either if the instruments used stipulate that a treaty will be created when they are exchanged, or if the fact that the exchange of instruments will create a new treaty is established in another way[182]. According to the Court, the first case is not applicable to the situation and there has not been enough proof to confirm the second.

Furthermore, considering the exchange of Notes as the creation of a treaty means not following the custom that is usually considered with regards to international agreements. The usual practice requires the drafting of a note from one State that suggests that the agreement be concluded, and attaches the text of said agreement. The other party then sends another note with the complete text and agrees to the conclusion of the treaty. There can be some other ways to conclude a treaty, but the main concept is that the two parties have to be in complete agreement regarding the wording and the meaning of the agreement, which is clearly not the case in the exchange of Notes.

Another main point is the Declaration of Charaña. With the right wording this document could be considered as a binding international agreement. However, the Court states, the language used in the document shows that it was drafted under a political light and not a legal one. The Court sees the Declaration more as a show of fraternity and solidarity rather than a formalization of the terms between the States[183]. The document states that in the Declaration there is no presence of a duty to negotiate. However, the Court also recognizes that Chile and Bolivia are effectively in the middle of a negotiation and that Chile did propose to give Bolivia a sovereign access to the sea by ceding part of its coastline. During the discussions to formalize this cession Peru was involved and vetoed the resolution, offering to put the territory under the jurisdiction of the three States. When Chile did not agree to this, the negotiations ended.

For the matter of the 1986 communiqués, the Bolivian position is that they could be considered as a starting point for negotiations, therefore implied a duty to negotiate. The Chilean answer to this is that in the meeting of 1987 that followed the communiqués there was no mention of the willingness of Chile to be bound. The only issue Chile wanted to clarify in the communiqué was the position of the States previous to the meeting. The Court draws inspiration from the *Aegean Sea Continental Shelf* case to judge on this instance. In that case, the Court stated that there is "no rule of international law which might preclude a joint communiqué from constituting an international agreement"[184]. However, the two communiqués cannot be considered as the source of obligation towards Chile.

Neither can the Algarve Declaration. In fact, it only indicated the States' inclination to find a solution for the maritime issue, based on an agenda which still had to be drafted.

The plan was defined in the 13-points Agenda, the sixth point of which concerned the maritime issue.

[181] Vienna Convention, Article 2, para. 1 (a).
[182] Vienna Convention, Article 13.
[183] 2018 Judgement, p. 40 para. 126.
[184] *Aegean Sea Continental Shelf (Greece v. Turkey),* Judgement, I.C.J. Reports 1978, p. 39, para. 96.

However, this document too was found to only have a political meaning[185].

The judgement also tackles the issue of Chile's declarations. Bolivia focuses on many declarations made by Chile that, in the Bolivian opinion, are the basis of a legal obligation[186]. According to the Court, there are some specific criteria that have to be considered for a declaration to have binding nature. As a matter of fact, the Court brought to mind the case *Nuclear tests (Australia v. France)*, more especially the argument made in regard to the oral declaration made by the French authorities. To deliberate whether the declaration was binding or not, the Court Stated that: "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding"[187]. Moreover, to conclude what the legal consequence of a statement is, there is the need to "examine its actual content as well as the circumstances in which it was made"[188]. The way the declarations are worded do not imply that Chile was willing to undertake a legal duty to negotiate a Bolivian sovereign access to the sea.

Furthermore, Bolivia accuses Chile of frustrating its legitimate expectations. The answer of the Court is that legitimate expectations can be present in cases where there is a dispute between an investor and its host State. It does not exist in general international law, therefore it cannot be taken as a legitimate claim.

In conclusion, the Court recognizes the long dialogue that has taken place between the two countries aimed at finding a solution to the maritime issue of Bolivia. However, it cannot agree with Bolivia on the fact that there is ground to develop an obligation towards Chile[189]. The Court is clear in expressing that the judgement must not be considered as an official stop to negotiations: it sustains in fact that if both parties agree, there are no impediments to finding a way out from the land-locked situation of Bolivia[190].

[185] 2018 Judgement, p. 43, para. 138: as was remarked by the head of the Bolivian delegation to the General Assembly of the OAS "the agenda was conceived as an expression of the political will of both countries to include the maritime issue".
[186] *Ibidem*, p. 44-46.
[187] *Nuclear tests (Australia v. France),* Judgement, I.C.J. reports 1974, p. 267, para 43; see also *Nuclear Tests (New Zealand v. France),* Judgement I.C.J. Reports 1974, p. 472, para. 46.
[188] Ibidem, p. 472, para. 46.
[189] *2018* Judgement, p. 54, para. 175.
[190] 2018 Judgement, para. 196.

CHAPTER III

DISPUTE OVER THE STATUS AND USE OF THE WATERS OF THE SILALA RIVER (CHILE v. BOLIVIA)

As discussed in the previous chapter, the conflict regarding the sovereign access to the Pacific Ocean is systematically kept alive by Bolivia. As a matter of fact, the conflict is also maintained through various initiatives such as the Day of the Sea (*Dia del Mar*), the existence of a Navy (Armada Boliviana) and in general the official rhetoric adopted by the Government.

For the above reasons it is fair to say that relations between the two countries are rather cold and complex, and even situations not directly linked to the littoral dispute become a pretext to endorse the issue.

It is in this framework that a new dispute arose between the two countries, this time regarding the use of the waters of the Silala river.

This chapter will analyze the start of the legal process regarding this dispute, as it could be an important milestone for the development of relations between the two countries.

The first part will be dedicated to the overview of the case and the reasons behind this proceeding. Then the analysis will move to the norms that govern the issue of the use of the waters of a shared river.

As the case has not yet been judged by the International Court of Justice during the drafting of this chapter, the last section will be dedicated to a tentative analysis of what the judgement could mean for the development of relations between Chile and Bolivia.

Figure 3: The geographical location of the Silala River.

Source: Picswe.net.

1. Overview of the case

The Silala is a river born from a series of springs in the Bolivian territory which have been modified with a series of artificial canals to unite in a single watercourse, passing through Chilean territory[191].

The dispute has roots that date back to 1999, the year in which Bolivia asserted its exclusive rights regarding the waters of the river[192]. The accusation towards Chile was based on the fact that according to the Bolivian view the river had been artificially redirected. Chile reacted to the declaration maintaining that the river is naturally brought to pass through its territories as a consequence of the natural slope of the territory.

This declaration clearly demonstrated that the views of the two countries were irreconcilable. On the one hand, Chile claims that the Silala river has an international connotation and that its waters can be used according to the customs of international law. Bolivia should therefore cooperate and provide opportune information on measures it may take regarding the use of its waters[193].

On the other hand, the Bolivian claim is that the Silala river does not represent a transboundary watercourse. Therefore, the use of the waters is exclusive to Bolivia and Chile should pay to use its waters, as compensation.

On May 30th, 2016, the Minister of Foreign Affairs of Chile sent a note to the register of the international Court of Justice to announce its intention to file an application against Bolivia[194].

The application stated the reason why Chile initiated the legal proceedings. The starting point of the explanation was the 1904 Treaty of Peace between the two States: the River Silala was found to be crossing the boundary between two border points[195]. The definition of the Silala being a river which crossed both sides of the border was reiterated in 1942 under the Protocol of the Conservation of Boundary Markers[196].

The application then argues that in 2002 Bolivia declared that the Silala river was property of Bolivia as it did not naturally flow towards Chile but had been artificially modified to run in that direction. The declaration also introduced the idea of interrupting the direction of the river towards Chile or beginning legal action for the compensation of its inappropriate use[197]. This declaration was rejected by Chile, including any measures that would modify the course of the River in Chilean territories[198]. Following a series of projects

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[191] B.M. Mulligan, G.E. Eckstein, *The Silala/Siloli Watershed: Dispute over the Most Vulnerable Basin in South America* [2011] Water Resources Development 596-597.

[192] See T. Meshel, *A New Transboundary Freshwater Dispute before the International Court of Justice* (2016) 42 Water Intl 92; B.M. Mulligan, G.E. Eckstein, *The Silala/Siloli Watershed: Dispute over the Most Vulnerable Basin in South America* (2011) 27 Water Resources Development 595; C.R. Rossi, *The Transboundary Dispute Over the Waters of the Silala/Siloli: Legal Vandalism and Goffmanian Metaphor* (2017) 53 Stanford J Intl L 55.

[193] *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)*, Application Instituting Proceedings, I.C.J reports 2016

[194] Ibidem, p. 2.

[195] Treaty of Peace and Friendship entered into by Bolivia and Chile, 20 October 1904, published in the Chilean Official Gazette No. 8169 of 27 March 1905 (Annex 9.1)

[196] Protocol on the Conservation of Boundary Markers, 10 August 1949 (Annex 13).

[197] Communication No. 143 from the General Consulate of Chile in Bolivia attaching a press release from the Ministry of Foreign Affairs of Bolivia, 26 February 2002 (annex 25)

[198] Press release from the Ministry of Foreign Affairs of Chile, 4 March 2002 (annex 26).

developed along the river by Bolivia, the Chilean conclusion is that they may have dangerous effects on the quality of the waters. They also add that Chile had never been informed of the development of those projects, or on the safety measures used to prevent dangerous effects.

In its application, Chile also reminds the Court of the various declarations made by Bolivia which stated that Chile was lying in calling the Silala an international river, or that it continuously makes illegal use of the waters without compensating Bolivia[199].

Therefore, the Chilean Government asks the Court to rule that the Silala is in fact an international river; that Chile is allowed to use its waters according to the rules of customary international law; that Bolivia is obligated to take all the necessary measures to avoid pollution, which may harm Chile and, lastly, that Bolivia has an obligation to cooperate with Chile by giving information any time it may adopt some measures regarding the river[200].

2. The issues before the Court

In its application, Chile introduced three main arguments against Bolivia. The first describes how international law defines an international watercourse[201]; the second reminds the readers of the principle of "equitable and reasonable utilization" of said watercourses[202], the third represents the other duties Bolivia must comply with according to customary international law[203].

It must be noted that the custom of international law is fragmented for what concerns watercourses[204]. A big component of the legal regime regarding rivers has to be found in treaty law. Therefore, in his "Brownlie's Principles of Public International Law", Crawford states a series of contentions between States which have been solved through the interpretation of the Treaties in force between the two parties[205]. Taking into consideration the *Lac Lanoux* case between France and Spain, the author points out that the issues at hand were to be determined considering the law of treaties, as well as the principles of responsibility of the States[206]. A landmark for the codification of the principles ruling over the use of shared watercourses was reached with the adoption by the International Law Association (ILA) of the Helsinki Rules on the Uses of Waters of International Rivers in 1966. The document was followed in 2004 by the Berlin Rules on Water Resources, adopted by the same Association.

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[199] Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Application, Registry of the Court 2016, p.18, para. 37-38.
[200] Ibidem p. 23, para. 50.
[201] Ibidem p. 20 paras 43-45.
[202] Ibidem p. 22, paras 46-47.
[203] Ibidem p. 22, paras 48-49.
[204] P. Cullet, *Water Law in India. Overview of Existing Framework and Proposed Reforms* (2007) IELRC Working Paper, 1 <www.ielrc.org/content/w0701.pdf>.
[205] The author mentions the *Lac Lanoux* case between France and Spain; the *Gabčikovo-Nagymaros* case of 1997 and the *River Oder* case of 1929. J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford, 2012, p. 338-339.
[206] Ibidem.

The International Law Commission for its part drafted the UN Convention on the Law of Non-Navigational Uses of Watercourses (UNWC)[207]. The Convention unified the principles to interpret grievances regarding watercourses. It has been stated in the document that there are factors which must be considered to obtain an equitable and reasonable use of shared watercourses. States must also avoid significant harm to coastal states, and provide remedy if that happens. Section three of the document also states provisions regulating prior notification of planned measures[208]

The Convention has not been signed by either of the two States considered in this analysis. However its provisions are considered to be part of customary international law[209].

Therefore, taking into consideration the statements of customary international law, the following paragraphs will discuss the regulations that would apply if Chile was found to be right and the Court recognized the Silala as an international river.

2.1. The definition of an international watercourse

Oppenheim, a known German jurist, provides a clear distinction between watercourses, dividing them between national, international and internationalized rivers[210]. This definition is later confirmed by jurists Karl Strupp and Briggs[211] and stipulates a series of characteristics that distinguish rivers.

In his book "The Law of the Nations"[212], Briggs maintains that a river is national when its waters flow inside the territory of a single State; an international river on the contrary crosses the boundaries of a State to flow into another; finally, an internationalized river, may it be national or international, is subject to a special convention between States.

According to Oppenheim, the qualification of "international" should be given to those rivers that are governed by a special regime in a treaty. Therefore, he gives two more definitions that introduce the concept of "boundary rivers" and "non-national rivers" for those watercourses that flow between more than one State.

The Chilean Application suggests the definition of Article 2 of the UNWC, which establishes that: "Watercourse means a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus". The article follows with paragraph (*b*) which states that "International watercourse means a watercourse, parts of which are situated in

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[207] Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) UNGA Res 51/229 (21 May 1997) UN Doc A/RES/51/229. Consideration must also be paid to the so-called Berlin Rules on Water Resources, adopted by the International Law Association at the Berlin Conference on Water Resources Law on 21 August 2004.

[208] J. Crawford, *Brownlie's Principles of Public International Law*, OUP Oxford, 2012, p. 339.

[209] J.W. Dellapenna, *The Customary International Law of Transboundary Fresh Waters* (2001) Intl J of Global Environmental Issues 264.

[210] L. Oppenheim, *A Treasie,* Longmans, Green, and co. New York, 1905, pp 225-226, in Chahuan, *Settlement of international Water Law Disputes in International Drainage Basin*, Berlin, p. 91.

[211] K. Strupp, *Theorie und praxis des volkerrechts*, München, 1925, p. 39.

[212] H. Briggs, *The Law of Nations. Cases, Documents and Notes.* Stevens, Appleton-Century-Crofts, New York, 1952.

different states"[213]. According to the application, the Silala river has international characteristics as it runs into Chilean territories following a natural path created throughout time. The definition also includes two conditions which must be met for a watercourse to be defined as international. First of all, it must constitute "by virtue of their physical relationship a unitary whole" and they have to "normally flow into a common terminus". The first condition has been interpreted by the ILC[214] to refer to the parts of the system who, intertwining, come to form a watercourse[215]. In the description of the components, the ILC included the word "canals" to explain how artificial waterways could also be interpreted as being part of watercourses.

Moreover, the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes considers transboundary waters as "any surface or ground waters which mark, cross or are located on boundaries between two or more States"[216]. It is further stated that "surface waters include waters collecting on the ground in a stream, river, channel, lake, reservoir or wetland".[217] It does not make reference to artificial canals as in the case of the river Silala.

Some international instruments have considered canals, both natural and artificial, as being part of the definition of international watercourse[218]. However, the second Article of the Helsinki rules on the Uses of Waters of International Rivers considers an "international drainage basin" as "a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus"[219]. The Berlin Rules consider a "drainage basin" as "an area determined by the geographic limits of a system of interconnected waters, the surface waters of which normally share a common terminus". Canals are mentioned when considering navigation. In fact, a watercourse is considered navigable by the Berlin Rules if "in its natural or canalized condition, the watercourse is currently used for commercial navigation or is capable of being so used in its natural condition[220].

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[213] Convention on the Law of the Non-Navigational Uses of International Watercourses, New York, 21 May 1997, UN doc. A/RES/51/229 (1997) ANNEX 30

[214] International Law Commission

[215] ILC, "Report of the International Law Commission on the work of its forty-sixth session: chapter III (The law of the non-navigational uses of international watercourses)", 1994.

[216] United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992), art. 1.

[217] United Nations Economic Commission for Europe, "Guide to Implementing the Water Convention, adopted by the fifth session of the meeting of the parties (10-12 November 2009) 14[73].

[218] For example the Convention instituting the Definitive Statute of the Danube (Paris, 1921) defines an internationalized river system as including "any lateral canals or waterways which may be constructed". Similarly, the ILA 1958 Resolution on the Use on the Waters of International Rivers defines drainage basin as "an area within the territories of two or more States in which all the streams of flowing surface water, both natural and artificial, drain a common watershed terminating in a common outlet or common outlets either to the sea or to a lake or to some inland place from which there is no apparent outlet to a sea". The 1974 Draft European Convention for the Protection of International Watercourses against Pollution defines international watercourses as "any watercourse, canal or lake which separates or passes through the territories of two or more States". Lastly, the Convention Instituting the Definitive Statute of the Danube (23 July 1921) defines an internationalized river system as including "any lateral canals or waterways which may be constructed, whether to duplicate or improve naturally navigable portions of the river system, or to connect two naturally navigable portions of one of these waterways".

[219] The Helsinki Rules on the Uses of the Waters of International Rivers (adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966), Art. 2.

[220] The Berlin Rules: International Law Association Berlin Conference on Water Resources Law (2004), art. 43(3) and (4).

One of the grievances expressed by Bolivia is that the natural course of the Silala river has been artificially deviated by constructing artificial canals which connect smaller watercourses into a bigger one. Accordingly, the internationality of the river cannot be proved as authentic because the actual course is not the natural one.

According to the sources taken into consideration, one can understand that there is not an inclusive and unified opinion which considers artificial canals as part of a watercourse.

The condition of a watercourse, be it the Silala or any other, is fundamental to determine the rules and obligations applied to the territories of the States involved in the flow of the river, which must cooperate accordingly to the status given to the stream.

Therefore the question arises of whether it is reasonable or not to consider a river passing beyond national boundaries to be considered as merely domestic[221]. The *Lake Lanoux* Case could offer some starting points for the decision of the Court, as the judgement expresses that "the Tribunal, from the viewpoint of physical geography, cannot disregard the reality of each river basin, which constitutes "a whole". […] The unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life[222]. The judgement does not exclude the possibility that a watercourse with shared basins might be considered international.

Even if a state were to declare its sovereignty *de jure*, "There is a real difference when the authority of the State ends at a point on land and when it ends at a point in the water. The difference is not in the concept of authority but in its applicability to the physical phenomena… State A's prohibition against spilling oil into waters of a lake that lies partly in on State A's side of a boundary cannot be effective if State B on the other side of the lake does not also prevent such discharges into the lake. The physical properties of liquids and normal movements of the water will result in some oil crossing the border. So, too, a prohibition by State A against reducing the water level in a boundary river is ineffective if waters users in State B on the other side of the river are not under any restriction as to the amount of water they can withdraw from the river. The principle of sovereignty will not keep water on one side of the river up when water on the other side goes down"[223].

There are three theories that regard the use of international watercourses under customary international law.

The first one is the theory of absolute territorial sovereignty, also known as the "Harmon theory". It is based on the idea that a State can exercise unlimited authority over the segments of the international watercourses on its territory, regardless of the consequences for the other states that share the same river[224]. Explaining his doctrine, Harmon states that "the fundamental principle of international law is the absolute sovereignty of every Nation as against all others within its own territory… all exceptions, therefore, to the power of a Nation within its own territory must be traced up to the consent of the Nation itself. They can flow from no other legitimate source"[225].

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[221] Remarks by SC McCaffrey, *The Non-Navigational Uses of International Watercourses Seminar*, 1990, n 23.
[222] *Lake Lanoux Arbitration (France* vs *Spain),* 1957, XII RIAA 304.
[223] ILC, *"Report of the International Law Commission on the work of its twenty-eight session"* (1976) UN Doc A/31/10, 159 [140].
[224] J. Barberis, Los recursos naturales compartidos entre Estados y el derecho internacional, Tecnos, Madrid, 1979 pp. 23-24.
[225] Treaty of Guadalupe Hildago-International Law 21. Op Att'y General . 274, pp282-283 (1895).

Another theory is that of absolute territorial integrity. According to this view, the downstream States can demand the non-interference of the upstream one regarding its use of the watercourse[226]. In other words, the downstream State is benefitted, as it has the right to forbid projects of the upstream State which might divert the natural flow of the watercourse. The two main supporters of this theory were Huber and Oppenheim. The latter regarding this matter states that: "the flow of not-national, boundary, and international rivers is not within the arbitrary power of one of the riparian States, for it is a rule of International Law that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighboring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighboring State, but likewise to make such use of the river as either causes danger to the neighboring State or prevents it from making proper use of the flow of the river on its part."[227]

The third theory is that of limited sovereignty. It is based on the idea that each State can use shared rivers, provided that the use does not distort the interests and the rights of the other states[228]. This theory is also known as the theory of sovereign equality and territorial integrity and it has become the preferred view in international law. It implies that both upstream and downstream States have the right to use the waters of international rivers as long as it follows the principle of equitable and reasonable utilization.

Considering the outcomes of previous cases, it would be surprising if the Court decided to declare the Silala a domestic watercourse. Moreover, even if that was the case, Bolivia would have to consider the use Chile makes of the river, as it goes unequivocally beyond Bolivian borders to pass through Chilean State lines.

Therefore, it could be argued that a river flows regardless of state boundaries[229]. Upstream States might not agree with this view, but if they did not recognize the effects of their policies on the quality or quantity of the water they might hinder downstream States, perhaps irreparably. For this reason, the principle of equitable and reasonable utilization of watercourses has been developed, to regulate the behavior of riparian countries towards one another concerning the policies to adopt about a river.

2.2. The Principle of Equitable and Reasonable Utilization and Other Obligations of Bolivia under Customary International Law

The principle of equitable and reasonable utilization regarding international watercourses has been analyzed in multiple instances and by a variety of experts[230]. Therefore, it is convenient to divide the examination of the principle following the two key words, which are reasonableness and equality.

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[226] P. Menon, *Water Resources development of International Rivers with special reference to the developing world* in International Lawyer 9, 1975 , pp.441-464.

[227] L. Oppenheim, *International Law*. *A Treasie,* Longmans, Green, and co. New York, 1905, p. 475.

[228] M. Rahaman, (2009) *Principles of international water law: creating effective transboundary water resources management*, *Int. J. Sustainable Society*, Vol. 1, No. 3, pp.207–223

[229] T. Mershel *What's in a name? the Silala waters and the applicability of international watercourse law,* Questions of International Law, 2017.
Found at http://www.qil-qdi.org/whats-name-silala-waters-applicability-international-watercourse-law/

[230] A. Tanzi, *et al.*, *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes,* University College Cork, 2015, p. 146.

With regard to a reasonable utilization of watercourses, the scope is clear: the use a State makes of its natural resources can provoke consequences, both positive and negative, beyond its borders. Article 1 of the Declaration that the Institut de Droit International (IDI) adopted at the Session of Madrid of 1911 states that: "Neither State may, on its own territory, utilize or allow the utilization of the water in such a way as to seriously interfere with its utilization by the other State or by individuals, corporations, etc. thereof"[231].

The 1958 Conference of the International Law Association (ILA) reiterates the duty to respect the legal rights of the States which share the waters of an international river. It also mentions for the first time the rights to an equitable and reasonable utilization of the benefits of the waters[232].

These ideas became the basis for the Helsinki Convention of 1992 on the Use of the Waters of International Rivers. The Rules are fundamental to specify and investigate the situations in which a State is damaging another, therefore acting illegally. The Helsinki Convention also declares that the States that share an international river have equal right to use the watercourses, but in its Supplementary Protocol pays particular attention to the fact that its States should have as their primary aim the mission to provide "access to drinking water for everyone"[233]

Concerning the equitable use, there are three meanings that this concept could have:

In a general meaning, it could imply that the elements of an international watercourse are subjected to the sovereignty of the States sharing it because of their physical interrelation. This concept expresses the contrast between a territorial sovereignty and the characteristic of internationality the river should have. Evensen in his Report for the international law Commission wrote: "a water State is, within its territory, entitled to a reasonable and equitable share of the use of waters of an international watercourse"[234]. According to these words it could appear that he expressed the prominence of the sovereignty of the States vis-à-vis the international character of the watercourses.

Secondly, it could also describe the method used to determine the rights of use the States have, particularly expressing the ways and procedures to provide a definitive settlement to conflicts of interest in accordance with the principle[235].

Lastly, it could also concern the result of the coordination of the uses, obtained with an equitable division of the behavior a State must have and with an explanation of said behavior[236].

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[231] International Regulations regarding the use of international watercourses for purposes other than the navigation adopted by IDI at the Session of Madrid, 20 April 1911, in Annuaire de l'IDI ,1911, p. 156.

[232] Resolution on the Uses of the waters of International Rivers, in Report of the 54th Conference of ILA held in New York , September 1-7, 1958.

[233] Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 June 1999, entered into force 4 August 2005) (18 October 1999) UN Doc MP.WAT/2000/1 art 6. See A Tanzi, *Reducing the Gap between International Water Law and Human Rights Law: The UNECE Protocol on Water and Health* (2010) 12 Intl Community L Rev 267-285.

[234] International Law Commission, *Yearbook of the International Law Commission,* 1983, document A/CN.4/399. Art. 6, para. 1.

[235] UN Watercourses Convention, *User's Guide Fact Sheet Series: Number 4*.
Found at https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-4-Equitable-and-Reasonable-Utilisation.pdf

[236] B. Chahuan: *Settlement of international Water Law disputes in international Basin ,Berlin* ,1981. p. 58

Regardless of the sense attached to the concept of equitable usage of watercourses, the principle under discussion is of paramount importance to understand the relations that States that share an international river should maintain.

The concept of equity is based on the principles of reciprocal consideration and coordination of interests. The duty to collaborate, cooperate and negotiate would prevent disputes. The Convention on the Law of Non-Navigational Uses of International Watercourses maintains that states should cooperate "on the basis of sovereign equality, territorial integrity, mutual benefit and good faith to obtain optimal utilization and adequate protection of an international watercourse"[237].

Furthermore, Article 5 of the Convention of New York regards the principle of equitable and reasonable utilization of Watercourses. It states that: "Watercourse States shall, in their respective territories, utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimum and sustainable utilization thereof and benefits therefrom, taking into account the interest of the watercourse concerned, consistent with adequate protection of the watercourse"[238]. After defining in general terms what equitable use means, the first paragraph specifies that the usage of a watercourse have to be carried out in an "optimal and sustainable" time[239]. In this way, the General Assembly introduced a novelty introducing the concept of "sustainable use" of a watercourse. This highlights the fact that the General Assembly took into consideration the evolution of international custom regarding environmental sustainability. This also includes the excessive use of the resources given by the river, or their alteration[240].

Following the tendency of the General Assembly to focus on environmental protection, the principle of equitable and reasonable utilization is also accompanied by a principle of no-harm. This means that States should abstain from adopting measures on international rivers which could bring damage to its neighbors. The list includes among other things pollution or artificially modifying the flow of a river[241].

The Chilean Application exemplifies the importance of the principle of equitable and reasonable utilization by making reference to the *Hungary/Slovakia* case of 1997[242]. On that basis Chile sustains that the use it is making of the waters of the river Silala is lawful, as demonstrated by previous cases[243].

The Application also states that Bolivia has other obligations dictated by international law. First of all, it should ensure the prevention of transboundary damage to the use of the waters of the Silala river. Bolivia should also report and update Chile on measures that are being developed which might be harmful toward the Chilean use of the waters of the river.

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[237] Convention on the Law of the Non-Navigational Uses of International Watercourses (n 5) art 8(1)
[238] UN Doc.A/51/869.
[239] V.Tanzi, *La Convenzione di New York sui corsi d'acqua internazionali*, Rivista di diritto internazionale , 1997, p.979 in B. Al Qaryouti, *Le risorse idriche nel diritto internazionale con particolare riferimento alla Palestina,* Centro Studi per la Pace, 1998.
[240] Convention on the Law of the Non-Navigational Uses of International Watercourses (n 5) arts 5-6. *Case concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia*) (Merits) [1997] ICJ Rep para 78.
[241] Convention on the Law of the Non-Navigational Uses of International Watercourses (n 5) art 7.
[242] Chilean application, p. 22 para.46
[243] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 56, para. 85.

Chile maintains that Bolivia did not follow these obligations; rather it violated them by building a fish pond, as well as a dam and a factory to bottle water during 2012 without complying with the requirements for information made by Chile. Furthermore, it also violated its duty when it built a military structure which could potentially have harming effects on Chile[244].

3. A tentative Analysis

Comparing the previously mentioned principle of equitable and reasonable utilization and the principle of no-harm, an article published by Questions of International Law suggests that there appears to be a lack of hierarchy between the two disputes regarding if and to what extent one could justify harm if the action follows the idea of equitable and reasonable utilization of waters[245].

If a conflict arose between the two concepts, as this is the case, the State would have to consider with particular attention the vital human needs. This should be done to determine both the equitable use of rivers and potentially harmful measures[246]. Regarding the matter, the Statement of Understanding accompanying the Watercourse Convention states that, while considering vital human needs, "special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation[247]".

A similar sentiment has been showed in the Berlin Rules on Water Resources, a document aimed at classifying the fundamental rules regarding the subject matter. It has in fact been declared that "States shall first allocate waters to satisfy vital human needs"[248]. In the same document, article 17 states the specific rights individuals have with regard to water access: "every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual's human needs"[249].

Assuming that the Court will recognize the Silala River as having an international nature, Chile would be correct in claiming that Bolivia should respect its obligations under customary international law.

Another subject for analysis derives from the Bolivian stance that it should have the right to use 100% of the benefits of watercourse. As previously mentioned, the Harmon Doctrine maintains that States have absolute sovereignty over their resources, which includes the parts of international watercourses which flow within national borders. The sovereignty would include the artificial modification of the natural flow or the

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[244] Chilean application p. 22 para 48-49.

[245] R. Greco *The Silala Dispute: Between International Water Law and the Human Right to Water*. Questions of International Law, May 31st, 2017. Link: http://www.qil-qdi.org/silala-dispute-international-water-law-human-right-water-forthcoming/

[246] Convention on the Law of the Non-Navigational Uses of International Watercourses (n 5) art 10(2).

[247] UNGA Sixth Committee, 'Report of the Sixth Committee convening as the Working Group of the Whole', Statements of Understanding Pertaining to Certain Articles of the Convention UN Doc (11 April 1997) A/51/869, para 8.

[248] Berlin Rules on Water Resources (n 5) art 14(1).

[249] Ibidem, art 17(1): "Every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual's vital human needs'. As it will be seen in section 4, this provision corresponds to the definition of the right to water provided for by the International Committee on Economic, Social and Cultural Rights."

pursuing of national measures, without having to take into consideration the consequences that the projects might have on downstream riparian States[250].

Bolivia has shown to have adopted this doctrine as its basis for the claim of absolute use of the watercourse. However, the Harmon Doctrine has been proven to be controversial[251] as the principle of cooperation, and especially the principle of no harm, are generally preferred to the principle of absolute territorial sovereignty. The general tendency is to accept either the "limited territorial sovereignty theory" or the "theory of limited sovereignty", as international law tends to accept restrictions if they are tied to the rights of other states and to the Principle of Equitable and Reasonable Utilization of resources.

Moreover, a further issue arises, considering that the Silala River provides drinkable water to the populations of the area, both in Bolivia and in Chile[252]. The question arises whether absolute sovereignty by Bolivia would hinder the Chilean population that uses that water. It was previously mentioned that the Berlin Rules on water resources dedicate particular attention to the protection of vital human needs. It must also be noted that Articles 55 and 56 of the UN Charter assign to the Member States a duty to cooperate to achieve economic, social and cultural rights[253].

The International Covenant on Economic, Social and Cultural Rights (CESCR) expresses the same concept. In fact, in its Article 2(1) it states that "international cooperation for development and thus for the realization of the economic, social and cultural rights is an obligation of all the states"[254]. The CESCR further clarifies this principle by providing that the external duties of a State reflect the denominations of the internal ones, namely the duty to protect, fulfill and respect human rights[255].

The duty to respect is expressed with the obligation a State has to "refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activity undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction"[256].

The duty to protect on the other hand entails States to prevent both natural and legal persons from deterring the right of access to water from happening in third States[257].

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[250] US Attorney General Harmon in 1895 said: 'The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only, because, in my opinion, the rules, principles and precedents of international law impose no liability or obligation upon the United States.' (1894-1897) 21 Official Opinions of the Attorneys General of the US 283.

[251] S. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 1996, 36 Natural Resources J 549.

[252] R. Greco, *The Silala Dispute: Between International Water Law and the Human Right to Water*. Questions of International Law, May 31st, 2017. Link: http://www.qil-qdi.org/silala-dispute-international-water-law-human-right-water-forthcoming/

[253] *The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (Heidelberg, January 2013 Principle 8: 'a) obligations relating to the acts and omission of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally'

[254] UN Committee on Economic, Social and Cultural Rights, 'General Comment No 3: The Nature of States Parties' Obligations (Art. 2, Para 1, of the Covenant)' (14 December 1990) UN Doc E/1991/23, paras 14 and 13.

[255] T. Bulto, *The human right to water and states' extraterritorial obligations,* 2013. in *The Extraterritorial Application of the Human Right to Water in Africa* (pp. 127-177. Cambridge University Press.

[256] General Comment No 15 (n 31) para 31.

[257] Ibidem, para 31.

Lastly, the duty to fulfill is completed when States make access to water in other countries easier. In the words of the CESCR, the fulfillment must be met "depending on the availability of resources […] for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required"[258].

The right to have access to drinking water is recognized by the Human Rights Council[259], as well as by the UN General Assembly[260].

To sum up, the Chilean Application revolves around three points.

According to the definition of international watercourse, the three theories that could guide the decision of the Court concern three very different views of the subject matter. Bolivia has shown to have a tendency towards the Harmon Theory. The theory has found some supporters, and was used by India when it temporarily appropriated of a part of the waters of the Indus River, claiming that it had the right to do so regardless of the previous appropriations by Pakistan[261]. The Harmon Doctrine is also supported by Hyde[262].

However, the theory has found difficulties to become predominant, because as scarcity of water resources becomes a growing issue, the States involved in hydric controversies have demonstrated to prefer the other two theories previously explained.

With respect to the Principle of Equitable and Reasonable Utilization, the Chilean success in this case depends on whether or not the International Court of Justice will declare the Silala river an international watercourse. As a matter of fact, customary international law requires a reasonable use of watercourses in the sense that it should not cause negative consequence for countries that share the same waters; the use or watercourses also has to be equitable in the sense that it must follow reciprocal cooperation and consideration.

It is also important to note that the equality aspect of the Principle also considers the sustainability issue. The Silala river is a source of drinkable water for the populations of the Atacama desert. The desert is considered to be the driest nonpolar area in the world[263], so much that in some areas the weather station never reported rain. The conditions of the desert are so dire that a research published in 2003 showed the results of an analysis to find life in some regions of the desert. The technology used was the same as the one applied by Nasa to find life sources on Mars. The research shows that the scientists were incapable of detecting any sign of life.

Being so arid, the Chilean concern with the sanitary conditions of the river becomes more understandable: if Bolivia were to pollute the waters of the river in any way, this would affect the access that natives of the area have to clean water. Therefore, if the Silala River were accepted as an international

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[258] General Comment No 15 (n 31), para 34.

[259] UNHRC Res 15/9 'Human rights and access to safe drinking water and sanitation' (30 September 2010) UN Doc A/HRC/RES/15/9.

[260] UNGA Res 64/292 'The Human Right to Water and Sanitation' (28 July 2010) UN Doc A/RES/64/292

[261] PCA, *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Order of 23 September 2011, available at www.pca-cpa.org/showpage.asp? pag_id=1392.

[262] C. Hyde, *International Law* ,449 (1945) ; J. Bruhács, *The Law of non-navigational uses of international courses"* , Budapest, pp 38-39.

[263] L. Jennifer, *What's so Special About the Atacama Desert?,* Live Science, https://www.livescience.com/64752-atacama-desert.html

watercourse, Chile would be right to demand that the measures initiated by Bolivia took into consideration the well-being of the populations living in that area.

Lastly, the Chilean Application also analyses the other obligations that Bolivia has, according to Chile, under customary international law. The Application states that the neighboring State must notify Chile of any measures they plan to take which might have a hindering effect on the use of the watercourse. The claim follows the principle of no-harm, which maintains that States should not take measures which could injure other countries.

The basis for this assumption can be found in the judgement of the Court regarding the 2010 *Pulp Mills* case. In that instance, Argentina had accused Uruguay of having authorized the integration of two pulp mills on the shared river Uruguay. Argentina's claim was that it had not been consulted, as it should have been according to the terms of the 1975 Treaty between the countries. The pulp mills, in addition, were deemed as potentially harmful for the quality of the watercourse. In the Judgement, the Court agreed with Argentina's claim and stated that Uruguay had not carried out the conditions set out in the Treaty, therefore violating it[264]. On the other hand, the Court responded to the second claim of Argentina stating that there was no proof of the lack of diligence by Uruguay in carrying out the studies to avoid harm for the neighboring State[265]. Therefore, it was assured that "The Parties have a legal obligation […] to continue their cooperation through CARU[266] and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment"[267].

Chile claims that Bolivia should "take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in the vicinity of the Silala river"[268]. Moreover, according to the Application, Bolivia should also "exchange data and information to conduct, where appropriate, an environmental impact assessment, in order to enable Chile to evaluate the possible effects of such planned measures"[269]. The sources used for this chapter do not mention an obligation to inform neighboring countries regarding projects taking place in areas close to international watercourses, namely the construction of sewerage services and the development of mining activities from third parties in the Bolivian national territory[270].

Having analyzed the Chilean Application, it would appear that Chile is indirectly and tacitly requesting a right of veto on the Bolivian projects in the areas surrounding the Silala river. Such right of veto is not contemplated in the customary International Law that has been analyzed and referred to in this Chapter's research.

[264] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgement, registry of Court 2010, p. 60, para. 122
[265] Ibidem, p. 79, para 226.
[266] Administrative Commission of the River Uruguay
[267] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgement, Registry of Court 2010, p. 91, para. 266.
[268] Application, p. 22 para 50 section d
[269] Ibidem, section *e*
[270] Chilean Application, p. 14, para. 25.

For the above reasons, the Bolivian claim to a complete sovereignty and no obligations towards other countries over the Silala River could be difficult to accept by the International Court of Justice. It has been discussed that, were the Court to accept the definition Chile gives of international watercourse in the instance of the Silala River, customary international law would support Chile concerning the Country's use of the watercourse, as long as this is done with reason and equity.

However, the Court might have some concerns on the matter of Chile's right to information. In fact during the research for this chapter the obligation to cooperate did not appear to include a duty to give detailed information to neighboring countries to allow them to evaluate the consequences.

Conclusions

It has been almost 140 years since between Chile and Bolivia relations became tense. Nonetheless, it is impossible to deny the existence of a bond existing between the Chilean, Peruvian and Bolivian communities living in the areas taken into consideration.

The Chilean population living in the regions of Antofagasta, Iquique and Arica, the territories annexed to Chile after the war, presents diverse characteristics which maintains several links to its Bolivian and Peruvian neighbors. An example of the open-mindedness of those populations were the "friendship caravans" of 1958, which showed the cultural, familiar and societal connection with the populations of the other countries, regardless of years of rivalry and historical dislike.

The President of the Bolivian Republic Evo Morales has said that "the Northern Chilean population, far from being a homogeneous group, is crossed by strong social divisions within a hierarchical order which allows the visibility of integrated Chilean groups and others less willing to assimilate"[271].

In the aftermath of the 2018 ICJ judgement, the Chilean President Sebastian Piñera declared that "President Evo Morales has created false expectations and great frustrations towards his own population. Moreover, he wasted five valuable years of our time in the healthy and necessary relations which Chile has to maintain towards its neighboring countries, including of course Bolivia. […] Not even a square centimeter of our sea and sovereignty has ever been, or will ever be, at stake"[272].

Given these premises it appears evident that relations between the two countries will not change in a short amount of time. The Bolivian society considers its landlocked condition as a "national trauma" that it believes can be solved only through the integration of Arica into the national territory. The lack of diplomatic relations between the two countries fuels even more the dislike each people feels towards the other, and the complex situation caused by the landlocked status of Bolivia has been reduced to a tug-of-war between the two countries and their representatives, who refuse to give up as much as an inch to start constructive dialogues. The diplomatic situation is reflected in the way the population acts: the common idea shared by Chileans is that Bolivians are in a less economically advanced state because they do not apply efficient policies of development. While a part of that argument might have some foundation, the discussion does not evolve in a constructive attempt to help but often does not recognize the dire conditions a landlocked situation creates for a State. On the other hand, many Bolivians too often lack a deeper understanding of the situation. Adopting a broader point of view, aimed at solving the maritime issue rather than gaining back Arica, might offer a different solution to the problem. It is a fair assumption to think that

[271] In Spanish: "La sociedad chilena nortina, lejos de ser un grupo homogéneo, está cruzada por fuertes divisiones sociales dentro de un orden jerárquico que permite la visibilidad de grupos chilenos integrados y otros menos proclives a la integración".
[272] In Spanish: "El presidente Evo Morales ha creado falsas expectativas y grandes frustraciones a su proprio pueblo. Además, nos ha hecho perder cinco valiosos años en las sanas y necesarias relaciones que debe tener Chile con todos sus países vecinos, incluyendo por supuesto a Bolivia. […] Nunca estuvo ni va a estar en juego ni un centímetro cuadrado de nuestro mar y soberanía".

Arica might be the natural port for Bolivia but that it is not the only option that Bolivia has to export its goods.

If neither State decides to open up different paths to conversations, a reconciliation of the two countries seems unlikely, at least in the short run. Rather than keep struggling to obtain Arica, if Bolivia adopted a more pragmatic stance it could decide to further develop its commercial ties with countries such as Peru and Brazil, bypassing Chile and investing in national infrastructures which could overcome the geographical limitations and, maybe, even be more convenient in the long run.

Of course, these assumptions are made without considering the social and cultural barriers which have crystallized the behavior of the two countries for decades. If the Bolivian government decided to increase the amount of products shipping from a Peruvian port such as Ilo, this would cause an uprising of all the companies which participate in the current commercial activities of Bolivia. All the companies involved in the transportation and shipment of Bolivian goods through the port of Arica would probably unite and lobby the Bolivian Government to maintain the situation as it is.

The relations between Bolivia and Chile are much more intricate than one might assume, precisely because they have stemmed from centuries of hatred and are now fundamentally engrained in the two countries' societies.

The "friendship caravans" demonstrate that the divisions between the two countries can be overcome if people decide to look beyond the resentment and focus on the shared points of each other's culture.

At the moment such a reconnection is not likeable. The issue of the Bolivian access to the sea is often used to unite the population of both countries under a century-long dispute taking advantage of the national feelings such a concept evokes.

It is impossible to know precisely what would restore a less tense, if not friendlier, relation. It is however necessary for both populations to develop a much deeper understanding of the situation, as only a profound knowledge of the issue can result in effective measures to limit the downsides of a landlocked status.

Through the elimination of stereotypes connected to the issue and the adoption of a more open point of view, cooperation seems more viable. It would be wise to take example from the populations in the border area which, even if still divided by deep-rooted differences, were able to cooperate with their neighbors. Through that spontaneous process of cooperation, they succeeded in creating a fruitful cooperation which benefits both countries.

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Riassunto in Lingua Italiana

È da più di un secolo che il Cile e la Bolivia si trovano in una situazione di rivalità. La diffidenza tra le due nazioni è talmente intrinseca alle due società che il contenuto dei commenti fatti da un paese riguardo all'altro, siano essi politici o popolari, tende sempre allo scherno, al pregiudizio o addirittura all'aggressione vera e propria.

Prima di discutere le vicende giudiziarie che hanno coinvolto i due paesi è necessaria un'introduzione di stampo storico. Infatti, la controversia nasce alla fine del diciottesimo secolo.

Il deserto di Atacama è una vasta area, che si estende tra la parte meridionale del Perù e quella settentrionale del Cile. Le peculiarità geografiche che lo caratterizzano fanno del deserto una delle regioni più aride al mondo.

Che cosa rende dunque questa zona così importante, tanto da provocare una guerra e dei procedimenti dinanzi alla Corte Internazionale di Giustizia?

La risposta si può trovare nei depositi di guano e successivamente quelli di nitrato che vennero scoperti proprio in quell'area verso la metà del diciannovesimo secolo. Il deserto di Atacama infatti non era mai stato considerato come una potenziale fonte di risorse economiche. Dunque, durante la dominazione Spagnola l'area non aveva mai ricevuto particolari attenzioni. Mentre altre zone dell'America del Sud venivano esplorate e mappate, le ricerche svolte sul deserto di Atacama si limitavano alla descrizione approssimativa dei suoi limiti, senza spingersi troppo verso l'interno.

Intorno al 1704 vennero scoperte delle riserve di metalli preziosi che lentamente portarono la regione a popolarsi. Questo processo di popolamento tuttavia non riuscì a rendere l'area abbastanza attraente per provocare dei processi di esplorazione più intensi.

All'indomani delle dichiarazioni d'indipendenza di Cile e Bolivia, il confine stabilito per dividere le due nazioni venne posizionato proprio in quel deserto. Credendolo privo di attrattive, la maggior parte dei documenti ufficiali descrivevano questa divisione in modo molto vago, lasciando ampio spazio per l'interpretazione. Fu questa la base del futuro conflitto che coinvolse i due paesi.

Infatti, nel 1842 vennero trovati degli ampi depositi di guano, un rinomato fertilizzante. Nello stesso periodo venne anche scoperto nella zona il nitrato, altresì chiamato salnitro. Il materiale rappresentava una grande risorsa per la società dell'epoca, in quanto poteva essere usato sia come fertilizzante che come propellente. Prevedibilmente, nel momento in cui avvenne quella scoperta l'area ottenne una crescita esponenziale della popolazione e attirò l'attenzione degli stati che avevano territori in quella zona.

Poiché non era mai stata portata a termine una mappatura completa del territorio e i confini stabiliti tra le due nazioni erano particolarmente nebulosi, il Cile decise di considerare quella zona grigia diplomatica come un'opportunità. Nello stesso anno il Presidente del Cile Manuel Bulnes promulgò la cosiddetta "legge del guano", che prevedeva che il confine tra il suo paese e la Bolivia dovesse essere posizionato a cavallo del ventitreesimo Parallelo a partire della cosiddetta Baia di Mejillones.

Questa legge non riuscì tuttavia a fermare le spedizioni cilene oltre i confini stabiliti. Al fine di limitare le conseguenze negative che la situazione causava, nel 1866 i due paesi redassero un Trattato per definire con chiarezza il comportamento che i governi dovessero tenere riguardo al confine.

La linea di demarcazione venne dunque spostata al ventiquattresimo parallelo sud, e l'area compresa tra il ventitreesimo e venticinquesimo venne dichiarata come condivisa. I due paesi avrebbero dunque distribuito i costi e i profitti della zona equamente e si impegnavano a non imporre tributi che potessero limitare l'azione delle compagnie stabilitesi nell'area.

Tuttavia, qualche anno dopo la Bolivia introdusse una tassa nella zona, giustificata dal fatto che il territorio veniva sfruttato principalmente da una compagnia cilena, che il governo Boliviano dichiarò di aver consultato.

La cosiddetta "tassa dei dieci centesimi" divenne dunque un *casus belli* per il Cile, che dichiarò i trattati vigenti nulli. Nel 1879 dunque il Cile iniziò il conflitto contro la Bolivia, la quale si era alleata con il Perù attraverso un trattato segreto. Grazie al recente avvicinamento che il Cile aveva avuto con i paesi occidentali, la nazione riuscì a unire la disciplina che caratterizzava il suo esercito al progresso tecnico e strategico del vecchio continente. Nel 1883, dopo aver invaso la città peruviana di Tacna e cercato di imporre delle condizioni eccessivamente dure che vennero rifiutate, il Cile accettò di firmare un trattato di pace con il Perù, che avrebbe preso il nome di Trattato di Ancón.

La sezione del trattato che avrebbe avuto le conseguenze più gravi fu l'articolo due: il territorio cileno fu infatti esteso fino a comprendere Arica, una città a sud di Tacna precedentemente sotto il controllo peruviano. L'articolo dunque rendeva ufficialmente la Bolivia uno stato privo di litorale, in quanto il territorio costiero del paese allora si estendeva tra quello peruviano al nord e quello cileno al sud. La storia ha dimostrato come questa nuova divisione territoriale abbia pesantemente danneggiato la crescita boliviana: infatti se in passato avere un accesso al mare era importante per commerciare, in un mondo globalizzato come quello attuale la necessità si è trasformata in obbligo. Le statistiche rivelano che i paesi che non godono di un accesso al mare in media crescono molto più lentamente di quelli che invece hanno sovranità su un porto.

Lo sviluppo della Bolivia sarebbe stato ancora più in pericolo se non si fosse arrivati nel 1904 a un accordo, il Trattato di Pace e di Amicizia, che imponeva al Cile l'obbligo di collegare la capitale boliviana La Paz con il porto di Arica attraverso infrastrutture costruite a spese cilene. La soluzione tuttavia non ottenne il risultato di riappacificare le due nazioni, in quanto la Bolivia non rinunciò mai al desiderio di ottenere un accesso sovrano al mare.

La forza di volontà dimostrata dalla Bolivia non è priva di fondamento in quanto pur avendo un accesso al mare garantito dal Cile, le sue esportazioni sono quasi del tutto dipendenti dalle politiche adottate dal paese vicino.

I recenti processi cileni di privatizzazione hanno portato infatti i lavoratori della zona a iniziare frequenti scioperi, dei quali non risentono solo le esportazioni cilene ma anche quelle boliviane.
Inoltre, la manutenzione delle infrastrutture offerte dal Cile viene spesso trascurata, provocando ulteriori rallentamenti alla Bolivia.

A questo proposito il governo boliviano ha promosso svariate procedure legali per ottenere un accesso sovrano al mare: per esempio, nel 1975 i dittatori Augusto Pinochet e Hugo Banzer, capi di stato rispettivamente cileno e boliviano, svilupparono un accordo che prevedeva uno scambio di territori tra i due paesi che comprendesse la cessione di Arica alla Bolivia. Questo accordo non ottenne i risultati sperati in quanto il Trattato di Ancón prevedeva che, in caso di cessione di territorio cileno o peruviano a terze parti, l'altro paese avrebbe avuto diritto di veto sulla decisione. Quando venne chiesta l'opinione del Perú riguardo alla potenziale cessione di Arica alla Bolivia, questo si avvalse del diritto di veto, rendendo dunque l'accordo non valido.

Svariati altri tentativi si sono susseguiti per risolvere il problema dell'accesso al mare, ultimo dei quali nel 2013 con la richiesta boliviana alla Corte Internazionale di Giustizia di riconoscere l'obbligo cileno di negoziare un accesso sovrano all'Oceano Pacifico.

La posizione boliviana riguardo ai fatti è chiara: il Cile sta attualmente violando l'obbligo a cui è sottoposto di negoziare con la Bolivia l'accesso sovrano al mare. A testimonianza di ciò la memoria boliviana riporta il testo della Convenzione delle Nazioni Unite sul diritto del mare, che obbliga gli stati a trovare un accordo sulle condizioni e modalità per il passaggio di beni provenienti da stati senza litorale.
Quest'obbligo prevede anche che le negoziazioni vengano portate avanti in buona fede e siano ragionevoli.

La memoria boliviana sostiene che il Cile non stia adempiendo al proprio dovere. I numerosi tentativi che si sono susseguiti per risolvere la posizione boliviana non sono infatti mai andati a buon fine, nonostante il Cile abbia sempre dichiarato la propria volontà di collaborare per trovare una soluzione. Il governo cileno dunque, prosegue il documento, sta presentando un comportamento duale: da una parte dichiara il proprio impegno a trovare un accordo che risolva il problema litoraneo della Bolivia mentre dall'altra rifiuta l'esistenza di un obbligo di negoziare.

Questo documento ha provocato una reazione cilena espressa tramite un'obiezione preliminare, attraverso la quale il Cile ha cercato di convincere la Corte a riconoscere la propria mancanza di giurisdizione sulla questione. La tesi principale sviluppata nell'obiezione è infatti l'idea che gli argomenti presentati dalla Bolivia siano già stati risolti attraverso una serie di trattati e dichiarazioni. Inoltre, nel documento si dichiarava la supposta volontà boliviana di annullare il Trattato di Pace del 1904.

A quest'asserzione la Bolivia ha risposto riportando alla memoria le dichiarazioni da parte del governo cileno di voler discutere la questione del litorale a prescindere dalle condizioni del Trattato. Il documento sostiene che il Cile stia fraintendendo le intenzioni boliviane: l'annullamento del Trattato di Pace non è mai stato un loro obiettivo. Lo scopo della Bolivia è infatti quello di fare in modo che la Corte riconosca la propria giurisdizione sull'argomento, data dal fatto che contrariamente all'opinione cilena gli assunti in questione non

sono stati risolti. Una volta superata la fase preliminare, il fine ultimo rimane pertanto quello di riconoscere l'obbligo cileno di negoziare un accesso al mare.

La risposta della Corte ha dimostrato un allineamento verso l'opinione boliviana. Infatti, la Bolivia ha correttamente esposto le premesse per dimostrare la giurisdizione della Corte riguardo alla questione, giustificata dal fatto che gli argomenti presentati nella memoria sono effettivamente rimasti irrisolti nonostante gli accordi avvenuti durante gli anni. L'obiezione portata avanti dal Cile è stata dunque rifiutata proclamando l'impossibilità di fermare il processo a una fase preliminare. La Corte si è espressa a favore della Bolivia e ha domandato una contro-memoria da parte del Cile per completare il processo giudiziario.

La posizione cilena riguardo all'argomento viene dunque espressa nella contro-memoria. Il documento espone la propria tesi sostenendo che non esiste un obbligo dettato dalla legge che preveda una negoziazione da parte del Cile con la Bolivia per garantirne un accesso sovrano al mare.

La contro-memoria dichiara espressamente che la Bolivia non abbia considerato la distinzione tra la volontà di creare un dovere legale e le dichiarazioni politiche fatte con lo scopo di dimostrare una tendenza del governo ad agire in un determinato modo. Durante tutte le negoziazioni avvenute negli anni, il Cile aveva dimostrato la propria volontà di venire incontro alla Bolivia per trovare una soluzione; durante le conversazioni diplomatiche la Bolivia non ha mai dichiarato l'esistenza di un obbligo.

Anche supponendo che tale vincolo sussista, prosegue la contro-memoria, questo dovrebbe avere estensione e durata limitata per essere supportato dal diritto consuetudinario. Inoltre, l'obbligo di negoziazione prevede che essa si svolga in buona fede, ma non che vada contro l'interesse nazionale. Il documento si conclude ribadendo che i tentativi ai quali il Cile ha preso parte per permettere alla Bolivia di ottenere un accesso sovrano al mare sono stati frutto di un processo diplomatico che seguiva le norme consuetudinarie. Il Cile sostiene che tale dovere di negoziare non è mai stato presente e chiede pertanto alla Corte di rifiutare gli argomenti posti dalla Bolivia che sostengano il contrario.

Alla conclusione del procedimento, il primo di ottobre 2018 la Corte Internazionale di Giustizia ha comunicato il suo verdetto. Nel giudizio conclusivo, la Corte si è espressa a favore del Cile, in quanto ha riconosciuto che all'interno dell'obbligo di negoziazione non viene incluso quello di trovare un accordo. Nel documento viene espressa l'idea che due o più stati possano decidere di creare un obbligo di negoziazione, ma che quest'obbligo non possa esistere se non espressamente sancito.

Per giustificare quest'affermazione la Corte sostiene che, anche in presenza di un accordo tacito, persiste la necessità di trovare prove concrete della formulazione di tale consenso. Facendo riferimento ai tentativi avvenuti in passato tra i due stati, viene dimostrato come in nessun caso questi possano essere considerati come prove concrete determinanti l'introduzione di un obbligo da parte del Cile.

La Bolivia cita molte dichiarazioni cilene che presumibilmente determinano la nascita dell'obbligo. Tuttavia, già in casi precedenti era stato proclamato che anche gli atti unilaterali devono seguire criteri specifici per rappresentare una base giuridica valida per creare un obbligo. Nel caso del Cile, queste condizioni non si sono presentate e dunque non possono essere considerate come una prova dell'esistenza di tale obbligo.

La Corte infine prende in considerazione l'accusa che vede il Cile come responsabile di aver creato delle legittime aspettative che puntassero all'ottenimento di un accesso al mare da parte della Bolivia.

A tale proposito, la Corte dichiara che la presenza di legittime aspettative si può riscontrare in casi di controversie tra un investitore e lo stato che lo ospita. Tale concetto non è invece presente nel diritto internazionale, e non può dunque essere considerato come un'argomentazione legittima.

La Corte riconosce che il lungo dialogo tra i due paesi si è sempre svolto con l'obiettivo di modificare le condizioni che rendono la Bolivia un paese privo di litorale. Tuttavia, deve dissentire con la Bolivia riguardo all'esistenza di prove che testimonino un obbligo cileno di far sì che queste modifiche avvengano.

Ciononostante, la Corte dichiara anche che il verdetto non si deve considerare come una conclusione del negoziato: infatti essa ribadisce il concetto che, nel caso tutte e due le parti fossero d'accordo, non esistono impedimenti legali alle trattative diplomatiche tra i due paesi.

Conclusasi questa vicenda, i rapporti tra i due paesi si sono ulteriormente raffreddati, raggiungendo livelli di tensione e diffidenza che hanno reso particolarmente fertile il terreno per l'insorgere di nuove controversie.

Pur essendo diverse le ragioni del contendere, l'area interessata è sempre la stessa. All'interno del deserto di Atacama infatti scorre il fiume Silala. Tale corso d'acqua è di vitale importanza per il Cile, in quanto non solo alimenta le miniere presenti nell'area, ma è anche una delle poche fonti di acqua potabile disponibili per la popolazione della zona. Il corso del fiume come lo si conosce attualmente è stato ottenuto deviando le acque di svariati corpi idrici minori affinché convergessero in un letto più ampio.

La controversia ha radici profonde, ma il procedimento giurisdizionale dinanzi alla Corte ha avuto inizio nel maggio del 2016. Fu in quella data che il Cile dichiarò di voler chiedere alla Corte Internazionale di Giustizia un giudizio sull'uso scorretto che la Bolivia sta apparentemente facendo delle acque del fiume Silala.

Nella sua domanda introduttiva, il Cile ricorda alla Corte che una serie di progetti portati avanti dalla Bolivia nei pressi del fiume potrebbero rappresentare un pericolo per le sue acque. Il documento sostiene inoltre che il Cile non è stato informato della volontà di portare a termine tali progetti, contrariamente a quanto il diritto internazionale prevede nei casi di corsi d'acqua che attraversino più stati.

Rimanendo sull'argomento, il documento contesta anche il fatto che la Bolivia abbia ripetutamente accusato il Cile di considerare erroneamente il Silala come fiume internazionale. Il governo cileno è stato dunque accusato di utilizzare l'acqua del fiume in modo illegale, portando la Bolivia a chiedere un risarcimento per il supposto abuso.

Pertanto, il governo cileno chiede alla Corte di riconoscere che il fiume Silala abbia caratteristiche internazionali e che di conseguenza il Cile abbia il diritto di usarne le acque seguendo le regole in vigore. Inoltre, chiede anche di riconoscere l'obbligo da parte della Bolivia di prendere tutte le misure necessarie per evitare l'inquinamento delle acque, oltre ad informare il governo cileno di ogni progetto che possa interferire con le caratteristiche naturali del fiume.

Il procedimento è ancora lontano dall'essere concluso, in quanto la Corte non ha ancora espresso un giudizio di qualsiasi tipo riguardante l'argomento.

Pretendere di anticipare il giudizio della Corte sarebbe peccare di *hybris*. Tuttavia, è possibile analizzare le aree tematiche toccate dalla richiesta cilena e avanzare alcune ipotesi che potrebbero essere prese in considerazione per la deliberazione. La domanda del Cile si basa su tre punti chiave nella sua accusa contro la Bolivia. Il primo verte sulla definizione di corso d'acqua internazionale; il secondo sul principio di sfruttamento ragionevole ed equo delle risorse idriche ed il terzo sulle altre obbligazioni che la Bolivia deve seguire secondo il diritto internazionale. Riguardo alla condizione di internazionalità del Silala, la Bolivia ha ripetutamente espresso l'idea che questo non possegga tali caratteristiche, in quanto è stato artificialmente modificato per farlo passare attraverso il territorio cileno. Tuttavia, il precedente caso di *Lake Lanoux* potrebbe servire come punto di partenza per riconoscere che se un paese, in questo caso la Bolivia, ottenesse la sovranità sul corso d'acqua, questo non impedirebbe di configurare un obbligo di tenere in considerazione anche le altre nazioni che godono del passaggio del fiume.

A tal proposito tre teorie potrebbero venire in aiuto per comprendere la situazione, nello specifico la teoria della sovranità territoriale assoluta, quella dell'integrità territoriale assoluta e infine la teoria della sovranità o della integrità territoriale limitata. La Bolivia si rifà alla prima, che sostiene che lo stato a monte possa esercitare autorità illimitata sui segmenti del fiume che passano attraverso il territorio nazionale. Questa dottrina tuttavia è stata spesso scartata in favore della seconda o, più recentemente, della terza. Infatti la teoria della sovranità o della integrità limitata prevede che entrambi gli stati coinvolti abbiano il diritto di utilizzare le acque internazionali di un fiume fintantoché applichino il principio dello sfruttamento equo e ragionevole delle risorse. Tale principio infatti prevede che gli stati coinvolti mostrino un reciproco interesse e volontà di collaborazione per evitare di arrecare danno agli altri.

È inoltre importante ricordare che il Silala rappresenta una delle poche fonti di acqua potabile della zona. Prendere misure potenzialmente rischiose per la sicurezza dell'acqua potrebbe dunque contravvenire alle condizioni poste dal principio, relativo ai diritti umani, di proteggere, rispettare e rimediare.

Pertanto, prendendo in considerazione gli elementi precedentemente espressi, è ragionevole pensare che la Corte possa fare riferimento a questo contesto dottrinale che tende ad allinearsi con la posizione cilena per sviluppare il proprio giudizio. Tuttavia, si dovrà aspettare l'opinione della Corte per verificare che effettivamente gli argomenti presi in considerazione siano inerenti al caso.

Considerando le ostilità belliche e legali che si sono susseguite per più di un secolo, risulta dunque comprensibile il clima di tensione tra i due stati, che ha provocato l'interruzione dei rapporti diplomatici fin dagli anni Settanta. Lo stato Boliviano non ha mai smesso di rivendicare un diritto sovrano di accesso al mare. È ragionevole pensare che tale aspirazione non si fermerà nel prossimo futuro. È tuttavia importante riconoscere che questa lotta si è cristallizzata, concentrandosi spesso unicamente nella ricerca della sovranità su Arica.

Sarebbe forse conveniente cercare di accedere al mare attraverso altre vie. L'andamento delle politiche nazionali di questi due paesi non sembra indicare la volontà di riappacificarsi nel prossimo futuro. Diversificando la propria strategia, dunque, la Bolivia potrebbe trovare altre soluzioni che possano permetterle di risollevare la propria economia. Così facendo sarebbe anche possibile un'eventuale riappacificazione con il Cile che porterebbe un ulteriore beneficio economico.