

**INDIGENOUS PEOPLES' DIPLOMACY, MEDIATION, AND
CONCILIATION AS A RESPONSE TO THE I.C.J. DECISION IN
THE *OBLIGATION TO NEGOTIATE ACCESS TO THE PACIFIC
OCEAN CASE***

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ABSTRACT

The Article analyzes the International Court of Justice's decision in the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* case and its failure to provide an original and effective legal solution to an important territorial dispute in Latin America. As a response to this, this Article makes the case for the engagement of other institutions and actors including the Secretary General of the United Nations, the Organization of American States, and Pope Francis, who could facilitate mediation processes for the resolution of this international conflict. This Article considers historical facts that demonstrate the intention of the parties to find a negotiated solution to their territorial dispute. It makes the case for using mediation and conciliation, for the resolution of the conflict, and makes arguments against power politics and the use of military force as instruments for the resolution of the territorial dispute. Moreover, this Article demonstrates that the people of Bolivia and Chile can find a mutually beneficial solution to their dispute by creating, among others, civil

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society reconciliation commissions with the leading participation of indigenous people. Finally, this Article makes the case for indigenous peoples, as the original owners of the territory under dispute, to become essential actors in the process of resolving the conflict.

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INTRODUCTION

In the case *Obligation to Negotiate Access to the Pacific Ocean*, the International Court of Justice (“I.C.J.”), contrary to Bolivia’s petition, ruled that Chile did not have a legal obligation to negotiate sovereign access to the Pacific Ocean with Bolivia.¹ Despite its ruling, the I.C.J. encouraged Bolivia and Chile to continue their historical efforts in

1. *Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile)*, Judgment, 2018 I.C.J. 507, ¶ 564 (Oct. 1). <https://www.icj-cij.org/public/files/case-related/153/153-20181001-JUD-01-00-EN.pdf>.

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drafting a solution to the international territorial dispute. In particular, the I.C.J. stated:

[T]he Court's finding should not be understood as precluding the Parties from continuing their dialogue and exchanges, in a spirit of good neighborliness, to address the issues relating to the landlocked situation of Bolivia, the solution to which they have both recognized to be a matter of mutual interest. With willingness on the part of the Parties, meaningful negotiations can be undertaken.²

The I.C.J.'s ruling was consistent with Article 33.1 of the United Nations ("U.N.") Charter because there are other legal means, besides judicial settlement, for the peaceful resolution of the Bolivia-Chile territorial dispute, including mediation and conciliation.³ However, it is important to remember that I.C.J. decisions are valid only for a specific case, and they are not considered precedents for other cases in the same court, or other international or national tribunals.⁴ Therefore, Bolivia could continue to attempt the adjudicatory venue to achieve its objective of finding a negotiated solution to obtain a sovereign access to the Pacific Ocean. However, a better approach would be for both sides, Bolivia and Chile, to use other means for the peaceful resolution of their territorial dispute.

As a person of Bolivian descent and a professor of international law, my analysis seeks to understand the implications of the I.C.J. decision for Bolivia and propose a peaceful means for the resolution of the Bolivia-Chile territorial dispute that considers the interests of indigenous people. This Article analyzes the reasoning of the I.C.J. judges and their failure to provide an original and effective legal discourse to enable Bolivia and Chile to continue their efforts to find a negotiated solution to their territorial dispute. This Article highlights the dissenting opinions of the president of the I.C.J., Abdulqawi Ahmed Yusuf, Judge Patrick Lipton Robinson, Judge Nawaf Salam, and *ad hoc* Judge Yves Daudet. This Article also proposes the engagement of other institutions and actors including the Secretary

2. *Id.*

3. U.N. Charter art. 105 ¶ 3.

4. Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993. According to Article 59 of the Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case." *Id.*

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General of the U.N., António Guterres, the Organization of American States (“O.A.S.”), and Pope Francis, who could facilitate mediation and conciliation processes for the resolution of the dispute.

This Article makes the case for indigenous people, as the original owners of the territory in dispute, to become essential actors in public diplomacy efforts to facilitate negotiation processes between Chile and Bolivia. The Article demonstrates that the people of Chile and Bolivia can find a mutually beneficial solution to their dispute by creating, among others, civil society reconciliation commissions. It shows that this can contribute to building up a political context favorable to the resolution of their territorial disputes and to the development of better international relations between Bolivia and Chile.

I. POWER POLITICS AND NATIONAL INTERESTS

To understand the Bolivia-Chile conflict, it is important to know the historical context that has influenced their international relations. It is also important to understand the ideas, in Chile and Bolivia, that have created the conditions for intense conflicts and the lack of political will to resolve their territorial disputes. Colonialism, racism, and militarism are some of the ideologies that have influenced the international relations between the two countries.⁵

Chile and Bolivia’s histories have each been characterized by totalitarian regimes that have sustained racist views of indigenous populations in both countries.⁶ In Chile, the dictatorship of General Augusto Pinochet protected Neo-Nazi movements that embraced racist and violent views of politics.⁷ Military dictatorships in Bolivia, including the one of General Garcia Meza, protected Nazi war criminals

5. See Aparajita Gangopadhyay, *From Land Wars to Gas Wars: Chile—Bolivia Relations and Globalisation*, 70 *India Quarterly* 139, 139 (2014).

6. See Javiera Barandiarán, *Researching Race in Chile*, 47 *LATIN AM. RES. REV.* 161, 169 (2012) (analyzing racial discrimination in Chile); see also Henry Stobart, *Bolivia’s Anti-Racism Law: Transforming a Culture?*, in *CULTURES OF ANTI-RACISM IN LATIN AMERICA AND THE CARIBBEAN* 191–92 (Peter Wade et al., eds., 2019) (analyzing racism in Bolivia and legal reforms to address it).

7. See generally Ricardo Lagos et al., *The Pinochet Dilemma*, 114 *FOREIGN POL’Y* 26–39 (1999) (analyzing charges for crimes against humanity against Chilean President Pinochet); see also HUGH O’SHAUGHNESSY, *PINOCHET: THE POLITICS OF TORTURE* 49–118 (2000).

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such as Klaus Barbie.⁸ Both countries have embraced views based on racist presuppositions, and both have been guilty of widespread violations of human rights, including tortures and killings of political opponents.⁹ One of the main features of these totalitarian movements was their views regarding the racial inferiority of indigenous communities. For example, in Chile there is widespread recognition of its *mestizo* identity, which is the result of the integration of the Spanish and indigenous races.¹⁰ Despite this fact, there is also a lack of acknowledgment of the importance of indigenous peoples in Chile's political and economic structures. Indeed, "today's actual living and breathing indigenous peoples are both actively ignored and 'excluded symbolically and materially' from Chilean society As a result, Chile purportedly has no 'Indian problem,' unlike its more 'indigenous' and 'backwards' geopolitical rivals and neighbors, Bolivia and Peru."¹¹

The influence of totalitarian ideologies, in both countries, provided a foundation for racist and discriminatory treatment of indigenous communities.¹² In that historical context, it was very difficult to construct effective efforts to resolve Bolivia's landlocked situation.¹³ The ruling elites of both countries have focused on the protection of

8. See generally PETER MCFARREN & FADRIQUE IGLESIAS, *THE DEVIL'S AGENT: LIFE, TIME AND CRIMES OF NAZI KLAUS BARBIE* (2013).

9. *Id.* at 49–118.

10. Kevin Funk, "Today There Are No Indigenous People" in Chile? *Connecting the Mapuche Struggle to Anti-Neoliberal Mobilizations in South America*, 4 J. POL. LATIN AM. 125, 127 (2013).

11. *Id.* at 127–28 n. 3 ("the quotation in this essay's title – that 'today there are no indigenous people' in Chile – is from a 1978 report by the Chilean government's Agricultural and Livestock Development Agency . . . summarizing the Pinochet regime's posture towards indigenous claims.").

12. See generally Graeme S. Mount, *Chile and the Nazis*, in MEMORY, OBLIVION, AND JEWISH CULTURE IN LATIN AMERICA 77–90 (Agosin Marjorie ed., 2005) (discussing the influence of Nazis in Chile); see also Jean Grugel, *Nationalist Movements and Fascist Ideology in Chile*, 4 BULL. LATIN AM. RES. 109–22 (1985); see also MCFARREN & FADRIQUE IGLESIAS, *supra* note 8 (analyzing the influence of Nazis in Bolivia).

13. Jean Grugel, *Nationalist Movements and Fascist Ideology in Chile*, 4 BULL. LATIN AM. RES. 109, 113 (1985).

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their economic and political interests and have disregarded the interests of important sectors of society, namely indigenous people.¹⁴

The belief that Chilean society is superior because of its European identity and Bolivia is an inferior country because of its large indigenous population is completely contrary to sociological, historical, and scientific evidence.¹⁵ Consistent with this reality, there are sectors of Chilean society that have supported efforts for the peaceful resolution of territorial disputes between Chile and Bolivia.¹⁶ Applying a constructivist perspective of international relations, it can be said that prevalent ethnocentric ideas in Chile and Bolivia have shaped both countries' international relations.

In the current historical context, Bolivia and Chile are facing political instability. President Evo Morales, who was one of the main proponents to take the Bolivia-Chile territorial dispute to the I.C.J., was removed from power.¹⁷ As a result, there is an ongoing process to have new presidential elections in Bolivia.¹⁸ Ethnic and political conflicts have become more prevalent in Bolivia. In Chile, around twenty-six protesters were killed during demonstrations against President Sebastián Piñera's government.¹⁹ Following the demonstrations in Chile, the Office of the U.N. High Commissioner for Human Rights said, "during the recent mass protests and state of emergency the police and army failed to adhere to international human rights norms and

14. See Leslie E. Wehner, *Developing Mutual Trust: The Othering Process between Bolivia and Chile*, 36 CAN. J. LATIN AM. & CARIBBEAN STUD. 109, 125–26 (2011) (analyzing the ruling elites of Bolivia and Chile and their roles in increasing conflict between the two countries).

15. See ALANA LENTIN, RACISM AND ANTI-RACISM IN EUROPE 72, 77 (2004) (analyzing false presuppositions of racist ideologies).

16. See, e.g., *Canciller Ribera calificó de "lamentable" apoyo de diputados opositores a demanda marítima de Bolivia*, EL MOSTRADOR (July 30, 2019), <https://www.elmostrador.cl/noticias/pais/2019/07/30/canciller-ribera-califico-de-lamentable-apoyo-de-diputados-opositores-a-demanda-maritima-de-bolivia/> (For example, Chilean congressman, Boris Barrera, and Chilean Senator, Alejandro Navarro, supported Bolivia's case to obtain a sovereign access to the Pacific Ocean).

17. See Kevin Clarke, *Was there a coup in Bolivia? After Evo Morales, what's next?*, AM. MAG. (Nov. 27, 2019), <https://www.americamagazine.org/politics-society/2019/11/27/was-there-coup-bolivia-after-evo-morales-whats-next>.

18. *Id.*

19. *Chile protests: UN accuses security forces of human rights abuses*, BBC NEWS (Dec. 13, 2019), <https://www.bbc.com/news/world-latin-america-50779466>.

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standards relating to management of assemblies and the use of force.”²⁰ Because of generalized discontent regarding economic and social injustice, and despite the Chilean success at the I.C.J. in the Bolivia-Chile case, President Sebastián Piñera is one of the *least* popular presidents in the history of Chile with a fourteen percent approval rating.²¹ These facts demonstrate the political and social fragility of Latin American societies that have not addressed their ethnic and social justice issues properly.

Despite the similarities between Bolivia and Chile, there are also meaningful differences, including their military power.

According to the World Bank, Bolivia's military expenditure in 2018 was 1.5% of its GDP.²² In 2017, Bolivia had 71,000 armed forces personnel, which is 1.3% of its labor force.²³ Chile's military expenditure in 2018 was 1.9% of its GDP, and in 2017, Chile had 122,000 armed forces personnel, which is 1.3% of its labor force.²⁴ Because of Chile's historic military and economic superiority, there has been unequal bargaining relations between Chile and Bolivia.²⁵ This type of relationship illustrates how “[p]ower can be thought of as the ability of an actor to get others to do something they otherwise would not do”²⁶ It is important to also note that besides military power, there are other forms of power, including economic, cultural, and moral.²⁷

20. U.N. Human Rights Office of the High Commissioner, *UN Human Rights Office report on Chile crisis describes multiple police violations and calls for reforms*, OHCHR (Dec. 13, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25423&LangID=E>.

21. Dave Sherwood, *Support for Chile's Pinera lowest for president since Pinochet era: poll*, REUTERS (Oct. 27, 2019), <https://www.reuters.com/article/us-chile-protests/support-for-chiles-pinera-lowest-for-president-since-pinochet-era-poll-idUSKBN1X60NW>.

22. The World Bank, *World Development Indicators: Military expenditures and arms transfers*. <http://wdi.worldbank.org/table/5.7> (last visited Nov. 9, 2020).

23. *Id.*

24. *Id.*

25. See Gangopadhyay, *supra* note 5, at 141.

26. ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 11 (1997).

27. See Joseph S. Nye, *Soft Power*, 80 FOREIGN POL'Y 153, 155 (1990) (analyzing soft power as a concept).

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Considering this reality, Bolivia and Chile should make efforts to change the characteristics of their bilateral relations, which are characterized by mutual distrust, and acknowledge that it is consistent with their national interests to improve their international trade relations, their mutual commitment to the protection of the environment, and their commitment for the protection of fundamental human rights among others.²⁸ These countries should also take steps to restore their diplomatic relations to jointly address global problems of mutual interest. A peaceful resolution of territorial disputes is necessary to transform the broken international relations between Bolivia and Chile. Cooperation is even more crucial due to the extreme human and economic costs of the COVID-19 pandemic—especially in Latin America. In the current context, sustained international cooperation between neighboring countries such as Bolivia and Chile is essential.

II. INTERNATIONAL LAW AND DIPLOMACY, OR POWER POLITICS?

Because of its historically superior military and economic strength, Chile's foreign policy has denied Bolivia's aspirations to obtain a sovereign access to the Pacific Ocean. Chile nonetheless has negotiated frequently, under the auspices of international organizations, with Bolivia to resolve their territorial dispute, including at the Ibero-American Summit (2003) and the Monterrey Summit of the Americas (2004).²⁹ Beginning in 2012, at the Sixty-Seventh session of the U.N. General Assembly—and contrary to the historical trend—Chile started

28. See Wehner, *supra* note 14, at 109–38 (analyzing the mutual distrust in the bilateral relations between Chile and Bolivia, and some efforts to change that dynamic).

29. See Christopher R. Rossi, *A Case Ill Suited for Judgment: Constructing 'A Sovereign Access to the Sea' in the Atacama Desert*, 48 U. MIAMI INTER-AM. L. REV. 28, 79 (2017) (“The parties returned to numerous bilateral meetings in Uruguay (the ‘Fresh Approach’ meetings, 1986-87), at the XIII Ibero-American Summit in Bolivia (2003), at the Monterrey Summit of the Americas (2004), on four occasions in 2005, (New York, Salamanca, Mar del Plata, and Montevideo). During the Sixty-Seventh Session of the United Nations General Assembly in 2012, Bolivia affirmed that bilateral options remained open with Chile; Chile responded by declaring Bolivia lacks any legal basis for claiming a sovereign access to the Pacific Ocean by territories belonging to Chile”).

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to express a lack of willingness to continue diplomatic negotiations to resolve Bolivia's landlocked situation.³⁰

In reaction to an unfavorable array of opposing international political forces, which prevented the continuation of bilateral diplomatic negotiations, Bolivia pursued an international adjudicatory mechanism to persuade Chile to continue their negotiations. In 2013, Bolivia brought a petition to the I.C.J. against Chile.³¹ However, the court ruled against Bolivia and decided Chile does not have a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean.³² Although it was not the intention of the I.C.J., the court's decision has validated the views of certain sectors of Chilean and Bolivian societies who believe military power is the only means to resolve territorial disputes between sovereign states.

By ruling in favor of Chile—the country with more military might—and by deciding that Chile does not have a legal obligation to negotiate with Bolivia—the weaker militant country—the I.C.J. failed to contribute to finding a normative solution to the countries' long-lasting territorial dispute. This conflict will continue to influence international relations between Chile and Bolivia significantly, and will also continue to have a negative impact in regional political and economic integration in South America.³³

Despite denying the existence of Chile's legal obligation to negotiate with Bolivia, the I.C.J. has recognized the historical necessity, for both countries, of continuing their diplomatic effort to find a solution to Bolivia's landlocked situation.³⁴ At this juncture, one of the main questions is whether powerful political elements will form bilateral relations between Chile and Bolivia, or if a normative solution to resolve territorial disputes by peaceful means, consistent with

30. *Id.* at 79–80.

31. See generally Erica Endlein, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile): Deal Or No Deal*, 27 TUL. J. INT'L & COMP. L. 365 (2019); see also International Court of Justice, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, ICJ-CIJ, <https://www.icj-cij.org/en/case/153-By> (specifying Bolivia brought the petition).

32. Endlein, *supra* note 31, at 371.

33. See generally Mitchell A. Seligson, *Popular Support for Regional Economic Integration in Latin America*, 31 J. LATIN AM. STUD. 129–50 (1999) (analyzing the support of Latin Americans to processes of economic integration).

34. *Bol. v. Chile*, 2018 I.C.J. Reports ¶ 564.

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principles of global justice, will prevail. If the power political paradigm continues, Chile will continue to impose its views on Bolivia through superior military power. If the normative-global justice perspective prevails, then both countries will use mediation, conciliation, and other normative mechanism to find a peaceful solution to their territorial dispute.

Considering the overwhelming majority of Bolivians have a lifelong ideological and cultural commitment to restore their country's sovereign access to the Pacific Ocean, and that sectors of the Chilean population also believe in the importance of finding a mutually beneficial resolution of the conflict, there is a historical and moral imperative to find a normative solution. Against the failure of the I.C.J. to apply international law norms in an effective manner to contribute to restore the negotiated solution venue for the Bolivia-Chile territorial dispute, the discourse of international law continues to lay the foundation to resolve the conflict.³⁵ International law recognizes the importance of the principle of equality of sovereign states to maintain peaceful relations between and among sovereign states.³⁶ Developing nations, such as Bolivia, which struggle against powerful neighbor countries, such as Chile, are interested in a just interpretation and implementation of international legal standards to resolve issues that undermine their economic development, such as the lack of access to the oceans.

Chile's reliance on its superior military power to ensure that Bolivia accepts its landlocked condition has shaped relations between the countries. In place of militant might, Bolivia has relied on diplomacy, international institutions, and international law to resolve its territorial disputes with Chile.³⁷ Chileans and Bolivians need to understand the importance of resolving their territorial disputes as part of

35. See generally Oisín Suttle, *Law as Deliberative Discourse: The Politics of International Legal Argument - Social Theory with Historical Illustrations*, 12 J. INT'L L. & INT'L REL. 154–64 (2016) (analyzing International Law as a discourse).

36. See, e.g., STEVE RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW, A MORAL RECKONING OF THE LAW OF NATIONS* (2015) (discussing the sovereign equality of nation norms as legal and moral principles).

37. See Rossi, *supra* note 29, at 80.

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implementing objectives consistent with the national interests of both countries.³⁸

Consistent with a constructivist perspective,³⁹ Chile and Bolivia must accept that their prejudices of each other have influenced their international bilateral relations and their territorial disputes to the disadvantage of both.⁴⁰ Recognition of the value of the differences between the neighboring countries will enrich and help manifest their common destiny. A recognition of the historical importance of indigenous peoples' contributions to the wellbeing of both countries can provide a new foundation for understanding of their national interests. A fresh approach is needed for Chile and Bolivia to resolve their conflicts and promote economic integration processes for the benefit of both countries.

III. THE TERRITORY OF BOLIVIA AND CHILE, THE INCA EMPIRE, AND THE *UTI POSSIDETIS* PRINCIPLE

It is essential to understand the place of indigenous people, such as the Aymara, Mapuche, and Quechua in Bolivia and Chile, to fully comprehend the concept of sovereignty in the context of the Bolivia-Chile conflict. An indigenous perspective regarding the Bolivia-Chile conflict must consider the historical characteristics of the territory under dispute.

The Inca Empire was sovereign over the territories that now constitute the Atacama Desert.⁴¹ The survivors of the Inca Empire are now the Aymara, Quechua, Mapuche, and other indigenous people of Bolivia and Chile.⁴²

38. See generally MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 1–33 (1996) (analyzing the concept of national interest).

39. See generally Sarina They, *Introducing Constructivism in International Relations Theory*, E-INT'L REL., February 23, 2018, <https://www.e-ir.info/pdf/72842>.

40. See DAVID A. BALDWIN, POWER AND INTERNATIONAL RELATIONS: A CONCEPTUAL APPROACH 139–54 (2016) (analyzing the constructivist perspectives in international relations).

41. See John Hyslop & Mario Rivera, *An Expedition on the Inca Road in the Atacama Desert*, 37 *ARCHAEOLOGY* 33, 33 (1984).

42. See *Indigenous Latin America in the Twenty-First Century: The First Decade*, WORLD BANK GROUP 25 (2015), <http://documents.worldbank.org/curated/en/145891467991974540/pdf/98544-REVISED-WP-P148348-Box394854B-PUBLIC-Indigenous-Latin-America.pdf> (For

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Tiwanaku was one of the most advanced indigenous pre-Incan civilizations, which shaped the cultures and territories of what is now Bolivia and Chile, including Atacama, a coastal desert.⁴³ Before the Spanish conquest of the New World, indigenous peoples were the owners of territories like the one under dispute between Chile and Bolivia. With regard to the ownership of the coast of Atacama by indigenous people, Diremar (Strategic Management for Maritime Vindication) states:

The bonds connecting the Andean region with the coast of Atacama date back to ancient times when indigenous territories were connected permanently to the ocean. During its expansionist phase, the Tiwanaku culture built at least seven settlements in the Azapa Valley, right along the Pacific coast. In the southwestern part of its dominion, the Inca Empire stretched as far as the Atacama Desert. . . . These bonds were respected under colonial rule, which explains why Bolivia was founded in possession of a vast and wealthy seacoast in the Atacama region. Bolivia exercised sovereignty over this territory until 1879, when the Chilean invasion changed the country's geography and history.⁴⁴

Considering the descendants of indigenous peoples, original owners of Atacama, are still an important part of the populations of Bolivia and Chile, it is essential to understand their views and interests. This is the case because Spanish conquerors took away their original territories, including Atacama, and exploited their natural resources.⁴⁵ Indeed, “[t]o say that Bolivia, Chile, or Peru first owned the land, and that it was taken from them, ignores the fact that land ownership is itself an artificial construct. The natives were there before any modern

the number of indigenous populations in Bolivia and Chile) [hereinafter WORLD BANK GROUP].

43. See Kelly J. Knudson, *Tiwanaku Influence in the South-Central Andes: Strontium Isotope Analysis and Middle Horizon Migration*, 19 *LATIN AM. ANTIQUITY* 3, 6 (2008) (discussing the influence of Tiwanaku on the territory of Atacama).

44. MINISTRY OF FOREIGN AFFAIRS OF BOLIVIA: STRATEGIC MANAGEMENT FOR MARITIME VINDICATION - DIREMAR, *THE BOOK OF THE SEA* 15 (2015) [hereinafter DIREMAR].

45. See PAUL J. ZWIER, *PRINCIPLED NEGOTIATION AND MEDIATION IN THE INTERNATIONAL ARENA, TALKING WITH EVIL* 223–24 (2013).

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nation-states with defined boundaries existed.”⁴⁶ The people that owned the Atacama Desert were part of the Inca Empire. To comprehend the importance of this fundamental historical fact, it is necessary to know the historical background of the original owners of the territory under current dispute between Bolivia and Chile. No history of the region would be complete without recognizing the influence of the Inca Empire as the leader of the Andean civilization.⁴⁷

The Incas had a high level of economic and political power, which they used to conquer and colonize other indigenous nations. Although there are different theories about the origins of the Incas, there is consensus among scholars that the civilization of *Tiwanaku* preceded and influenced the formation of the Inca Empire.⁴⁸ A diversity of nations were part of the Andean civilization, both before and after the establishment of the Inca Empire, including the Colla, Lupaca, Omasuyu, and Pacaje.⁴⁹ The power of the Inca Empire was manifest in its economic, cultural, political, normative, and military development.⁵⁰ The production and distribution of food, sophisticated constructions of roads and the creation of beautiful art, and other cultural expressions were examples of the positive aspects of Inca society. Among the tangible elements of power, the territory and population of a nation are important.⁵¹ Regarding the Inca domain:

At the time of the Spanish Conquest in A.D.1532, the majority of the vast territory of Andean South America had been united into a single

46. *Id.* at 223.

47. *See, e.g.*, HANS J. MORGENTHAU, *POLITICS AMONG NATIONS, THE STRUGGLE FOR POWER AND PEACE* (1951) (To determine the power and influence of nations, it is important to consider military, political, economic, and other aspects. For Morgenthau, a classic exponent of realism, the elements of national power are geography, natural resources, military preparedness, industrial capacity, population, national character, national morale and the quality of diplomacy).

48. *See, e.g.*, JOHN WAYNE JANUSEK, *IDENTITY AND POWER IN THE ANCIENT ANDES* 225 (2004).

49. *See, e.g.*, WALDEMAR ESPINOZA SORIANO, *LOS INCAS, ECONOMÍA, SOCIEDAD Y ESTADO EN LA ERA DEL TAHUANTINSUYO* (3d ed. 1997).

50. *See* GEOFFREY W. CONRAD & ARTHUR A. DEMAREST, *RELIGION AND EMPIRE: THE DYNAMICS OF AZTEC AND INCA EXPANSIONISM* 36 (2005).

51. *See, e.g.*, Michael Barnett & Duvall Raymond, *Power in International Politics*, 59 *INT'L ORG.* 39, 39 (2005) (analyzing the concept of power and its elements).

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political entity now commonly called the Inca Empire. Known to its rulers as Tawantinsuyu, meaning roughly ‘The Land of Four Quarters’ in the Inca language, this empire included parts of the modern countries of Colombia, Ecuador, Peru, Bolivia, Argentina, and Chile.⁵²

Considering these historical facts, there was once a unity between the people of Bolivia Chile.⁵³ Furthermore, despite the Spanish conquest and colonization of the New World, and the systematic efforts to destroy indigenous peoples and their cultures, the descendants of the Inca Empire have survived in both countries.⁵⁴

The Incas believed in the existence of many gods, such as *Inti*, *Pachamama*, and others.⁵⁵ Specifically, the principles of reciprocity and duality were the foundations of the Inca worldview:

The world was viewed as being balanced between a series of dual opposing forces. Contrasting forces encompassing such concepts as upper versus lower, light versus dark, wet versus dry, heat versus cold, male versus female, and so on, complemented each other, providing an equilibrium in which life could exist. . . The purpose of Andean religion was to delineate the basic divisions of the cosmos and maintain them in harmony through reciprocal exchange. . .⁵⁶

The Incas had fundamental normative principles such as *ama llulla*, *ama sua*, *ama qhella* (“do not be a thief,” “do not be a liar,” “do not be lazy”).⁵⁷ The Incan Empire used religious narratives to accomplish normative and political objectives. The influence of the Inca, and other indigenous peoples’ worldviews, is still seen in social and political

52. GORDON F. MCEWAN, *THE INCAS: NEW PERSPECTIVES* 3 (2006).

53. *Id.*

54. *See* WORLD BANK GROUP, *supra* note 42 (For the numbers and importance of indigenous people in Latin America).

55. *See generally* MARÍA ROSTWOROWSKI, *OBRAS COMPLETAS VII, ESTRUCTURAS ANDINAS DEL PODER, IDEOLOGÍA RELIGIOSA Y POLÍTICA* (2007) (analyzing the Andean religious worldviews and its influence in political structures).

56. *See* MCEWAN, *supra* note 52, at 137–38.

57. *See, e.g.*, FEDERICO GENG DELGADO, *HISTORIA DEL DERECHO DEL DERECHO PERUANO* 30 (2005).

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movements in Latin America including Bolivia and Chile.⁵⁸ Concepts such as reciprocity, equilibrium, and the importance of mother earth, are part of the ancestral creed that has run with the land. The common identity and experiences of indigenous peoples, such as the Aymara, Mapuche, and Quechua, are seen in Bolivia and Chile.⁵⁹ Their historical experience and their philosophical understandings can help find an original solution to the territorial dispute between the two countries.

After the Spanish conquest of the Andean region of South America, indigenous territories were occupied, and indigenous populations were systematically assimilated and, in some cases, exterminated.⁶⁰ Because of the Spanish conquest and colonization of the New World, indigenous peoples lost their territories. The *uti possidetis* legal principle was applied to determine the territorial boundaries of the countries of Latin America and created the conditions for territorial conflicts among Latin American countries.⁶¹ The *uti possidetis* principle has been applied in Latin America in the following way:

To guard against contested boundary claims, emerging Latin American republics employed the principle of *uti possidetis*. The principle froze territorial title at the moment of independence, 'no matter how arbitrary those boundaries may have been drawn.' As a convenient means of quieting title, the principle ensured that colonial boundaries instantly became international boundaries for Latin America's new republics. It proved a costly means of securing non-violent transitions to sovereignty, and it has been criticized for its agnostic regard for the human populations disrupted by the territorial divisions.⁶²

58. See generally Salvador Martí Puig, *The Emergence of Indigenous Movements in Latin America and Their Impact on the Latin American Political Scene: Interpretive Tools at the Local and Global Levels*, 37 *LATIN AM. PERSP.* 74 (2010) (analyzing indigenous people in political processes).

59. See generally C. Xavier Albó, *Aymaras Entre Bolivia, Perú y Chile*, 19 *ESTUDIOS ATACAMEÑOS* 43 (2000) (analyzing the Aymara people of South America).

60. See generally David Maybury-Lewis, *Genocide Against Indigenous Peoples*, in *ANNIHILATING DIFFERENCE: THE ANTHROPOLOGY OF GENOCIDE* 45–53 (Alexander Laban Hinton ed., 2002) (analyzing genocide in the conquest and colonization of nations).

61. See Rossi, *supra* note 29.

62. *Id.* at 54.

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The Bolivian Republic applied the *uti possidetis* principle in its formation, after obtaining its independence from Spain in 1826.⁶³ In 1826, Bolivia was subdivided into provinces, including Atacama, which became part of the department of Potosi.⁶⁴ Considering this reality, a potential solution to the Bolivia-Chile dispute could grant indigenous peoples of Chile and Bolivia shared sovereignty over parts of Atacama.⁶⁵ This will enable Bolivia to have sovereign access to the Pacific Ocean, and will create a model of sustainable economic integration by recognizing the rights of indigenous peoples including their self-determination.

Bolivia is one of the most indigenous countries in Latin America. According to the World Bank, there are 4.12 million indigenous peoples, which is 41% of the Bolivian population.⁶⁶ According to the Chilean Census, in Chile, 12.8% of the population identify as indigenous. In that country, there are 2.185 million indigenous people. This includes the Mapuche (79.8 %), Aymara (7.2 %), and Diaguita (4.1 %).⁶⁷ Regarding the Mapachu indigenous population of Chile, “the Mapuche were the most successful indigenous group in the Americas at resisting Spanish colonialism, maintaining an independent existence in their homelands until conquered by Chile’s violent ‘pacification’ campaign in 1883. More recently, the Mapuche have also been the most active indigenous group in Chile”⁶⁸

The Spanish conquest and colonization of the New World were characterized by the disregard of the sovereignty of indigenous political communities.⁶⁹ This was consistent with the views of Spanish government officials and some scholars that believed in the ethnic “natural” inferiority of indigenous peoples and the right of Spain to take

63. DIREMAR, *supra* note 44, at 15.

64. *Id.*

65. *See* Rossi, *supra* note 29.

66. WORLD BANK GROUP, *supra* note 42, at 25.

67. INSTITUTO NACIONAL DE ESTADÍSTICA, 2DA ENTREGA RESULTADOS DEFINITIVOS CENSO 2017, http://www.censo2017.cl/wp-content/uploads/2018/05/presentacion_de_la_segunda_entrega_de_resultados_censo_2017.pdf.

68. *See* Funk, *supra* note 10.

69. *See generally* AARON M. SHATZMAN, THE OLD WORLD, THE NEW WORLD, AND THE CREATION OF THE MODERN WORLD, 1400–1650: AN INTERPRETIVE HISTORY 63–108 (2013).

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over their territories. Describing what happened in that historical context in Bolivia, Diremar (Strategic Management for Maritime Vindication) stated:

The Spanish crown established a new type of political administrative organization in America, creating Viceroyalties and Captaincies-General. The Viceroyalty of Peru was created in 1542 and was divided into Royal Audiences, one of which was the Royal Audience of Charcas (today Bolivia) . . . which comprised the Atacama District and its coast as part of its jurisdiction.⁷⁰

In 1776, the Viceroyalty of Río de La Plata was created.⁷¹ Subsequently, the Royal Audience of *Charcas*, including the Atacama region, became part of its jurisdiction.⁷² However, this did not last very long. In 1782, the Viceroyalty was fragmented in diverse administrative units, such as Potosi, which included the Atacama coastal land.⁷³ Although the many redistributions of territorial administrative jurisdictions, after the formation of Latin American countries, the original territories, such as the Atacama coastal territory, originally belonged to indigenous communities.⁷⁴ Bolivia and Chile must recognize the injustices of the Spanish conquest and colonization of the New World against indigenous communities and ensure the participation of indigenous communities in the resolution of their territorial disputes. Unlike in previous historical contexts, the rights of indigenous peoples are globally recognized in international normative instruments, including the U.N. Declaration on the Rights of Indigenous People⁷⁵ and the American Declaration on the Rights of Indigenous

70. DIREMAR, *supra* note 44, at 24.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

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Peoples.⁷⁶ These international legal sources recognize the self-determination and sovereignty of indigenous peoples.⁷⁷

IV. THE ORIGINS OF THE BOLIVIA-CHILE TERRITORIAL DISPUTE, THE LEAGUE OF NATIONS, AND THE ORGANIZATION OF AMERICAN STATES

The lack of fulfillment of bilateral treaties characterizes the international relations between Chile and Bolivia.⁷⁸ It not only demonstrates the close relationship between power politics and international law, but also how power can undermine the just territorial aspiration of military weak sovereign states such as Bolivia.⁷⁹ Since its independence from Spain in 1865, Bolivia has had access to the Pacific Ocean. However, it lost its territory in an unjust war with Chile.⁸⁰ Recognizing the importance of access to coastal lands, in 1866, both countries signed a bilateral treaty regarding the demarcation of their coastal borders,⁸¹ which was later reaffirmed in the Treaty of Limits between Bolivia and Chile of 1874.⁸²

Unfortunately, in 1879, Chile started the War of the Pacific against Bolivia and Peru and occupied Bolivia's coastal territories.⁸³ Describing the end of the war and the establishment of peaceful relations between Bolivia and Chile, the I.C.J. opined:

Hostilities between Bolivia and Chile came to an end with the Truce Pact, signed in 1884 in Valparaíso. Under the terms of the Pact, Chile, inter alia, was to continue to govern the coastal region. As a

76. See G.A. Res. 2888, American Declaration on the Rights of Indigenous Peoples (June 15, 2016).

77. See Glenn T. Morris, *In Support of the Right of Self-Determination for Indigenous Peoples under International Law*, 29 GER. Y.B. INT'L L. 277, 308 (1986) (analyzing the right to self-determination of indigenous peoples).

78. See Rossi, *supra* note 29.

79. See Michael C. Williams, *Why Ideas Matter in International Relations: Hans Morgenthau, Classical Realism, and the Moral Construction of Power Politics*, 58 INT'L ORG. 633 (2004) (analyzing realism and power politics in international relations).

80. See, e.g., MARK EVANS, JUST WAR THEORY: A REAPPRAISAL 203–22 (2005) (analyzing the concepts of just and unjust wars).

81. See *Bol. v. Chile*, 2018 I.C.J. Reports ¶ 16.

82. *Id.*

83. *Id.*

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result of these events, Bolivia lost control over its Pacific coast. In 1895, a Treaty on the Transfer of Territory was signed between Bolivia and Chile, but never entered into force. It included provisions for Bolivia to regain access to the sea, subject to Chile acquiring sovereignty over certain territories. On 20 October 1904, the Parties signed the Treaty of Peace and Friendship . . . which officially ended the War of the Pacific as between Bolivia and Chile. Under that Treaty, which entered into force on 10 March 1905, the entire Bolivian coastal territory became Chilean and Bolivia was granted a right of commercial transit through Chilean ports. The Court notes that, since the conclusion of the 1904 Peace Treaty, both States have made a number of declarations and several diplomatic exchanges have taken place between them regarding the situation of Bolivia vis-à-vis the Pacific Ocean.⁸⁴

The ruling elites of Bolivia and Chile disregarded the interest of essential sectors of their populations including the original owners of the territory under dispute. Indigenous peoples in Chile and Bolivia were not consulted, nor did they participate in the negotiations and conclusion of the *Peace Treaty of 1904* or any other treaties regarding the Bolivia-Chile territorial dispute.⁸⁵ Considering the socio-political implications and economic impact of the Bolivians' loss of its access to the Pacific Ocean, the interests of indigenous people should have been considered in the negotiating processes and conclusion of treaties between Chile and Bolivia.⁸⁶

The international relations between Bolivia and Chile have failed to follow the norms of international law, which condemn use of military force to resolve disputes.⁸⁷ For example, on August 6, 1874, Chile and Bolivia signed a treaty to recognize their territorial boundaries.⁸⁸ A Protocol to this agreement selected arbitration as the means for resolving disputes related to the treaty implementation.⁸⁹ Despite this legal commitment, on February 14, 1879, Chile invaded Bolivian

84. *Id.* at 1.

85. *See id.*

86. *See infra* Part V.B.

87. *See generally* DIREMAR, *supra* note 44.

88. *Id.* at 19.

89. *Id.*

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territory and annexed the Antofagasta port.⁹⁰ Regarding this historical context, Diremar summarized that:

Bolivia was dragged into a conflagration it had neither sought nor desired and, forced to defend its sovereignty, pursuant to the Treaty of Defensive Alliance concluded with Peru in 1873, along with its ally it tried to stop the advance of the Chilean troops which eventually occupied all of Bolivia's Litoral, the Peruvian provinces of Tarapacá, Tacna and Arica and even the Peruvian capital city of Lima.⁹¹

A peaceful means for the resolution of the territorial dispute happened at the League of Nations. Regarding the importance of the resolution of its landlocked situation, Bolivia stated its case at the 1919 Paris Peace conference, and at the League of Nations.⁹² In response to this, in 1922, Manuel Rivas Vicuña, Chile's delegate, expressed Chile's willingness to negotiate with Bolivia.⁹³

Frank B. Kellogg, who was a mediator in a territorial dispute between Chile and Peru, attempted to resolve the Bolivia-Chile territorial dispute.⁹⁴ On November 30, 1926, he proposed to grant Bolivia the territories of Tacna and Arica.⁹⁵ In a memorandum sent to Frank B. Kellogg, Chile expressed its agreement to grant a stripe of territory and a port to Bolivia.⁹⁶

Since the late nineteenth century, the O.A.S. has provided a forum to find a peaceful resolution to the Bolivia-Chile territorial dispute. In 1970, the O.A.S. General Assembly issued Resolution 426, which recommended that Chile and Bolivia negotiate so Bolivia may have a "free and sovereign territorial connection with the Pacific Ocean."⁹⁷

90. *Id.* at 30.

91. *Id.*

92. *Id.* at 25 (Bolivia was a signatory of the Peace of Versailles); Treaty of Peace with Germany (Treaty of Versailles, 1919), June 28, 1919, 2 Bevans 43, 225 Consol. T.S. 188, <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf>.

93. DIREMAR, *supra* note 44, at 25.

94. *Id.* at 27.

95. *Id.*

96. *Id.*

97. Organization of American States G.A. Res. 426, OEA/Ser.P/IX.0.2 (October 22–31, 1979).

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The O.A.S. passed two other resolutions in 1980 and 1981, recommending that Chile and Bolivia negotiate a peaceful resolution regarding Bolivia's sovereign access to the Pacific Ocean.⁹⁸ In 1983, the O.A.S. General Assembly adopted Resolution 686, which both Bolivia and Chile voted in favor of. The resolution encouraged both countries "to begin a process of rapprochement and strengthening of friendship of the Bolivian and Chilean peoples, directed toward normalizing their relations and overcoming the difficulties that separate them, including, especially, a formula for giving Bolivia a sovereign outlet to the Pacific Ocean."⁹⁹

It is evident that Bolivia has relied on international law, including bilateral agreements with Chile, to resolve its lack of access to the Pacific Ocean. Bolivia has also attempted to facilitate negotiations with Chile through international organizations, such as the League of Nations and the O.A.S., to resolve its territorial disputes with Chile. The O.A.S. has continued to provide an institutional framework to find solutions to Bolivia's landlocked status, while taking into consideration its historical international relations with Chile. Future efforts at the O.A.S. should also consider the role of indigenous peoples in the diplomatic resolution of conflicts between Bolivia and Chile.

A. *The Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile) Case at the I.C.J.*

Maintaining the recent trend of pursuing negotiations of territorial disputes through international mechanisms, Bolivia decided to initiate proceedings before the I.C.J. to gain access to the Pacific Ocean. On March 23, 2011, Bolivia's first indigenous President, Evo Morales Ayma, announced the initiation of these proceedings:

Despite 132 years of dialogue and efforts, Bolivia does not have a sovereign access to the Pacific In recent decades[,] and particularly in recent years, International Law has made great

98. DIREMAR, *supra* note 44, at 88; Organization of American States G.A. Res. 481, OEA/Ser.P/X.0.2 (Nov. 19–27, 1980); Organization of American States G.A. Res. 560, OEA/Ser.P/XI.0.2 (Oct. 2–11, 1981).

99. Organization of American States G.A. Res. 686, OEA/Ser. P/XIII.O.2 (Nov. 14–18, 1983).

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progress; there are now tribunals and courts which sovereign States can appeal to and claim or demand what is rightfully theirs.¹⁰⁰

Bolivia believed that the I.C.J. established a legal obligation for Chile to negotiate a solution to provide Bolivia access to the Pacific Ocean. Bolivia, a State with a weak military, relied on the legal strength of an international adjudicatory body to persuade Chile, the more militant State, to change its diplomatic position and agree to negotiate a peaceful solution to the territorial dispute.

Bolivia and Chile recognized the I.C.J.'s jurisdiction over territorial disputes in the American Treaty on Pacific Settlement ("ATPS"), also known as the "Pact of Bogotá."¹⁰¹ On April 24, 2013, Bolivia filed an application at the I.C.J. regarding Chile's obligation to negotiate a solution to the territorial dispute with Bolivia.¹⁰² In its application, Bolivia asserted that Chile had a legal obligation to negotiate Bolivia's sovereign access to the sea.¹⁰³ The basis for this obligation is international "agreements, diplomatic practice and a series of declarations attributable to [Chile's] highest-level representatives, to negotiate a sovereign access to the sea for Bolivia."¹⁰⁴ One of Bolivia's main objectives was to demonstrate Chile's "obligation to negotiate in good faith with Bolivia in order to reach an agreement granting Bolivia sovereign access to the Pacific Ocean."¹⁰⁵

On July 15, 2014, Chile raised a preliminary objection to the I.C.J.'s jurisdiction. The I.C.J. rejected Chile's preliminary objection by applying Article XXXI of the Pact of Bogotá treaty.¹⁰⁶ The Court decided it had jurisdiction through the Pact of Bogotá since the case was solely about whether Chile was obligated to negotiate with Bolivia and whether Chile breached the treaty, and would not determine the States' sovereignty.

100. DIREMAR, *supra* note 44, at 47.

101. American Treaty on Pacific Settlement (Pact of Bogota), Apr. 30, 1948, 30 U.N.T.S. 55, O.A.S.T.S. 17 & 16.

102. Bol. v. Chile, 2018 I.C.J. Reports ¶ 564.

103. DIREMAR, *supra* note 44, at 50.

104. *Id.*

105. Bol. v. Chile, 2018 I.C.J. Reports ¶ 1.

106. *Id.*; American Treaty on Pacific Settlement (Pact of Bogota), *supra* note 101, art. XXXI.

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Bolivia's case focused on the principle of *pactum de negotiando* including the interpretation that a fundamental component of negotiations is that they are conducted in good faith.¹⁰⁷ The Court ruled against Bolivia, finding that Chile had no legal obligation to negotiate in good faith a sovereign access to the Pacific Ocean for Bolivia.¹⁰⁸

In its reasoning, the I.C.J. rejected Bolivia's argument regarding bilateral agreements as a source of Chile's legal obligation to negotiate.¹⁰⁹ Bolivia argued that Chile's obligation was embodied in bilateral agreements, including the minutes of a meeting between Bolivia's Minister for Foreign Affairs and Chile's Minister Plenipotentiary (January 1920); the exchange of diplomatic notes between Bolivia and Chile (1950) and of a memorandum from the Chilean Ambassador to Bolivia (1961); the Charaña Declaration, signed by the Bolivian and Chilean presidents (February 1975); communiqués between the Chilean and Bolivians secretaries of state (November 1986); a joint declaration between the Bolivian and Chilean secretaries of state (February 2000); and a bilateral Bolivia-Chile working group's thirteen-point agenda (2006).¹¹⁰ The I.C.J. did not find a legal obligation to negotiate Bolivia's sovereign access to the Pacific Ocean in any of these bilateral instruments.¹¹¹

The I.C.J. also did not find a legal obligation to negotiate with Bolivia in Chile's unilateral acts.¹¹² The I.C.J. rejected Bolivia's arguments based on the doctrine of acquiescence. It noted that Bolivia "has not identified any declaration which required a response or reaction on the part of Chile in order to prevent an obligation from

107. *Bol. v. Chile*, 2018 I.C.J. Reports ¶ 48.

108. Press Release, International Court of Justice, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile): The Court Finds that the Republic of Chile Did Not Undertake a Legal Obligation to Negotiate a Sovereign Access to the Pacific Ocean for the Plurinational State of Bolivia*, I.C.J. Press Release 2018/49, 1 (October 1, 2018) [hereinafter International Court of Justice].

109. *Id.* at 2.

110. *Id.*

111. *Id.* at 1.

112. *Id.* at 2.

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arising.”¹¹³ The Court further rejected arguments based on estoppel,¹¹⁴ and stated:

Although there have been repeated representations by Chile of its willingness to negotiate Bolivia’s sovereign access to the sea, such representations do not point to an obligation to negotiate. Bolivia has not demonstrated that it changed its position to its own detriment or to Chile’s advantage, in reliance on Chile’s representations.¹¹⁵

The court rejected Bolivia’s arguments based on the doctrine of legitimate expectations because it is a principle restricted to the field of foreign direct investments between host countries and foreign investors.¹¹⁶ The I.C.J. indicated that Article 2.3 of the U.N. Charter and Article 3 of the O.A.S. Charter express a general obligation to resolve disputes by peaceful means, but they do not require the parties to use a specific mechanism like negotiation.¹¹⁷

Regarding the eleven O.A.S. General Assembly resolutions on the issue of Bolivia’s sovereign access to the Pacific Ocean, the I.C.J. reasoned: “. . . none of the relevant resolutions indicates that Chile is under an obligation to negotiate Bolivia’s sovereign access to the Pacific Ocean. Moreover, as both Parties acknowledge, resolutions of the General Assembly of the OAS are not per se binding and cannot be the source of an international obligation.”¹¹⁸ The I.C.J. rejected Bolivia’s claim regarding Chile’s legal obligation to negotiate because of an accumulative effect of all the sources that demonstrate the existence of such obligation. Specifically, the I.C.J. said, “given that its analysis shows that no obligation to negotiate Bolivia’s sovereign access to the Pacific Ocean has arisen for Chile from any of the invoked legal bases taken individually, a cumulative consideration of the various bases cannot add to the overall result.”¹¹⁹

113. *Id.*

114. *See generally* Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369 (1996) (explaining the doctrine of estoppel in international law).

115. International Court of Justice, *supra* note 108, at 3.

116. *Id.*

117. *Id.*

118. *Id.* at 4.

119. *Id.*

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Contrary to its overall reasoning regarding the lack of Chile's legal obligation to negotiate in good faith an access to the Pacific Ocean for Bolivia, the I.C.J. also recognized the existence of a historical conflict between Chile and Bolivia, and the importance of having negotiations to resolve it. Regarding this, the I.C.J. indicated:

Nevertheless, the Court's finding should not be understood as precluding the Parties from continuing their dialogue and exchanges, in a spirit of good neighborliness, to address the issues relating to the landlocked situation of Bolivia, the solution to which they have both recognized to be a matter of mutual interest. With willingness on the part of the Parties, meaningful negotiations can be undertaken.¹²⁰

As a matter of common interest, the I.C.J.'s recognition of the historical efforts to resolve the landlocked problem of Bolivia and its encouragement to continue to address this issue provides a foundation for seeking original and effective means for the peaceful resolution of the Bolivia-Chile conflict. Besides adjudicatory means, in the resolution of international disputes there are other mechanisms for the peaceful resolution of conflicts, including mediation and conciliation, which will be considered in this Article.

B. Dissenting Opinions and the Negotiation Option

Regarding the decision of the Bolivia-Chile case, the President of the I.C.J., Abdulqawi Ahmed Yusuf, recognized the existence of historically consistent interactions and declarations between Chile and Bolivia. He believed these actions reflected efforts, made in good faith, to obtain a negotiated solution to Bolivia's landlocked problem.¹²¹ Consistent with this view, in his declaration in the case records, he wrote:

It is possible, as is the case here, that the Court may reject the relief requested by an applicant because it is not sufficiently founded on law. This may satisfy the judicial function of the Court, but it may not put to an end the issues which divide the Parties or remove all the uncertainties affecting their relations. It is not inappropriate, in such

120. Bol. v. Chile, 2018 I.C.J. Reports ¶ 564.

121. Bol. v. Chile, 2018 I.C.J. Reports ¶¶ 566–68 (Oct. 1) (Declaration of President Yusuf).

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circumstances, for the Court to draw the attention of the Parties to the possibility of exploring or continuing to explore other avenues for the settlement of their dispute in the interest of peace and harmony amongst them.¹²²

Consistent with his written statement, Judge Yusuf also made a public statement in which he highlighted the fact that the I.C.J. recognized the existence of a history of negotiations between Chile and Bolivia to resolve the landlocked Bolivian problem.¹²³ He said that “for the Court, these periodic exchanges and statements of the Parties reflected attempts made in good faith to address the landlocked situation of Bolivia.”¹²⁴ Considering the resolution of the territorial dispute is of mutual interests of Chile and Bolivia, he opined: “This recognition by the Parties of the importance of the issue, paired with their willingness to resolve it, may provide the basis for a meaningful solution to be identified in the future.”¹²⁵

Judge Yusuf recognized that the decision of the I.C.J. was limited to the arguments presented in the case. The most important part of the declaration recognizes that the positivist legal analysis of the I.C.J. did not end the territorial dispute between Bolivia and Chile, and that the I.C.J. properly requested both countries to continue to find a mechanism for the resolution of their territorial dispute.

In his dissenting opinion, Judge Patrick Lipton Robinson recognized Chile’s legal obligation to negotiate a solution to the territorial dispute regarding Bolivia’s sovereign access to the Pacific Ocean.¹²⁶ He believes that the historical agreements between the parties, including the Trucco Memorandum and the Declaration of Charaña, are evidence of the creation of a legal obligation for Chile to

122. *Id.* at 567.

123. H.E. Abdulqawi Ahmed Yusuf, President of the International Court of Justice, Speech at the 71st Session of the International Law Commission (July 11, 2019), <https://www.icj-cij.org/public/files/press-releases/0/000-20190711-STA-01-00-EN.pdf>.

124. *Id.*

125. *Id.*

126. *Bol. v. Chile*, 2018 I.C.J. Reports ¶¶ 569–98 (Oct. 1) (Dissenting Opinion of Robinson, J.), <https://www.icj-cij.org/public/files/case-related/153/153-20181001-JUD-01-02-EN.pdf>.

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negotiate with Bolivia.¹²⁷ Consistent with this reasoning, he wrote the I.C.J. “should therefore have granted Bolivia a declaration that Chile has a legal obligation to negotiate directly with Bolivia to find a formula or solution that will enable Bolivia to have sovereign access to the Pacific Ocean.”¹²⁸

In his dissenting opinion, Judge Nawaf Salam analyzed the exchange of notes, between Bolivia and Chile, as a means to create an international agreement.¹²⁹ He wrote that like in the *Qatar v. Bahrain* case, the I.C.J. should have recognized the formation of an international agreement by the exchange of diplomatic notes between Bolivia and Chile.¹³⁰ Contrary to the reasoning of the majority opinion, Judge Salam believes that documents including the Trucco Memorandum and the Charaña Declaration, are evidence that “Chile and Bolivia were bound by a consistent obligation to negotiate on granting the latter sovereign access to the Pacific Ocean.”¹³¹ He used the *Qatar v. Bahrain* case as an example of the fact that international agreements can be done in diverse forms.¹³² According to Judge Salam:

It is evident from the wording of the Notes exchanged that, at the time they were drafted, the two States considered that negotiations with a view to concluding an agreement that would confer reciprocal benefits on both Parties were the only feasible way of attempting to satisfy Bolivia's aspirations. It is also clear from the terms of the Notes that they express the core of the undertaking to which the Parties had consented, namely to ‘formally enter into direct negotiations.’¹³³

127. *Id.* at 598.

128. *Id.*

129. *Bol. v. Chile*, 2018 I.C.J. Reports ¶¶ 599–606 (Oct. 1) (Dissenting Opinion of Salam, J.), <https://www.icj-cij.org/public/files/case-related/153/153-20181001-JUD-01-03-EN.pdf>.

130. *See* Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v. Bahrain*), Judgment, 2001 I.C.J. Rep. 40 (March 15), *available at* <https://www.icj-cij.org/public/files/case-related/87/087-19911011-ORD-01-00-EN.pdf> (discussing the reasoning of the I.C.J. in the *Qatar v. Bahrain* case).

131. Dissenting Opinion of Judge Salam, *supra* note 129, at 604.

132. *Id.*

133. *Id.* at 601.

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Regarding the importance of continuing to negotiate a solution to the Bolivia-Chile dispute, *ad hoc* Judge Yves Daudet highlighted that the I.C.J. decision recognizes the international dispute regarding Bolivia's sovereign access to the Pacific Ocean is a pending issue. Concerning paragraph 176 of the I.C.J. decision which expresses this view, he wrote:

[T]he Court's concern is that the dispute should not persist and that its decision should not be understood as being the end of the matter, allowing things to remain as they are. In this regard, while hard for Bolivia, the Judgment could, if the Parties so wish, prompt a return to negotiations, which would not be imposed but desired by both sides with a renewed spirit.¹³⁴

The I.C.J. judges' dissenting opinions in the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* case and paragraph 176 of the I.C.J. decision demonstrate the importance of continuing diplomatic negotiations between Chile and Bolivia to find a solution to Bolivia's landlocked problem. Mediation and conciliation are possible mechanisms to accomplish this objective. In the next section of this Article, I will analyze the efficacy of alternative dispute resolution mechanisms for the Bolivia-Chile territorial dispute.

V. AN INTEGRATIVE NORMATIVE APPROACH FOR THE RESOLUTION OF THE BOLIVIA-CHILE TERRITORIAL DISPUTE

Considering the complex historical and political characteristics of the Bolivia-Chile conflict and the failure of the I.C.J.'s legal positivism approach to contribute to its resolution, fundamental principles of global justice including *ex aequo et bono* need to become a foundation for its resolution. Regarding this principle, Leon Trakman, an experienced international relations law professor, opined that "[t]he ancient concept *ex aequo et bono* holds that adjudicators should decide disputes according to that which is 'fair' and in 'good conscience.'"¹³⁵ Specifically, in international law, "[i]f the adjudicative decision is to be

134. Bol. v. Chile, 2018 I.C.J. Reports ¶ 620 (Oct. 1) (Dissenting Opinion of Judge *Ad Hoc* Daudet), <https://www.icj-cij.org/public/files/case-related/153/153-20181001-JUD-01-04-EN.pdf>.

135. Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 CHI. J. INT'L L. 621, 621 (2008).

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'fair,' it must be fair against the background of rational actors exercising their free will."¹³⁶

Consistent with rational ideas of fairness, Chile and Bolivia have an obligation consistent with their national interests to obtain a solution to Bolivia's landlocked situation. This is also consistent with fundamental principles of global justice, including the peaceful coexistence between sovereign states, and respect for fundamental, individual, and collective human rights.¹³⁷ To diminish the mutual distrust between Bolivia and Chile, and to accomplish objectives consistent with global justice, the interests of indigenous peoples and civil sectors of society of both countries, must be considered. Moreover, any possibility of a violent resolution to this conflict must be prevented.¹³⁸

Consistent with Article 2(3) of the U.N. Charter, rather than relying on power politics and the potential use of military force, Chile and Bolivia have the legal obligation to resolve their dispute through peaceful means.¹³⁹ As mentioned above, Article 33 of the U.N. Charter requires sovereign states to resolve their disputes through peaceful means including negotiation, mediation, conciliation, arbitration, and judicial settlement.¹⁴⁰

The failure of the I.C.J. to contribute to a negotiated solution to a territorial dispute is evidence of the importance of considering alternative dispute resolution mechanisms in the resolution of international disputes between sovereign states.¹⁴¹ A case can be made for rethinking the structure of international dispute resolution by focusing not only on adjudicatory mechanism, but also on mediation, conciliation, and other alternative dispute resolution mechanisms. This

136. *Id.* at 637.

137. *See* RATNER, *supra* note 36 (describing global justice principles).

138. *See generally* Wehner, *supra* note 14 (discussing the effect of distrust on the Boliva-Chile dispute).

139. U.N. Charter art. 2 ¶ 3.

140. *Id.* art 33.

141. *See generally* Anna Spain, *Integration Matters: Rethinking the Architecture of International Dispute Resolution*, 32 U. PA. J. INT'L L. 1 (2010) (discussing the potential resolution of international disputes through alternative resolution mechanisms).

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analysis applies well to the case of the Bolivia-Chile territorial dispute.¹⁴²

A glaring flaw in the current international dispute resolution system is that “it overlooks the value and institutional development of mediation, despite states’ preference for mediation in certain contexts.”¹⁴³ Also, it does not have a structure to enable the integration of diverse methods of dispute resolution.¹⁴⁴ Regarding the shortfalls of adjudicatory means for the resolution of international disputes:

[A]djudication is not designed to address extra-legal issues. Its limited justiciability makes adjudication poorly equipped to resolve complex, multi-issue disputes involving political, social, environmental, and ethical interests. Often a court will issue an opinion that fails to resolve key issues in the case.¹⁴⁵

The limitations of the international adjudicatory process were seen in the I.C.J.’s decision in the Bolivia-Chile case, which did not provide adequate solutions for the resolution of one of the most important territorial disputes in Latin America.¹⁴⁶ Considering this reality, it is essential to find just and creative mechanisms for the resolution of the Bolivia-Chile territorial dispute, including the integration of diverse means. To illustrate of the effectiveness of an integrative approach:

[I]n the [I.C.J.] *Frontier Dispute* case, the governments of Mali and Burkina Faso reached a cease-fire and worked to resolve their underlying disputes through judicial settlement by the [I.C.J.] and a mediation like process that involved local stakeholders. This

142. *Id.*

143. *Id.* at 13.

144. *Id.*

145. *Id.* at 16–17 (“For example, despite the ICJ’s decision regarding Slovakia and Hungary’s dispute over a project to build barrages in the Danube River, the matter remains unresolved. In the *Nuclear Tests* cases, and other cases, the ICJ was heavily criticized for leaving the question of legality of nuclear testing, a politicized matter, undecided, and for failing to identify legal principles upon which environmental protection could be based.”).

146. *See generally* Bol. v. Chile, 2018 I.C.J. Reports ¶ 564.

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combination of rights-based and interest-based methods brought an end to the armed conflict and the ongoing disputes.¹⁴⁷

In paragraph 176 of the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* case opinion, the I.C.J. encouraged Chile and Bolivia to continue their negotiations to find a solution to Bolivia's landlocked situation.¹⁴⁸ This perspective is further supported by the reasoning of Judge Yusuf and the dissenting judges' opinions in the *Bolivia v. Chile* case. The I.C.J. can encourage a diplomatic solution to the territorial dispute by implementing an international mediation process between the two countries.

The I.C.J. decision demonstrates the Court's limitations in providing effective solutions consistent with international law. In order to make the international dispute resolution system more effective, the focus must be shifted to "embracing mediation and reducing the primacy of adjudication removes some authority from states as it promotes non-state actor participation in IDR processes. An integrated [International Dispute Resolution ("IDR")] structure creates a decentralized substructure within the international legal system."¹⁴⁹ Consistent with the integrative approach for international conflicts, the Inter-American system for dispute resolution provides a normative foundation for the peaceful resolution of the Bolivia-Chile territorial dispute. This foundation includes mediation, assistance, and conciliation.

Bolivia and Chile are signatories to the American Treaty on Pacific Settlement ("ATPS").¹⁵⁰ In Article IX, this treaty recognizes good offices and mediation as means for conflict resolution, such as the Bolivia-Chile conflict.¹⁵¹ Countries, such as Costa Rica, which traditionally have facilitated the peaceful resolution of international conflicts can attempt to reinvigorate the negotiation between Bolivia and Chile. Pope Francis is an Argentinian citizen who knows the

147. Spain, *supra* note 140, at 7.

148. *Bol. v. Chile*, 2018 I.C.J. Reports ¶ 564.

149. Spain, *supra* note 141, at 49.

150. Organization of American States, Signatories and Ratifications to the American Treaty on Pacific Settlement, DEPT. INT'L L., <http://www.oas.org/juridico/english/signs/a-42.html>.

151. See American Treaty on Pacific Settlement (Pact of Bogota), *supra* note 101, art. IX.

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historical, political, and cultural characteristics of Bolivia and Chile.¹⁵² He could utilize good offices to help Chile and Bolivia negotiate a peaceful solution to their territorial dispute. ATPS provides a foundation for Latin American countries to facilitate a mediated resolution of the Bolivia-Chile conflict. Regarding mediation as a means for the conflict resolution, Article XI of the ATPS states:

The procedure of mediation consists in the submission of the controversy to one or more American Governments not parties to the controversy, or to one or more eminent citizens of any American State not a party to the controversy. In either case the mediator or mediators shall be chosen by mutual agreement between the parties.¹⁵³

Bolivia and Chile can agree to have Pope Francis, or other distinguished citizens of Latin America, act as mediators for their territorial disputes.¹⁵⁴ Specifically, countries such as Costa Rica or Mexico can be mediators in the Bolivia-Chile dispute. Describing the functions of mediators, Article XII of the ATPS provides, “The functions of the mediator or mediators shall be to assist the parties in the settlement of controversies in the simplest and most direct manner, avoiding formalities and seeking an acceptable solution.”¹⁵⁵

An integrative approach to the resolution of the Bolivia-Chile territorial conflict must recognize the I.C.J.’s inherent limitations and embrace other means for international dispute resolution. Mediation, conciliation, and good offices are alternative dispute resolution mechanisms that will effectively resolve the Bolivia-Chile dispute. Further, an integrative perspective is consistent with the norms of the ATPS that recognize the importance of mediation, conciliation, and other alternative dispute resolution processes for the resolution of disagreements between Latin American countries.

152. See MARTIN SCHLAG, *THE BUSINESS FRANCIS MEANS: UNDERSTANDING THE POPE’S MESSAGE ON THE ECONOMY* 48–97 (2017).

153. American Treaty on Pacific Settlement (Pact of Bogota), *supra* note 101, art. XI.

154. SCHLAG, *supra* note 152, at 48–97.

155. American Treaty on Pacific Settlement (Pact of Bogota), *supra* note 101, art. XII.

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A. Pope Francis and U.N. Secretary General António Guterres as Mediators of the Bolivia-Chile Territorial Dispute

Mediation is defined as “a form of third-party intervention by which an unbiased party convenes disputing parties, facilitates a process for communicating positions and underlying interests and promotes agreement formation.”¹⁵⁶ Mediation has been an effective mechanism for national and international dispute resolution. Further, it is a major means for the resolution of disputes between those from different cultures.¹⁵⁷ Additionally, mediation is an important method for the resolution of business disputes between juridical persons, including transnational corporations. For example, the Center of the Settlement of Investment Disputes uses mediation to resolve conflicts between transnational corporations and governments.¹⁵⁸ Although not as frequently as in the business sector, mediation is also used in the resolution of territorial and other disputes between sovereign states. For example, consider China and Russia during the In the Amur River Dispute:

[T]he underlying issue was an unclear boundary demarcation along a portion of the Amur River and several islands. Russia claimed that ownership rights were granted under the 1858 Treaty of Adigun and the 1860 Peking Treaty. Although seemingly a legal matter, the parties resolved the dispute through a joint field-mapping exercise of the disputed area where they agreed to divide the islands in half. The process, which involved mediation, worked so well that they followed a similar arrangement in the Argun River Dispute.¹⁵⁹

From another perspective, philosopher Paul Ricoeur suggests the use of historical memory to facilitate mediation processes.¹⁶⁰ This perspective applies well to the Bolivia-Chile conflict because there is a

156. Spain, *supra* note 141, at 10.

157. Elizabeth Birch, *Practical and Cultural Aspects of International Mediation*, 5 Y.B. ON INT'L ARB. 215, 216 (2017).

158. International Centre for Settlement of Investment Disputes, *Investor-State Mediation, Subpage to Services*, WORLD BANK GROUP, <https://icsid.worldbank.org/en/Pages/process/adr-mechanisms—mediation.aspx> (last visited Oct. 17, 2020).

159. Spain, *supra* note 141, at 25–26.

160. See ZWIER, *supra* note 45, at 124–25 (discussing Paul Ricoeur).

well-documented negotiating history regarding the peaceful solution of Bolivia's landlocked condition. The importance of historical memory can also be seen in the fact that both countries have a common history of unity before the Spanish conquest and colonization of the New World. Specifically, the Incas and other indigenous peoples were the original inhabitants of Chile and Bolivia.¹⁶¹

Both countries have experienced military dictatorships acts of genocide against indigenous communities. Bolivia and Chile have experienced processes of national reconciliation and restoration of their respective democratic systems. Historical memory may remind Bolivians and Chileans, and their governments, that negotiations are meaningful steps toward a mutually beneficial agreement.¹⁶²

Regarding the principle approach to international negotiations and mediation, “[n]egotiation theorist[s] . . . emphasize an interest-based approach to negotiations instead of position bargaining . . . to focus on the underlying concerns of the parties instead of [focusing on] a defined, sometimes uncompromising objective.”¹⁶³ Consistent with the principle approach, Bolivia and Chile should focus on the political and economic importance of improving their bilateral relations. Both countries must also understand their common destiny to live as neighboring countries, and they must acknowledge the fact that their territorial disputes have damaged mutually beneficial processes of economic integration.

Mutual political forgiveness and reconciliation are fundamental factors in achieving a successful result in the Bolivia-Chile dispute. Specifically, success requires the participation of government officials, indigenous leaders, and civil society representatives in mediation processes. Public diplomacy should be an essential component in these types of efforts. Further, public diplomacy is essential to dispute resolution efforts. Indigenous leaders from both countries can begin this process by showing a willingness to speak sincerely about indigenous interests. Similarly, academic leaders, scientists, and

161. MCEWAN, *supra* note 52, at 3.

162. *See* ZWIER, *supra* note 45, at 126–43 (discussing using the integration of a historical approach, position bargaining and problem solving in international mediation processes).

163. *Id.* at 126.

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business leaders can also promote indigenous interests.¹⁶⁴ An international institution can act as a mediator, facilitating a mutual and proper understanding of the interests of Bolivia and Chile. The U.N., the O.A.S., and the Catholic Church are examples of potential mediators.

Pope Francis, given his understanding of the South American context and the importance of indigenous peoples in the region, is uniquely situated to mediate the territorial dispute between Bolivia and Chile. The Secretary General of the U.N., António Guterres, could also be an excellent impartial mediator for the conflict. The Beagle Channel case is a good example of a successful South America territorial dispute mediation:

The Beagle Channel conflict had its origins in a long-standing disagreement over the contours of the Argentine–Chilean border. The core issue in this dispute was sovereignty over three barren islands to the south of Tierra del Fuego and the scope of the maritime jurisdiction associated with those islands.¹⁶⁵

The Bolivia-Chile territorial dispute centers on Bolivia's sovereign access to the Pacific Ocean. Similarly, in the Beagle Channel dispute, military dictatorships in Chile and Argentina leveraged their territorial conflict to increase their domestic political influence by encouraging nationalist feelings and denigrating their opponent's cultural and national identities. Additionally, geopolitical interests increased the conflict's intensity. Indeed, "The military authorities of both countries had long regarded the southern zone as crucial to their long-term strategic objectives because of its three interoceanic passages—the Straits of Magellan, the Beagle Channel, and the Drake Passage."¹⁶⁶

164. See generally Nicholas J. Cull, *Public Diplomacy: Taxonomies and Histories*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 31–54 (2008) (analyzing public diplomacy).

165. Mark Laudy, *The Vatican Mediation of the Beagle Channel Dispute: Crisis Intervention and Forum Building*, in WORD OVER WAR, MEDIATION AND ARBITRATION TO PREVENT DEADLY CONFLICT 295 (Melanie C. Greenberg, et. al, eds., 2000).

166. *Id.* at 298.

Just as the Bolivia-Chile dispute, the Beagle Channel territorial dispute was a central priority of both countries' foreign policies.¹⁶⁷

Before the Pope's mediation of the Argentina-Chile dispute (1971-1977), there was an arbitration process done by the British Crown. Specifically, "[t]he arbitral decision, officially announced on May 2, 1977, established a boundary running roughly through the center of the Beagle Channel and extending to the east of the PNL island group. Thus, all three of the disputed islands were awarded to Chile."¹⁶⁸ However, Argentina rejected the decision of the arbitral panel and declared it void.

Chile rejected the British Crown's decision. This increased tensions between the two countries. Military force became an increasingly likely resolution of the conflict.¹⁶⁹ Chile sought a resolution by the I.C.J. However, Argentina, as a stronger military power, rejected this option and indicated that it might declare war if Chile seeks the I.C.J.'s assistance.¹⁷⁰

Pope Francis can appoint a personal envoy for good offices for the resolution of the Bolivia-Chile conflict. In the historical context of the Argentina-Chile conflict, Pope John Paul II sent a personal envoy to Buenos Aires and Santiago for good offices.¹⁷¹ A similar approach can be used to resolve the Bolivia-Chile conflict. Although a number of possible mediators were considered including, the king of Spain; Queen of England; and the Secretary General of the U.N., Kurt Waldheim, Pope John Paul II was elected as the best mediator for the Argentina-Chile conflict.¹⁷²

One reason Pope John Paul II was the best mediator was because of the institutional reputation of the Vatican to have patience, understanding, and prudence in mediating processes.¹⁷³ Moreover,

167. *Id.* ("By the time of the papal intervention in late 1978, the conflict over the Beagle Channel had become the primary foreign policy imperative of both governments.").

168. *Id.* at 299.

169. *Id.* at 300.

170. *Id.* at 301 ("Chile once again proposed that the dispute be submitted to the International Court of Justice. The unofficial response from Buenos Aires was that Argentina would consider that course of action to be *casus belli*.").

171. *Id.* at 302.

172. *Id.* at 304.

173. *Id.*

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“[t]he Pope, having a long-term perspective on his mission and being largely unaccountable to any interested constituencies, was almost certainly better suited to such a role than other heads of state.”¹⁷⁴ Considering the personal attributes of Pope Francis, and the institutional experience of the Vatican, the analysis regarding the reasons why the Pope John Paul II was chosen to mediate the Chile-Argentina conflict, may similarly apply to Pope Francis to resolve the Bolivia-Chile territorial dispute.

Similar to the Chile-Argentina conflict, the mediator of the Bolivia-Chile conflict needs to have a deep understanding of the interests of both parties and needs to facilitate an increasing understanding of opposite interests of the parties in the conflict.¹⁷⁵ The more Chile understands the Bolivian perspective, and Bolivia understands the Chilean perspective, the better the possibilities for the resolution of the conflict. The mediation process can create new value that benefits both sides.¹⁷⁶

A proper and mutual understanding of the issues was a central element of the success of the Argentina-Chile mediation.¹⁷⁷ Like in the Beagle Channel case, the Vatican can initiate a good offices process to facilitate dialogue between Bolivia and Chile. The Vatican's experience in mediating international disputes and Pope Francis' South American origins, uniquely position the Vatican to provide good offices to facilitate Bolivia-Chile negotiations.¹⁷⁸

Another essential element of the successful mediation of the Argentina-Chile Beagle Channel dispute was Pope John Paul's neutrality.¹⁷⁹ Through his neutral mediation there came a mutually

174. *Id.* at 304.

175. *See generally* GARY FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT, MEDIATION THROUGH UNDERSTANDING* (2008) (discussing the importance of the understanding perspective regarding mediation of conflicts).

176. *See generally* ROBERT H. MNOOKIN, *BEYOND WINNING, NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000) (providing a general analysis of the negotiation and the creations of value).

177. *See* Laudy, *supra* note 165, at 310.

178. *See generally* ALYNNA J. LYON, CHRISTINE A. GUSTAFSON & PAUL CHRISTOPHER MANUEL (EDS.), *POPE FRANCIS AS A GLOBAL ACTOR WHERE POLITICS AND THEOLOGY MEET* (2018) (analyzing Pope Francis' views and actions).

179. Lisa Lindsley, *The Beagle Channel Settlement: Vatican Mediation Resolves a Century-Old Dispute*, 29 J. CHURCH & ST. 435, 453 (1987); *see also*

beneficial agreement. The agreement recognized Argentine ships' rights to passage, through internal waters of Chile, to the Strait of Magellan.¹⁸⁰ A similar approach that implements the negotiating objectives of Bolivia and Chile can lead to a peaceful resolution of their territorial disputes.

The global recognition of Pope John Paul II and the influence and perceived neutrality of the Catholic Church in Latin American countries were some reasons for the effective mediation of the Pope in the territorial dispute between Chile and Argentina on the Beagle Channel.¹⁸¹ "Pope John Paul II formally accepted the role of mediator on the basis that the Vatican would be a mediator not an arbiter; he pledged to 'advise and assist' the nations to reach an agreement. The Vatican was not empowered to judge the merits of the case."¹⁸² In the current Latin America historical context, the Catholic Church can be an important factor in the resolution of the Bolivia-Chile conflict because Pope Francis has globally recognized moral authority and influence.¹⁸³

In November 2019, the Secretary General of the U.N. António Guterres, sent his personal representative, Jean Arnault, to mediate a political crisis in Bolivia.¹⁸⁴ The conflicts between political forces that supported President Evo Morales and opposition forces could have ended in a tragic civil war.¹⁸⁵ However, thanks to the mediation efforts of the Bolivian Catholic Church, the U.N., and the European Union, all parties of the conflict—including leaders of the political party Movement for Socialism ("M.A.S."), such as the President of the

Thomas Princen, *International Mediation - The View from the Vatican*, 3 NEGOT. J. 347 (1987).

180. *Id.*

181. *Id.* at 443.

182. *Id.* at 445.

183. See Lyon, Gustafson & Manuel, *supra* note 178 (analyzing Pope Francis' views and actions).

184. Statement, *Mr. Jean Arnault of France - Personal Envoy of the Secretary-General for Bolivia*, U.N. SECRETARY-GENERAL (Nov. 14, 2019), <https://www.un.org/sg/en/content/sg/personnel-appointments/2019-11-14/mr-jean-arnault-of-france-personal-envoy-of-the-secretary-general-for-bolivia>.

185. See, e.g., Anatoly Kurmanaev, Mónica Machicao & Ernesto Londoño, *Military Calls on President to Step Down After Election Dispute in Bolivia*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/11/10/world/americas/bolivia-election-evo-morales.html> (discussing the Bolivia political crisis).

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Senate, Ms. Eva Copa, and members of movements that overthrown President Evo Morales, including President Jeanine Añez—reached an agreement to have new presidential elections in Bolivia.¹⁸⁶ Consequently, the U.N. Secretary General could also offer good offices and could lead mediation efforts in the Bolivia-Chile territorial dispute.¹⁸⁷

U.N. Secretary Generals have been involved, using good offices, in resolution of international conflicts including the Cuban missile crisis, the Yemeni civil war, Iran-Iraq war, Afghanistan war, and Cambodian civil war.¹⁸⁸ For example, the U.N. Secretary Generals' good offices' joint efforts with the O.A.S. in the Esquipulas II process was essential resolving conflicts in Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.¹⁸⁹ The U.N. and O.A.S. helped establish an agreement that included procedures and objectives for negotiations between the parties to the conflicts. Also, the U.N. and the O.A.S. were granted the authority to pursue the implementation of agreements reached as a result of the negotiation processes.¹⁹⁰

Another example of the U.N. Secretary General's mediation efforts in Latin America occurred in Guatemala.¹⁹¹ Guatemala's civil war was one of the most violent in the region and resulted in the death of around one hundred thousand people and thousands of disappearances.¹⁹² In 1990, representatives of the U.N. Secretary General started to mediate

186. Daniel Ramos, *Bolivia's dueling parties converge on new vote to calm political chaos*, REUTERS (Nov. 14, 2019), <https://www.reuters.com/article/us-bolivia-election/bolivias-dueling-parties-converge-on-new-vote-to-calm-political-chaos-idUSKBN1XO2C8>.

187. See Thomas M. Franck, *The Secretary-General's Role in Conflict Resolution: Past, Present and Pure Conjecture*, 6 EUR. J. INT'L L. 360, 361 (1995) (regarding the authority of the U.N. Secretary General to contribute to the resolution of international disputes).

188. *Id.*

189. Permanent Rep. of Costa Rica to the U.N., Permanent Rep. of El Salvador to the U.N., Permanent Rep. of Guatemala to the U.N., & Permanent Rep. of Nicaragua to the U.N., Letter dated 27 August 1987 from the Permanent Representatives of Costa Rica, El Salvador, Guatemala and Nicaragua to the United Nations addressed to the Secretary-General, U.N. Doc. A/42/521, S/19085 (Aug. 31, 1987).

190. Franck, *supra* note 187, at 368–70.

191. *Id.*

192. *Id.*

negotiations for the resolution of the conflict between the government of Guatemala and insurgency groups.¹⁹³ These mediated negotiations bore fruit “[i]n January 1994, [when] the adversaries, negotiating under the Secretary-General’s auspices, had concluded a framework agreement which also provided for the UN to moderate future negotiations and verify compliance.”¹⁹⁴

As a result of the request, by sovereign states engaged in international disputes, the U.N. Secretary General established good offices efforts in the *Rainbow Warrior* case, the Guyana-Venezuela territorial dispute, the crisis in the former Yugoslavia, and in the Liberian conflict, among others.¹⁹⁵ In the Bolivia-Chile conflict, the parties to the territorial dispute can request the U.N. Secretary General to mediate negotiations to free Bolivia from being landlocked.

Chile has often expressed concerns for the protection of its national sovereignty and territorial integrity in efforts to resolve Bolivia’s landlocked situation.¹⁹⁶ The U.N. Secretary General’s involvement in mediation could reduce this apprehension. In regard to the Secretary General’s contributions are significant because they were “the least intrusive, least expensive and frequently most successful form of UN peace-making has proven to be the diplomatic role of the Secretary-General.”¹⁹⁷

Mediation and other mechanisms for the peaceful resolution of the Bolivia-Chile territorial dispute should be based on principles of global justice, including the equality of sovereign states and respect for fundamental human rights. Mediators that understand the interests of governments, the interests of civil society actors, and the indigenous peoples of Chile and Bolivia can help achieve a resolution rooted in global justice. The Beagle Channel mediation was successful because the moral authority of Pope John Paul II as the mediator. The Argentinian and Chilean people recognized the leadership and neutrality of the Pope, which created a strong public opinion support

193. *Id.*

194. *Id.* at 369–70.

195. *Id.* at 370, 379.

196. *See, e.g.,* DIREMAR, *supra* note 44, at 37.

197. Franck, *supra* note 187, at 383.

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for a peaceful resolution. The Bolivia-Chile conflict can be successfully resolved by taking a similar approach to mediation.¹⁹⁸

B. Indigenous Peoples' Diplomacy and International Conciliation as Necessary for the Resolution of the Bolivia-Chile Territorial Dispute

According to the Preamble to the American Declaration on the Rights of Indigenous Peoples:

[Recognizing] the rights of indigenous peoples are both essential and of historical significance to the present and future of the Americas; the important presence in the Americas of indigenous peoples and their immense contribution to development, plurality, and cultural diversity, and reiterating our commitment to their economic and social well-being, as well as the obligation to respect their rights and cultural identity; and that the existence of the indigenous cultures and peoples of the Americas is important to humanity.¹⁹⁹

The acknowledgment of the contributions of indigenous peoples of Latin America to the well-being of humankind, is a corollary that should also apply to the importance of indigenous peoples in leading public diplomacy efforts for the resolution of the Bolivia-Chile territorial dispute. Indigenous peoples in the Andean region of Latin American are fundamental actors in processes of social and economic development. They also ensure the existence of diverse and multicultural societies and are a source of strength for democratic institutions. Therefore, Bolivia and Chile should utilize the innovative and democratic ideas of indigenous peoples to negotiate a solution to their territorial dispute.

As part of resolving their long-lasting territorial conflict, Bolivia and Chile could design new and creative solutions. To facilitate a proper analysis of these proposals, a conciliation commission can be established. Conciliation as an alternative dispute resolution mechanism “implies a more in depth study of the dispute as compared to mediation, combined with the independence of the third party as it is found in adjudication, but aiming for amicable settlement in a

198. Laudy, *supra* note 165, at 317.

199. G.A. Res. 2888, *supra* note 76 ¶ 3.

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nonbinding manner instead of producing a binding finding of the law.”²⁰⁰

If Bolivia and Chile cannot resolve their pending conflict by bilateral negotiations, then a conciliation commission can facilitate its resolution. Leading experts, who represent the national interests of both countries—including indigenous peoples and civil society organizations—can be part of a Bolivian-Chilean Conciliation Commission. Article XV of the ATPS defines conciliation as:

The procedure of investigation and conciliation consists in the submission of the controversy to a Commission of Investigation and Conciliation, which shall be established in accordance with the provisions established in subsequent articles of the present Treaty, and which shall function within the limitations prescribed therein.²⁰¹

For a successful effort, the members of the commission, from each country, must have high credentials, including an understanding of indigenous peoples’ interests, history, and languages. There is also a need to ensure the participation of academics, from both countries, that have the highest levels of knowledge regarding the territorial dispute and can provide creative solutions for its resolution.²⁰²

One of the mandates of the commission can be the submission of proposals regarding solutions for sovereign access to the Pacific Ocean for Bolivia. Similarly, in the drafting of these proposals, the commission should also consider strategies to ensure the participation of indigenous communities, of both countries, in the negotiations and implementation of agreements between the parties. The commission should also consider relevant general principles of the law of sea that are reflected in the Convention on the Law of the Sea and in customary international law. Further, the commission should analyze the historical, economic, ethnic, cultural, normative, and political factors that can contribute to resolve the conflict. Besides conciliation

200. SVEN M.G. KOOPMANS, *DIPLOMATIC DISPUTE SETTLEMENT, THE USE OF INTER-STATE CONCILIATION* 37 (2008).

201. *See* American Treaty on Pacific Settlement (Pact of Bogota), *supra* note 101, art. XV.

202. *See generally* G.A. Res. 50/50, United Nations Model Rules for the Conciliation of Disputes between States (Jan. 29, 1996) (The Model Rules can be used to facilitate the working of the Bolivia-Chile Conciliation Commission).

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commissions, systematic public diplomacy efforts should be an essential component in the resolution of the Bolivia-Chile territorial dispute.

The conflicts in Bolivia and Chile, which resulted in dramatic changes in both countries, shows the importance of civil society in the political processes. In the case of Bolivia, the government of President Evo Morales, which led the efforts at the I.C.J., was overthrown.²⁰³ In the case of Chile, President Sebastián Piñera, who claimed an important victory of on behalf of his country in the Bolivia-Chile case at the I.C.J., has become one of the most unpopular presidents in the history of Chile.²⁰⁴ Popular protests against the economic policies of Mr. Piñera resulted in a call for a referendum to change the constitution of Chile.²⁰⁵ In Bolivia, there will new elections for president, vice-president, and members of congress.²⁰⁶

Considering the strength of civil society movements in Bolivia and Chile, civil societies should be the main actors in taking initiatives to invent creative solutions for the territorial conflict. Civil society organizations can establish bi-national committees to create proposals that can eventually be used by a Conciliation Commission established by the governments of Bolivia and Chile. Academic institutions in both states can establish conciliatory commissions to draft original proposals for the resolution of the territorial dispute. Indigenous peoples' organizations can do the same.

Historically, the governments of Chile and Bolivia did not properly address issues regarding the political participation, cultural protection and economic development of indigenous communities. As part of the

203. Clarke, *supra* note 17; see also Paola Flores & Carlos Valdez, *Bolivia's president Evo Morales resigns amid election-fraud allegations, deadly protests*, USA TODAY (Nov. 11, 2019), <https://www.usatoday.com/story/news/world/2019/11/10/evo-morales-bolivia-president-resigns-amid-protests-allegations/2557032001/>.

204. See Sherwood, *supra* note 21.

205. Natalia A. Ramos Miranda, *Chile's Pinera inks law for vote on new constitution*, REUTERS (Dec. 23, 2019), <https://www.reuters.com/article/us-chile-protests-constitution/chiles-pinera-inks-law-for-vote-on-new-constitution-idUSKBN1YR1S8>.

206. Daniel Ramos, *Bolivia's dueling parties converge on new vote to calm political chaos*, REUTERS (Nov. 14, 2019), <https://www.reuters.com/article/us-bolivia-election/bolivias-dueling-parties-converge-on-new-vote-to-calm-political-chaos-idUSKBN1XO2C8>.

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ruling elites' actions, Bolivia and Chile were engaged in several conflicts including the Pacific War.²⁰⁷ These actions did not reflect the will, nor did they consider the best interests, of the Aymara, Mapuche, Quechua, and other indigenous peoples. Considering that ruling elites of Chile and Bolivia have not been able to resolve the territorial disputes between their countries, the governments should instead consider and apply the proposals of indigenous peoples and civil society actors regarding the resolution of territorial disputes.

Through the history of diplomatic negotiations, between Chile and Bolivia, there has been a constant failure to achieve a resolution to the territorial dispute between these countries. The Chilean government has made several unilateral promises regarding its will to find a peaceful resolution of the conflict.²⁰⁸ Bolivian governments have not been capable of ensuring the resolution of the conflict. Bolivia and Chile have not consulted and engaged indigenous peoples and civil society actors in negotiation processes, nor in the development of diplomatic strategies for the peaceful resolution of territorial conflicts. This situation needs to be remedied by ensuring that, in the future, indigenous people and civil society actors play a central role in the peaceful resolution of the Bolivia-Chile territorial dispute.

In the process of creating conciliatory commissions at the civil society level, it is important to remember that Bolivia is one of the most indigenous countries in Latin America. According to the World Bank, there are 4.12 million indigenous people which is 41% of the Bolivian population.²⁰⁹ Chile also has an important indigenous population. According to Chilean Census, 12.8% of the population identify as indigenous, and there are 2.185 million indigenous people.²¹⁰ This includes the Mapuche (79.8%), Aymara (7.2%), and Diaguita (4.1%).²¹¹

The indigenous communities of Bolivia and Chile should be a key part of conciliation commissions with the participation of the Aymara, Mapuche, Quechua, and other indigenous peoples. The Bolivian and Chilean governments should consider the economic and cultural

207. DIREMAR, *supra* note 44.

208. *Id.*

209. WORLD BANK GROUP, *supra* note 42, at 25.

210. *Id.*

211. INSTITUTO NACIONAL DE ESTADÍSTICA, *supra* note 67.

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interests of the original owners of the territories under dispute. This could include the possibility of creating a joint administration, of territories under dispute, by indigenous peoples of both countries.

The participation of indigenous people in public diplomacy and governmental efforts is also important because of the diverse perspectives that they will bring to the resolution of the Bolivia-Chile dispute—consistent with their ancestral views of reality. For example, in describing the worldview of the Aymara people (who are descendants of the Incas), the “Andean people, economic, spiritual, and social life is inextricably tied to land and water. The Aymara of Chile are struggling to maintain their sustainable and traditional systems of irrigation water distribution, agriculture, and pastoralism in one of the most arid regions of the world, the Atacama Desert.”²¹²

Indigenous peoples who are the descendants of the Inca Empire continue to inhabit the Atacama region of Chile.²¹³ Therefore, they are an ethnic group that understands how the Bolivia-Chile territorial conflict has undermined the international relations between the two countries. The Aymara and Quechua people are a significant part of the Bolivian population and they share similar indigenous worldviews as the Aymara, Mapuche, and the other indigenous peoples of Chile that can trace their roots to *Tiwanaku* and *Tawantinsuyu*.²¹⁴ For a negotiated solution of the territorial conflict between Chile and Bolivia, there is a need to reestablish a meaningful, honest and productive dialogue between the parties to the conflict. The Aymara and other indigenous worldviews recognize the moral imperative of resolving conflicts through dialogue, communication, and by embracing a common human identity.²¹⁵ To emphasize importance of indigenous territories in the Aymara worldview, “Pachamama is the mother of Aymara culture because existence itself is made possible through this inexhaustible

212. Amy Eisenberg, *Jaqin Uraqpachat Amuyupa, The Aymara Cosmological Vision*, 5 LANGSCAPE MAG. (2016), <https://medium.com/langscape-magazine/jaqin-uraqpachat-amuyupa-f5df7806a8b8>.

213. See Héctor M. Morales, *Construcción Social De La Etnicidad: Ego y Alter En Atacama*, 46 ESTUDIOS ATACAMEÑOS 145, 147 (2013).

214. See generally Kelly J. Knudson, *La Influencia De Tiwanaku En San Pedro De Atacama: Una Investigación Utilizando El Análisis De Isótopos Del Estroncio*, 33 ESTUDIOS ATACAMEÑOS, 7–24 (2007).

215. Eisenberg, *supra* note 212.

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source of life. With Pachamama are all the generative spirits connected with the animals and crops.”²¹⁶

Reciprocity is one of the fundamental principles in reaching a negotiated solution to the territorial dispute between Chile and Bolivia. In the Aymara worldview, reciprocity is a fundamental normative principle that sustains social networks as foundation for the social and economic well-being of indigenous communities ²¹⁷ Reciprocity in international negotiations includes the idea of creating new value, consistent with the interests of the parties, for their mutual benefit. Considering the common cultural identity of the Aymara people and the fact that they are one of the original inhabitants of the territory under dispute, between Bolivia and Chile, they and other indigenous people, including the Mapuche, are uniquely positioned to contribute to find a negotiated solution to the problem. Regarding the importance of considering the views of indigenous peoples:

[A]n early Incan family living in the coastal City of Arica and ponder how the descendants of that family would manage when the land changed hands multiple times between Bolivia, Peru, and Chile in the 1800s. Such a family history would undoubtedly include stories of indigenous populations being overrun by the Spanish, stories of the later generations being pulled between loyalties to Spanish royalty, and stories of independence movements motivated by both the economic gain that would result from a change of regime and the injustice of what the Spanish took from them initially.²¹⁸

The indigenous communities of Bolivia and Chile should express their viewpoints regarding the peaceful resolution of the territorial dispute between the two countries. Considering that indigenous peoples were the original owners of the territories under dispute, and that their descendants have been affected negatively—both economically and existentially—by the Bolivia-Chile conflict, their worldviews and interests should be considered in the resolution of the territorial dispute.

216. *Id.*

217. *Id.*

218. *See* ZWIER, *supra* note 45, at 223.

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CONCLUSION

In the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* case, the I.C.J. did not provide a legal discourse to enable Chile and Bolivia to negotiate a peaceful solution to one of the most significant territorial disputes in Latin America. The limitations of the Court's reasoning reflects its reliance on legal positivism as a main method of legal analysis in the case. If the I.C.J. had utilized an integrative jurisprudential approach in the interpretation of international law, the Court could have considered the relevance of historical, moral, and cultural aspects in the normative resolution of the conflict. This could have demonstrated the importance of considering the interests of the original owners of the territory under dispute, the indigenous peoples of Bolivia and Chile. Considering the globally recognized rights of indigenous peoples, including to their ancestral territories, it was a mistake not to consider their views in the case.

Despite its verdict against Bolivia, the I.C.J. recognized that both countries should continue to engage in diplomatic negotiations to find a solution to a pending problem. This should encourage both countries to reengage not only in diplomatic negotiations between governments, but also in public diplomacy efforts. Such efforts can include dialogues and negotiations between civil society organizations and with the essential participation of indigenous communities. This is not only consistent with the fundamental principles of global justice, but it is also a pragmatic approach that facilitates the inclusion of diverse normative and cultural worldviews in the processes in the resolution of international conflicts. What the governments and ruling elites of Bolivia and Chile were unable to achieve, can perhaps be accomplished by indigenous peoples if they are given the opportunity to express their views regarding a pending conflict that pertains to the original territories.

This is especially relevant because Bolivia and Chile can trace their historical roots to the Inca Empire, one of the greatest indigenous civilizations in the history of humankind. This is also relevant because in the 21st century context, the people of Chile and Bolivia have an opportunity to demonstrate to the international community, that despite their governments' failures in resolving their domestic and international problems, their public diplomatic efforts can create new opportunities for the resolution of territorial disputes between neighboring countries.

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