4

Landlocked States

An Unfinished Battle

In March 1879, Bolivian engineer Eduardo Abaroa Hidalgo found himself wounded and surrounded by the lifeless bodies of his compatriots as hundreds of hostile Chilean troops advanced toward his position. Weeks earlier, Chile invaded the Litoral, Bolivia's arid coastal region, occupying the port city of Antofagasta and seizing control of the Atacama Desert with its lucrative nitrate deposits. Abaroa abandoned his job at a silver mine to lead the civilian resistance. As the Chilean army progressed inland, Abaroa's men joined forces with the scanty Bolivian military presence in the region in an attempt to prevent the invaders from reaching the oasis town of Calama. After destroying two bridges across the Topáter River, Abaroa and his compatriots dug in to face the advancing army. Badly outnumbered and facing a superior force that included cavalry and heavy artillery, Abaroa's side was quickly overwhelmed. The Bolivian military withdrew, leaving Abaroa's volunteers to continue the fight alone until none but Abaroa remained standing. According to Bolivian lore, when the Chilean army demanded Abaroa's surrender, his cheeky reply sealed his fate: "Me, surrender? Let your grandmother surrender, bastards!"[1]

Over a century later, Bolivia continues to commemorate the Battle of Topáter on March 23 as "The Day of the Sea" (*El Día del Mar*). On this national holiday, Bolivians gather to celebrate Abaroa's heroism while also collectively mourning the loss of the Litoral and affirming their determination to regain this corridor to the Pacific. In La Paz, a casket bearing Abaroa's remains proceeds in full ceremony of state from the Basilica of San Francisco to the Plaza Abaroa, where a monumental bronze statue

[1] Chantelle Bacigalupo, 'Every Year on "Dia Del Mar," Bolivia Celebrates the Coastline They Lost', The World, 22 March 2019; 'Day of the Sea', Bolivia Bella, www.boliviabella.com/day-of-the-sea.html [hereinafter Bolivia Bella].

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

honors the hero. Marching bands with majorettes, civic groups with banners, and marines clad in snow-white uniforms with polished sabers parade past the casket as the country's president and other dignitaries look on from an elevated grandstand. Representatives of the Bolivian navy also join in the procession, proudly reaffirming their official motto: "The sea is ours by right; to take it back is our duty."[2] Meanwhile, school children throughout the country unite their voices in an anthem that every Bolivian knows by heart – the "Hymn to the Litoral" (*Hymno al Litoral*):

> *We sing the song of the sea, the sea, the sea, that will soon be ours again.*
> *Let us raise our voice in happiness for the Litoral that Bolivia will soon have again, again, again.*
> *Antofagasta, beautiful lands of Tocopilla and Mejillones next to the sea, with Cobija and Calama return to Bolivia again.*[3]

For Bolivians, reclaiming the lost Litoral is not only a matter of national pride, but also of overriding national interest. As a result of Chile's annexation of the Litoral, Bolivia has the dubious distinction of being one of two landlocked countries in South America and one of forty-four landlocked countries worldwide.[4] Many of these countries became landlocked through colonial-era borders imposed by foreign powers. Unlike the developed landlocked states of Europe, the vast majority of landlocked states – including those in Africa, Central Asia, and South America – do not have navigable rivers, advanced transportation infrastructure, or a high degree of regional economic integration. As a result, they tend to experience lower economic growth than their coastal neighbors, and many rank among the most impoverished and least developed of developing countries. Bolivia, one of the poorest countries in South America, knows these disadvantages of landlocked status all too well. Thus, reclaiming the lost Litoral has dominated Bolivia's national aspirations and foreign policy for over 140 years.

International law no longer permits states like Bolivia to shed their landlocked status by wresting territory from their neighbors through military conquest.[5] A landlocked state's access to the sea therefore depends

[2] Laetitia Perrier Bruslé, 'Bolivia: Its Lost Coastline and Nation-Building' (2013) 689 *Annales de Géographie* 47–72, 58.
[3] Bacigalupo, 'Every Year on "Dia Del Mar."'
[4] Ernesta Swanepoel, 'The Law of the Sea and Landlocked States', Policy Briefing, South African Institute of International Affairs (2020).
[5] UN Charter art. 2(4); Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon and Schuster, 2018), p. 309.

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

upon neighboring states enabling them to transport people and goods through their territory. In this chapter, we show how mandatory cooperation explains and clarifies the legal position of landlocked states vis-à-vis transit states. We show that international law governing landlocked states offers a classic case of conflicting entitlements under international law. On the one hand, coastal states like Chile enjoy sovereignty over their territory, including the right to "territorial integrity and political independence."[6] On the other hand, landlocked states like Bolivia "have the right of access to and from the sea," including "freedom of transit through the territory of transit States by all means of transit."[7] Reconciling these conflicting entitlements is the work of mandatory cooperation.

By facilitating universal access to the sea, mandatory cooperation provides an equitable response to pathologies generated by the international legal order itself. A core function of international law is regulating the distribution of territorial sovereignty among states. The landlocked status of particular countries is the byproduct of an international legal order that validates borders established in the past through violent conquest and colonial subjugation. Absent mandatory cooperation, international law would consign landlocked states to a subservient position vis-à-vis transit states, who could arbitrarily prevent them from accessing the rest of the international community. Mandatory cooperation mitigates this structural injustice by requiring transit states to exercise their rights as territorial sovereigns in an equitable manner to facilitate foreign access to the sea.[8]

Territorial Sovereignty or Transit Rights?

Prior to the mid-twentieth century, international publicists offered diverging viewpoints about whether the law of nations required coastal states to permit foreigners to travel through their borders. Hugo Grotius argued that all people enjoyed a legal right of innocent passage through foreign territory.[9] This right encompassed not only passage of persons but also goods and

[6] UN Charter art. 2(4).

[7] UN Convention on the Law of the Sea art. 125(1), UN Doc. A/CONF. 62/122 (1982) [hereinafter UNCLOS].

[8] For a similar argument that international human rights law "attend[s] to pathologies" engendered by "the structure and operation of the international legal order" and "impose[s] obligations on sovereign . . . actors to exercise the authority they receive from international law in ways that respect the rights of all," see Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press, 2015), p. 1.

[9] Hugo Grotius, *The Rights of War and Peace* (Richard Tuck ed., Oxford: Oxford University Press 2005) (1625), p. 41 ("[A] free Passage ought to be granted to Persons, where just

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

merchandise intended for international commerce.[10] In Grotius's view, coastal states could not impose customs or taxes on people or goods transiting through their borders, except as reimbursement for costs incurred ensuring their security.[11] Grotius considered the right to travel and trade freely to be "clear and immutable" under the law of nations.[12]

Not everyone agreed with Grotius's assessment. A generation later, German jurist and political philosopher Samuel Pufendorf contested Grotius's view, arguing that under the law of nations a state was free to decide for itself how "free or cautious" it wished to be in welcoming foreigners into its territory.[13] According to Pufendorf, the principle of territorial sovereignty meant that "it is left in the power of all States, to take such Measures about the Admission of Strangers, as they think convenient," subject only to a narrow exception for those "who are driven on the Coasts by Necessity, or by any Cause that deserves Pity and Compassion."[14] Pufendorf also rejected Grotius's view that under the law of nations "every one has a Right of trading into foreign parts" and "of importing what the People there want."[15] Hence, "there lies no Restraint on a State, why ... it should not favour its own Subjects more than Strangers ... by demanding less Custom of the former, than of the latter."[16] Although Pufendorf characterized hospitality toward foreign travelers as a morally binding "Duty of Humanity," even this ethical obligation was subordinate to "good Reasons of State."[17] Thus, Pufendorf believed that the nationals of landlocked states could not claim a legal entitlement to travel or transport goods through coastal states except in cases of exceptional grave necessity and "ought to rest satisfied with [whatever] Station and Privileges [a transit state deigns to] assign them."[18]

This disagreement between Grotius and Pufendorf – the two leading lights of seventeenth-century international law – cast a shadow of uncertainty over the relationship between territorial sovereignty and transit rights.

occasion shall require, over any Lands and Rivers, or such parts of the Sea as shall be then in the Property and Possession of any other Nation.").

[10] Grotius, 'The Rights of War and Peace', p. 45.
[11] Grotius, 'The Rights of War and Peace', p. 47.
[12] Grotius, *The Free Sea* (Richard Hakluyt transl., Indianapolis: Liberty Fund, 2004) (1609), p. 10.
[13] Samuel Pufendorf, *The Law of Nature and Nations* (1729), p. 246.
[14] Ibid. p. 245.
[15] Ibid. p. 247.
[16] Ibid.
[17] Ibid. pp. 244–246.
[18] Ibid.

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

Did peaceful travelers have a right to innocent passage through foreign territory? Or were coastal states free to exclude most foreign nationals?

The debate was mostly academic because coastal states in Europe tended to accept that it was in their national interest to welcome foreigners, including traders who wished to transport goods and merchandise through their borders. For example, when the Swedish empire controlled every major port on the Baltic Sea at the end of the seventeenth century, it permitted foreign merchants to travel freely and engage in commerce throughout the Baltic region, subject to modest customs duties, in order to maintain a steady flow of economic activity and tax revenue through its ports.[19] Yet Pufendorf's vision of territorial sovereignty still spelled trouble for the commercial interests of landlocked states. By insisting that the law of nations would permit a coastal state like Sweden to close its borders to foreign traders, Pufendorf's account threatened geographically disadvantaged states with the possibility that coastal states might eventually sever transit through their borders or impose crushing customs duties. Even when coastal states did not close their borders, the mere possibility that they might do so placed landlocked states in a vulnerable position and became a source of friction conductive to conflict.

Illustrative of this dynamic was the Great Northern War (1700–1721), when Russia allied with Denmark and Saxony to challenge Sweden's regional hegemony. In the years leading up to the war, Tsar Peter I had made no secret of his ambition to acquire a "window to the West" by retaking territory along the Baltic that Sweden had seized from Russia nearly a century earlier in the 1617 Peace of Stolbova.[20] This objective was strategically important because Russia's access to blue water was limited to Arkhangelsk, a remote port on the White Sea to the far north. Sweden's dominion over the Baltic coastline meant that Russia depended greatly on foreign intermediaries to deliver its commodities to foreign markets. Anxious to burnish Russia's reputation in the West, Peter followed the conventions of European monarchs by commissioning a formal legal-historical brief to justify Russia's intervention in the war.[21] Having studied keenly both Grotius's *Law of War and Peace* and Pufendorf's *Law of Nature and Nations*, Peter likely would have been

[19] David Kirby, *Northern Europe in the Early Modern Period: The Baltic World 1492–1772* (London: Routledge, 1990), p. 240; Michael Roberts, *The Swedish Imperial Experience 1560–1718* (Cambridge: Cambridge University Press, 1979), pp. 101–130.

[20] Kirby, *Northern Europe in the Early Modern Period*, p. 299.

[21] Petr P. Shafirov, *A Discourse Concerning the Just Causes of the War between Sweden and Russia: 1700–1721* (New York: Oceana Publications, 1973).

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

acquainted with their divergent perspectives on transit rights.[22] It is noteworthy, therefore, that Russia's published justification for the war cited intelligence from a Swedish prisoner of war suggesting that Sweden had been preparing to invade Russia and seize Arkhangelsk to eliminate Russia's access to the sea and "cut off the Russians from . . . Commerce with Foreigners."[23] Although this was not Russia's primary legal argument for entering the war, its inclusion in Russia's war manifesto underscores Peter's fear that Sweden might eventually invoke Pufendorf's theory of territorial sovereignty, forbid commerce between foreigners, and establish a stranglehold on Russia's foreign trade. The only sure way to avert this threat would be for Russia to pierce Sweden's territorial holdings to the north and establish its own sovereign corridor to the Baltic. This plan ultimately came to fruition when Russian forces drove the Swedes from the Gulf of Finland, followed by Peter's triumph over King Charles XII at Poltava.[24] These victories enabled Peter to fulfill his dream of establishing a cosmopolitan port on the Baltic – St. Petersburg, Russia's "Venice of the North" – which served as the opulent capital of Imperial Russia from 1703 to 1918.

For over 250 years after Poltava, the debate between Grotius and Pufendorf over transit rights continued to simmer without definitive resolution. Writing in 1904, John Westlake divided "the opinions of accredited authors" on this subject into two categories:

> (A) Those who deny the right of innocent passage, referring the matter entirely to convention, and consequently allowing the territorial state to refuse the passage or to exact a price for it; with whom must be classed those who assert a duty on the part of the territorial state to allow the passage subject to a reasonable convention, but make that state the final

[22] William E. Butler, 'P.P. Shafirov and the Law of Nations', in Shafirov, *A Discourse Concerning the Just Causes of the War between Sweden and Russia*, pp. 1–6; E. V. Anisimov, *The Reforms of Peter the Great: Progress through Coercion in Russia* (John T. Alexander trans., Abingdon: Routledge, 1993), p. 25.

[23] Shafirov, *A Discourse Concerning the Just Causes of the War between Sweden and Russia*, p. 348. This legal-historical brief was the first original document produced in Russia addressing the law of nations. Friedrich Christian Weber, *The Present State of Russia*, 2 vols. (London: Routledge, 1968), vol. 1, p. 28.

[24] See Peter Englund, *The Battle that Shook Europe: Poltava and the Birth of the Russian Empire* (London; I.B. Tauris, 1988), p. 251 (explaining how Russia's victory over the formidable Swedes at Poltava in 1709 turned the tide of the Great Northern War, "signal[ling] the end of Swedish imperium" and "confirm[ing] the birth of a new great European power: Russia"); John LeDonne, 'Poltava and the Geopolitics of Western Eurasia' (2009–10) 31 *Harv. Ukrainian Stud.* 177, 188 (arguing that Russia's victory at Poltava "accelerated Muscovy's transformation into a great Eurasian power").

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

> judge of its duty; and (B) those who assert the right of innocent passage, of course normally to be regulated by convention, but so that a clearly wrongful refusal by the territorial state may be resented as an injury.[25]

In the former category, Westlake placed Johan Ludwig Klüber, Georg Friedrich von Martens, August Wilhelm Heffter, Carlos Calvo, Robert Phillimore, Travers Twiss, and William Edward Hall; in the latter category, he included Grotius (obviously), Pufendorf (dubiously), Emer de Vattel, Johann Kaspar Bluntschli, F. H. Geffken, Édouard Engelhardt, and Henry Wheaton, among others.[26] This debate persisted well into the twentieth century, with some commentators affirming a customary right of innocent passage and others denying the existence of such a right.[27]

Tensions between these competing views flared up during international negotiations in the latter half of the twentieth century, with disappointing results for landlocked states.[28] In negotiations leading to the 1965 Convention on Transit Trade of Land-locked States, delegations for landlocked states argued that international law already recognized a principle of free access to the sea. Transit states did not deny the existence of such a principle of free access, but they objected that the principle was subordinate to coastal states' territorial sovereignty.[29] Unable to move beyond this impasse, the Convention affirmed that landlocked countries "should have free access to the sea," but it did not establish a firm legal right.[30] Instead, it provided that states-parties "shall

[25] John Westlake, *International Law: Peace*, 2 vols. (Cambridge: Cambridge University Press, 1910), vol. 1, pp. 158–159.

[26] Westlake, *International Law*. Westlake fails to distinguish between Pufendorf's denial of a general legal right to innocent passage and his affirmation that states are morally obligated to permit innocent passage as a moral "Duty of Humanity."

[27] Compare, e.g., Elihu Lauterpacht, 'Freedom of Transit in International Law', in *Transactions of the Grotius Society* (London: Sweet & Maxwell, 1958), pp. 313–349 (affirming a right of innocent passage); with Georg Schwarzenberger, *International Law* (London: Stevens and Sons, 1957), vol. 1, p. 237 (denying a right of innocent passage).

[28] Earlier international agreements had relatively few members and limited scope. For example, the first international instrument on transit – the 1921 Barcelona Convention and its Statute on Freedom of Transit – established a right to freedom of transit by water and rail, but not road or air. James L. Kateka, 'Landlocked and Geographically Disadvantaged States' (2014) *IMLI Manual Int'l Mar. L.* 431, 435–436. The 1947 General Agreement on Tariffs and Trade (GATT) provided for freedom of transit for goods, but not for people. General Agreement on Tariffs and Trade (GATT), Geneva, 30 October 1947, in force 1 January 1948, art. V(2), 61 Stat. A3, TIAS No. 1700.

[29] Kishor Uprety, 'The Transit Regime for Landlocked States: International Law and Development Perspectives', World Bank (2006), p. 63.

[30] Convention on Transit Trade for Landlocked States, New York, 8 July 1965, in force 9 June 1967, art. 1, 1967 UNTS No. 8641.

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

by common agreement . . . accord: (a) [t]o the State having no sea-coast, on a basis of reciprocity, free transit through their territory," as well as (b) "access to seaports and the use of such ports."[31] Although superficially supportive of landlocked states' interests, without according substantive legal rights to landlocked states this mere agreement to agree (*pactum de contrahendo*) was unenforceable under international law.[32] Ultimately, therefore, the Convention essentially codified Pufendorf's approach to the transit interests of landlocked states: it proclaimed that coastal states and landlocked states *should* conclude transit agreements to facilitate oceanic access, but it did not establish a legal *right* to innocent passage.

Both Territorial Sovereignty and Transit Rights

Following the Convention on Transit Trade for Landlocked Countries, landlocked states continued to lobby for international recognition of a right to innocent passage to the sea. During the Third UN Conference on the Law of the Sea, landlocked states argued that their access to the sea should not depend on transit states' consent, which was too often used as leverage to bully them during negotiations.[33] Ultimately, transit states agreed to include a firm legal right to transit in the 1982 UN Convention on the Law of the Sea (UNCLOS).[34] Article 125 of UNCLOS provides that landlocked states are entitled to exercise "the right of access to and from the sea" – including "transit through the territory of transit States by all means of transport" – so that they can enjoy the full range of rights associated with "the freedom of the high seas and the common heritage of mankind."[35]

UNCLOS does not go so far as to embrace Grotius's view that a landlocked state's right of innocent passage trumps transit states' territorial sovereignty. Although Article 125 establishes transit as a genuine legal right, it also affirms that transit states retain "full sovereignty over their territory."[36] Transit states therefore "have the right to take all

[31] Convention on Transit Trade for Landlocked States.
[32] Uprety, 'The Transit Regime for Landlocked States', p. 66.
[33] Ibrahim J. Wani, 'An Evaluation of the Convention on the Law of the Sea from the Perspective of Landlocked States' (1982) 22 VJIL 627, 635.
[34] UNCLOS, art. 125(1).
[35] UNCLOS, art. 125(1). As discussed in chapters 3 and 8, "freedom of the high seas" and the "common heritage of mankind" are predicated on sovereign equality and joint stewardship.
[36] UNCLOS, art. 125(3).

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

measures necessary to ensure that the rights and facilities provided . . . for landlocked States shall in no way infringe their legitimate interests."[37]

By affirming *both* a legal right to transit *and* the prerogatives of territorial sovereignty, UNCLOS adopts an intermediate position. Territorial sovereignty is not hierarchically superior to transit rights nor is it subordinate to transit rights. Instead, Article 125 places these entitlements in direct conflict.[38] Landlocked states have a genuine legal "right" to access the sea "through the territory of transit States." But transit states have a no less significant right to exercise "full sovereignty" in order to protect their "legitimate interests." What emerges is a dialectic of dueling entitlements – a structural antinomy that can be reconciled only through the synthesizing praxis of mandatory cooperation.

How does UNCLOS reconcile transit states' territorial sovereignty with landlocked states' right to access the seas? Article 125 provides: "The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through, bilateral, subregional or regional agreements."[39] Contrary to the assertion of some commentators, this requirement does not render landlocked states' transit rights dependent on a future agreement.[40] Article 125 is not a mere agreement to agree. Under UNCLOS, landlocked states are entitled to exercise transit rights to access the sea – full stop. But determining how this right may be exercised without undermining the transit state's legitimate sovereign interests (e.g., public health and safety) requires international cooperation. Thus, UNCLOS contemplates that the legal entitlements of landlocked states and transit states must be reconciled harmoniously through mandatory cooperation.[41]

[37] UNCLOS, art. 125(3). Notably, UNCLOS does not define transit states' "legitimate interests."

[38] UNCLOS, art. 125.

[39] UNCLOS, art. 125(2).

[40] Uprety, 'The Transit Regime for Landlocked States', p. 86.

[41] Benvenisti suggests that rights of transit of landlocked states, including those articulated in Article 125 of UNCLOS, can be explained by a "restricted Pareto concept" according to which "one benefits and the other sustains no loss." Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295, 322. As Article 125(2) makes clear, however, for the transit rights of landlocked states to be reconciled with the sovereign rights of the transit state, the legally mandated path forward is through good faith, cooperative decision-making. In contexts where the passage is relatively lengthy and requires infrastructure such as a railway and port facilities, there will necessarily be a cost. If a transit state can rightfully refuse to negotiate access to the sea on the basis of this cost, a landlocked state's access right under Article 125 would be illusory.

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

Viewing transit rights through this lens of mandatory cooperation clarifies the legal obligations enshrined in Article 125. To satisfy their obligations to landlocked states, transit states must investigate and consult with landlocked states to fully understand and accommodate their legitimate interests with respect to the "terms and modalities for exercising freedom of transit." They may not arbitrarily withhold – or threaten to withhold – safe passage through their territory. In this way, mandatory cooperation provides an equitable safety valve against transit states exercising their territorial sovereignty in a manner that would effectively imprison the people of landlocked states within their own national territory. Landlocked states, in turn, must respect transit states' territorial integrity and political independence by accepting reasonable constraints on their passage through transit states. Article 125 thus places landlocked states and transit states under mutual obligations to establish cooperative frameworks for facilitating oceanic access. Failure to reach agreement about specific "terms and modalities" is not necessarily a violation of Article 125, as long as the parties remain committed to, and actively engaged in, the pursuit of an equitable solution. If negotiations reach an impasse, both sides arguably must pursue third-party dispute resolution in a good faith effort to achieve a mutually acceptable compromise that reflects due regard for their respective rights, consistent with equitable principles. Mandatory cooperation thus respects the rights of both landlocked states and transit states, while prohibiting either side from dictating unilaterally the terms of their interaction.

Bolivia v. Chile in the World Court

A recent proceeding between Bolivia and Chile in the International Court of Justice (ICJ) illustrates both the limits and promise of mandatory cooperation with regard to conflicts between landlocked and transit states. At issue in the proceeding is more than a century of diplomatic exchanges between Bolivia and Chile over the future of the disputed Litoral. For several decades after Chile's seizure of Bolivia's coastal region, the two countries normalized their relations through a series of agreements, while Bolivia continued to pursue a territorial outlet to the Pacific. In 1904, Bolivia and Chile concluded a Treaty of Peace and Friendship in which Bolivia formally recognized Chile's sovereignty over its former territory in exchange for financial compensation and other concessions, but without expressly addressing Bolivia's desire to

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

acquire an independent corridor to the ocean.[42] Over the next century, Bolivia periodically renewed negotiations with Chile without success. During a temporary thaw in relations, the reigning dictator-generals of Bolivia and Chile, Hugo Banzer and Augusto Pinochet, met in 1975 at the disputed border town of Charaña to shake hands over a possible agreement to grant Bolivia a sovereign corridor to the sea.[43] The tentative agreement soon unraveled under objections from both sides. The ensuing disagreement led the two countries to the brink of war in 1979, prompting Chile to plant landmines along the border. In the 2010s, Bolivia's pretensions to the Litoral gained renewed salience as Bolivian President Evo Morales and Chilean President Sebastián Piñera each exploited the issue to stoke nationalist fervor for political gain.[44]

In 2013, Bolivia instituted proceedings against Chile in the ICJ, seeking to compel Chile to return to the negotiation table.[45] Bolivia asserted that at various critical junctures during their diplomatic exchanges, Chile had undertaken a legal obligation to negotiate with Bolivia for the purpose of ending once and for all Bolivia's unfortunate status as a landlocked state.[46] Chile, however, vigorously rejected the notion that it had undertaken any such legal duty to negotiate a land surrender. Although Chile acknowledged that it had entertained Bolivian invitations to negotiate on a number of occasions, it categorically denied that its conduct reflected an intention to undertake a legal *duty* to negotiate with Bolivia over the possible transfer of Chilean territory to Bolivia.[47]

To be clear, in the proceedings before the ICJ, Bolivia did *not* assert its transit right under UNCLOS. Instead, Bolivia set its sights on a more

[42] Treaty of Peace and Friendship Between Chile and Bolivia, and Convention for the Construction and Convention for the Construction and operation of Railroad from Arica to La Paz, 20 October 1904, Chile No. 427.

[43] Bruslé, 'Bolivia'.

[44] Anne-Laure Amilhat-Szary, 'Are Borders More Easily Crossed Today? The Paradox of Contemporary Trans-Border Mobility in the Andes' (2007) 12 *Geopolitics* 1–10; Bruslé, 'Bolivia'.

[45] Application Instituting Proceedings, Obligation To Negotiate Access to the Pacific Ocean (Bolivia v. Chile), 14 April 2013, www.icj-cij.org/files/case-related/153/17338.pdf. The ICJ exercised jurisdiction over the dispute pursuant to Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogota) to which both Bolivia and Chile are members. Obligation To Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, 2015 ICJ Rep. 592, 610 (24 September).

[46] Bolivia Memorial, pp. 125–135, 138–151, 153–154.

[47] Obligation To Negotiate Access to the Pacific (Bolivia v. Chile), Counter-Memorial of the Republic of Chile, 13 July 2016, Vol. I, pp. 6–7, www.icj-cij.org/files/case-related/153/153-20160713-WRI-01-00-EN.pdf [hereinafter Chile Counter-Memorial].

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

ambitious target: securing a judgment that it was legally entitled to negotiate with Chile toward the possible return of the Litoral. Because the unilateral aspiration to acquire foreign territory is not an issue that triggers mandatory cooperation, the success of Bolivia's strategy depended on the ICJ agreeing that Chile had, in fact, voluntarily undertaken an obligation to negotiate with Bolivia for these purposes. Had Chile undertaken such an obligation, then it would have borne a relatively modest duty to receive and consider proposals from Bolivia in good faith. Chile would not, however, have been required to endorse or give any special weight to Bolivia's proposals. Unlike settings where mandatory cooperation applies, triggering the more robust duty of due regard, Chile would have been free to decide for itself whether, or on what terms, it would relinquish some of its coastal territory to Bolivia. Ultimately, however, the ICJ concluded that Chile had not voluntarily undertaken any such duty to negotiate with Bolivia for the purpose of granting Bolivia "sovereign access" to the Pacific.[48] By rejecting the idea that mandatory cooperation applies to state efforts to acquire foreign territory, the ICJ's judgment underscored the limits of mandatory cooperation as a constraint on territorial sovereignty.

Chile bears more robust duties of cooperation when it comes to facilitating transit through its territory pursuant to Article 125. Because Bolivia's right to access the ocean under UNCLOS is in tension with Chile's right to territorial integrity, Article 125 requires that the two states reconcile their conflicting entitlements through cooperation. Bolivia and Chile must therefore cooperate in investigating, consulting, negotiating, and, if necessary, pursuing third-party dispute resolution to establish equitable "terms and modalities" that balance their respective interests.[49] In pursuing cooperative solutions, each state must respect the other's legitimate interests and manifest an openness to compromise. These equitable requirements are essential not only to reconcile the states' respective rights under international law (territorial sovereignty vs. oceanic access), but also to ameliorate historical injustices arising from Chile's violent conquest of the Litoral and to prevent Bolivia's landlocked status from perpetuating Chilean domination and suppressing Bolivia's economic development.

In many respects, Bolivia and Chile have successfully implemented these legal obligations. Pursuant to the 1904 Treaty of Peace and Friendship,

[48] Obligation To Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, 2018 ICJ Rep. 507, 563 (1 October).

[49] UNCLOS, art. 125(2); *cf.* 'Obligation To Negotiate', p. 564 (observing that finding a solution to Bolivia's "landlocked situation" is "a matter of mutual interest" for both states).

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

Chile has connected Bolivia to the Pacific by constructing and maintaining a railway line and a paved highway between Bolivia's capitol, La Paz, and the Chilean port city of Arica.[50] Chilean lawmakers have worked with Bolivia to reduce regulatory red tape that would otherwise impede the free flow of people and goods across Chilean territory.[51] Bolivian cargo is exempt from Chilean taxes, and Chile allows Bolivia to exercise customs powers in the Chilean city of Arica over cargo traveling to or from Bolivia.[52] Pursuant to agreements negotiated in 1955 and 1957, a Bolivian state-owned company operates a pipeline from Sica in Bolivia to Arica in Chile, facilitating the shipment of Bolivian oil across the high seas to markets around the world.[53] To be sure, Bolivia clearly believes that further concessions by Chile are necessary – including a permanent transfer of coastal territory between the countries – to strengthen Bolivia's political independence and boost its economic development.[54] Yet, these lingering grievances should not overshadow the substantial progress that the states have made in reconciling their conflicting interests through diplomacy. For generations, Bolivia and Chile have managed to cooperate productively – investigating, consulting, and negotiating with one another on a wide variety of issues – in a good faith effort to balance equitably their respective sovereign interests. The fact that such a robust partnership has taken root and flourished – even as the two states remain bitterly divided over Bolivia's aspiration to acquire a territorial corridor to the Pacific – is a testament to the promise of mandatory cooperation.[55]

Mitigating Geographic Inequity

Bolivia is not the only landlocked state that has benefited from UNCLOS's endorsement of transit rights and mandatory cooperation.

[50] 'Chile Counter-Memorial', pp. 43–45, 53.
[51] Ibid. pp. 52–54.
[52] Ibid. p. 46.
[53] Ibid. pp. 50–51.
[54] Gideon Long, 'Bolivia-Chile Land Dispute Has Deep Roots', BBC News, 24 April 2013 (noting that Chile's complaint "reneged on agreements to give Bolivia access to ports further south on Chile's long Pacific coastline").
[55] Uprety, 'The Transit Regime for Landlocked States', p. 113 (observing that because bilateral negotiations tend to favor transit states, the resulting agreements "often tend to appear like a generous gesture rather than a provision negotiated by equals," and arguing that this trend offends "general principles of international law" (i.e., sovereign equality) by making "the status of a country subject to, and conditional upon, the benevolence (or malevolence) of another State" (i.e., domination)).

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

Over the past four decades, government and scholarly resistance to the legal transit rights of landlocked states has faded as 170 states have become parties to UNCLOS.[56] Consistent with UNCLOS, transit states generally have abandoned the practice of subjecting goods in transit to customs duties and other taxes, except as remuneration for services rendered.[57] These developments have paved the way for a host of international, regional, and bilateral agreements that facilitate oceanic access for landlocked states. International instruments such as the World Trade Organization's Trade Facilitation Agreement have lowered customs barriers, facilitated cooperation among national transit authorities, and expedited the release and clearance of goods in transit across national borders to facilitate transit.[58] In Africa – home to sixteen landlocked states – regional transit-facilitating agreements include the Trans-Kalahari Corridor Agreement (Botswana, Namibia, South Africa) and the African Continental Free Trade Area Agreement (thirty-two states-parties, with many more pending). After decades of tension, Somalia agreed in the recent Ankara Declaration to facilitate Ethiopia's access to the Red Sea "within a spirit of friendship and mutual respect," while Ethiopia recognized Somalia's sovereign "independence and territorial integrity."[59] As these examples illustrate, the overall trend post-UNCLOS reflects coastal states cooperating to facilitate oceanic access for landlocked states.

International recognition of transit rights has enabled landlocked states to appeal to international organizations for assistance when disputes have arisen with their coastal neighbors. Even before UNCLOS, Lesotho successfully enlisted the assistance of the UN Security Council and UN General Assembly when Apartheid-era South Africa closed several border posts in an attempt to strong-arm its fiercely independent landlocked neighbor.[60] In 2001, the General Assembly provided sustained institutional support for

[56] UNCLOS, UNTS, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

[57] UNCLOS, art. 127(1); Kishor Uprety, 'From Barcelona to Montego Bay and Thereafter: A Search for Land-locked States' Rights to Trade through Access to the Sea: A Retrospective Review' (2003) 7 *Sing. J. Int'l & Compar. L.* 201, 225.

[58] Joann Peterson, 'The WTO Facilitation Agreement: Implementation Status and Next Steps' (2020) *J. Int'l Com. & Econ.* 1, 2–3, www.usitc.gov/publications/332/journals/wto_trade_facilitation_agreement.pdf.

[59] Republic of Türkiye, Ministry of Foreign Affairs, 'Ankara Declaration by the Federal Democratic Republic of Ethiopia and the Federal Republic of Somalia facilitated by the Republic of Türkiye'.

[60] Susan Marks, 'Transit Rights of Lesotho' (1990) 16 *Commonwealth L. Bull.* 329, 337–344.

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

landlocked states by establishing the Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS). The UN-OHRLLS has worked with landlocked states and their regional neighbors to stimulate cross-border trade and transport, establish transit transport corridors, promote regional integration and infrastructure development, and facilitate integration into regional and global value chains.[61] The UN-OHRLLS has championed the Vienna Programme of Action for Landlocked Developing Countries, a ten-year cooperative global initiative (2014–2024) to promote landlocked states' access to the sea, including by promoting regional integration, eliminating regulatory red tape, and developing essential transportation infrastructure.[62]

As international, regional, and bilateral cooperation has increased, landlocked states have been able to pursue economic opportunities that would have been unimaginable a half century ago. For example, in 2015 the world's largest landlocked state, Kazakhstan, announced an audacious plan to develop a blue-water shipping fleet[63] – no mean feat for a country located 3,750 kilometers from the ocean.[64] This remarkable initiative would be impossible without the cooperation of three transit states that separate Kazakhstan from the Persian Gulf: Uzbekistan, Turkmenistan, and Iran.

Even with mandatory cooperation facilitating oceanic access, the practical disadvantages of landlocked status should not be underestimated. There are good reasons why Bolivia continues to commemorate the Day of the Sea each year, anticipating a future (real or imagined) when the lost cities of "Antofagasta, beautiful lands of Tocopilla and Mejillones next to the sea, with Cobija and Calama return to Bolivia again."[65] Compared to the average developing country, landlocked states like Bolivia spend more than twice as much of their export earnings on transport and

[61] UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States, 'Landlocked Developing Countries', www.un.org/ohrlls/content/landlocked-developing-countries.

[62] Second UN Conference on Landlocked Developing Countries, Vienna Programme of Action for Landlocked Developing Countries for the Decade 2014–2024. at 7, Vienna, 3 November 2014, A/CONF.225/L.1 [hereinafter Vienna Programme].

[63] Paul Goble, 'Land-locked Kazakhstan Plans to Build a Blue-Water Commercial Fleet', Eurasia Daily Monitor, 28 July 2015.

[64] UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, www.un.org/ohrlls/content/about-landlocked-developing-countries.

[65] Bacigalupo, 'Every Year on "Dia Del Mar."'

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press

insurance services.[66] Many are at the mercy of transit delays produced by shoddy roads, bureaucratic red tape, and violent unrest in neighboring transit states. International law does not obligate transit states to construct new infrastructure to facilitate access to the sea for landlocked states. During times of port or rail congestion, coastal states may treat the needs of landlocked states as a lesser priority – particularly if they view landlocked states as competitors in the global marketplace.[67] Due to these and other factors, the United Nations estimates that "the level of development in landlocked developing countries is on average twenty per cent lower than what it would be were they not landlocked."[68] Where economic development is concerned, geography is destiny.

Mandatory cooperation cannot erase the structural inequities inherent in landlocked status.[69] However, experience has shown that international cooperation can at least mitigate the inequities of geography by enabling landlocked states to reach blue water – the gateway to international commerce.

[66] UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, www.un.org/ohrlls/content/about-landlocked-developing-countries.

[67] Bojotlhe O. G. Butale, 'Bridging the Gap to the Sea for Landlocked States: A Case for Botswana' (2016), p. 29, www.un.org/oceancapacity/sites/www.un.org.oceancapacity/files/bj_butale_bridging_the_gap_for_landlocked_states.pdf.

[68] Vienna Programme, p. 4.

[69] Cf. North Sea Continental Shelf Cases (Fed. Rep. Germ./Den.; Fed. Rep. Germ./Neth.), Merits, 1969 ICJ Rep. 3, para. 91 (20 February) ("Equity does not necessarily imply equality. There can never be any question of completely refashioning nature.").

https://doi.org/10.1017/9781009304993.005 Published online by Cambridge University Press