

Available legal mechanisms
For Paraguay to resolve disputes
concerning freedom of transit of goods
through neighboring states

Ignacio Cazaña



FONDO
EDITORIAL
INEJ




Ciudad
del Saber
MEMBER

Available legal mechanisms for Paraguay to
resolve disputes concerning freedom of transit
of goods through neighboring states

Ignacio Cazaña

Heidelberg, Germany



FONDO
EDITORIAL
INEJ



Academic and Administrative Council

Rector: *Sergio J. Cuarezma Terán* (Nicaragua)

General Vice-rector: *Edwin R. Castro Rivera* (Nicaragua)

General Secretary: *José Coronel De Trinidad* (Nicaragua)

Academic Vice-rector: *Xuria E. Rodríguez Montenegro* (Nicaragua)

Research Vice-rector: *Gustavo A. Arocena* (Argentina)

International relations Vice-rector: *Manuel Vidaurri Aréchiga* (México)

Financial Administrative Vice-rector: *Sergio J. Cuarezma Zapata* (Nicaragua)

Editorial team

Author : Ignacio Cazaña
Editorial coordination : Alicia Casco Guido
Interior Design : Alicia Casco Guido
Cover Design : Christell Ponce Vargas

ISBN: 978-99924-21-61-1

Copyright

© INEJ, 2024

The INEJ is a higher education institution that contributes to the human, institutional, social and economic development of the Nicaraguan nation and the region, through scientific research and continuing education studies and postgraduate studies; created by Law No 604/2006, approved on October 26, 2006 and published in La Gaceta, Official Gazette, No. 229, on November 24, 2006, Republic of Nicaragua, registered in the National Council of Universities (CNU), registered and accredited by the National Council of Evaluation and Accreditation (CNEA) of Nicaragua, and member of the Central American Postgraduate Accreditation Agency (ACAP), Tegucigalpa, Honduras.

www.inej.net
info@inej.net

“In a conflict between States, the weak can be just, so can the strong. But, the injustice of one is limited by its own weakness, when the other’s can try to get where its strength can get. Thus, unable to make the just always strong, we have worked to make the strong always just”

Manuel Gondra, *Diplomat and President of Paraguay*

TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS	11
SUMMARY	13
INTRODUCTION	15
CHAPTER I: CONCEPT OF FREEDOM OF TRANSIT AND ITS RELEVANCE TO PARAGUAY.....	19
A. Conceptual considerations of Freedom of Transit of goods in International Law.	19
1. Concept of transit of goods in International Law	19
2. Concept freedom of transit of goods in International Law ...	23
3. Development of freedom of transit of goods in International Law.	25
4. Relation between freedom of transit of goods and similar figures in International Law	27
B. Importance of freedom of transit for Paraguay	32
C. Historical background about freedom of transit of Paraguayan goods.	34
CHAPTER II: RECENT DISPUTES.....	39
A. Recent problematic situations between Paraguay and its neighboring countries on freedom of transit of Paraguayan goods.	39
B. Mechanisms used to resolve the recent disputes.	46
C. Negatives issues on the mechanisms used.	48

CHAPTER III: AVAILABLE LEGAL MECHANISMS ON
INTERNATIONAL LAW ON FREEDOM OF TRANSIT51

A. International Legal framework regarding Freedom of Transit of goods	51
1. 1921 Barcelona Convention	51
2. 1965 New York Convention.....	57
3. UNCLOS	62
4. WTO	67
5. ALADI.....	76
6. MERCOSUR.....	80
B. Mechanisms of dispute settlement in International Law in the international legal framework regarding Freedom of Transit	86
1. General International Law.....	86
2. UNCLOS	90
3. WTO	93
4. ALADI.....	96
5. MERCOSUR.....	102
C. Freedom of transit in the resolution of disputes in International Law and the international legal framework regarding Freedom of Transit.	105
1. General International Law.....	105
2. UNCLOS	114
3. WTO	116
4. ALADI.....	124
5. MERCOSUR.....	125
D. Positive issues of dispute settlement mechanisms on freedom of transit of goods in International Law.....	128

CHAPTER IV: POSSIBLE SOLUTIONS AND
CONVENIENCE 131

A. Possible solutions to hypothetical problematic situations regarding the freedom of transit of Paraguayan goods through neighboring States	131
1. General considerations.....	131
2. Types of problematic situations	135
B. Convenience for Paraguay of the available mechanisms to resolve disputes regarding the freedom of transit of its goods	148

CONCLUSIONS	153
BIBLIOGRAPHY	158
ANNEX 1	175
ANNEX 2	177

LIST OF ABBREVIATIONS AND ACRONYMS

ALADI	: Latin American Integration Association
ATIT	: International Land Transport Agreement. 1921 Barcelona Convention: Barcelona Convention and Statute on Freedom of Transit
CAFYM	: Center of Fluvial and Maritime Boatmen of Paraguay
CMC	: Council of the Common Market
DSU	: Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization
GATT	: General Agreement on Tariffs and Trade
ICJ	: International Court of Justice
ITLOS	: International Tribunal for the Law of the Sea
LLS	: Landlocked States
MERCOSUR	: Southern Common Market
MFN	: Most Favoured Nation 1965 New York Convention: Convention on Transit Trade of Landlocked States Paraguay - Paraná Waterway Agreement: Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway
PCA	: Permanent Court of Arbitration
SOMU	: United Maritime Workers Syndicate of Argentina
TBT	: Technical Barriers to Trade Agreement
TFA	: WTO Trade Facilitation Agreement
UNCLOS	: United Nations Convention on the Law of the Seas
WTO	: World Trade Organization

SUMMARY

The Republic of Paraguay is a landlocked developing State that has an increasing trade exchange with the rest of the world. Freedom of transit is a relevant concept within such trade, as approximately half of the Paraguayan exports and two-thirds of Paraguayan imports have as destiny and origin, respectively, countries that are not neighboring to it, which means that almost all the goods included in this trade are under the regime of transit.

Moreover, in the history of foreign trade of Paraguay, and especially in the last decade, the incidents that affected freedom of transit of goods through its neighboring countries were frequent although they were caused by different reasons as well as they were solved by diverse mechanisms.

In this sense, the general objective of this thesis is to determine the existence of mechanisms within International Law that are available to Paraguay to resolve the disputes on freedom of transit of its goods with neighboring countries, as well as the suitability to apply them.

In order to fulfill the mentioned objective, the present thesis requires the application of different kinds of methodologies, such as descriptive, analytical, and comparative, as to address the conceptual scope related

to freedom of transit of goods, its historical development, the factual incidents, and disputes between Paraguay and its neighboring countries on this regard, its consideration in the current international and regional legal framework and the pertinent case law on the subject, the mechanisms within the mentioned framework which are available and applicable to resolve the above-indicated disputes, and the convenience on the recur to such mechanisms.

Furthermore, the application of the mentioned methodologies allows identifying the mechanisms within International Law that are available to Paraguay to resolve the disputes regarding freedom of transit of its goods with neighboring countries and the convenience for the country to resort to them, depending on the kind of situation that arises.

INTRODUCTION

The Republic of Paraguay, as seen in the maps displayed in Annex 1, is a land-locked developing State that has an important and increasing trade exchange with the rest of the world. In this sense, despite its geographical situation, approximately half of the Paraguayan exports and two-thirds of Paraguayan imports have as destiny and origin, respectively, countries that are not neighboring to it, which means that almost all goods included in this trade are under the regime of transit. This figure has been developed and enshrined as a State right with the concept of “freedom of transit” by regional and international frameworks, such as the Barcelona Convention and Statute on Freedom of Transit, the Convention on Transit Trade of Landlocked States, the Convention the United Nations Convention on the Law of the Seas, the World Trade Organization, the Latin American Integration Association and the Southern Common Market, as well as by the dispute settlement mechanisms contemplated in those frameworks.

Nonetheless, in recent years there have been several incidents between Paraguay and its neighboring countries in which the freedom of transit of goods originated in or destined to the first was involved. A large number of these incidents occurred in the Paraguay - Para-

ná waterway, which is the most important path for Paraguay exports and imports with the rest of the world. Moreover, the backgrounds of these kinds of incidents can be traced down to the Colonial era and were an element that influenced the independence of Paraguay.

Regarding the incidents in recent years, some of these were resolved by diplomatic negotiations between Paraguay and its neighboring countries, while others were decided unilaterally or within proceedings before domestic courts of those neighboring countries.

However, the application of these dispute settlement mechanisms did not prevent economic losses to Paraguayan traders and carriers nor stopped the historical uncertainty regarding the transit of Paraguayan goods in neighboring States. Even more, they imply a sticking point in the bilateral agenda between Paraguay and those neighboring countries.

Therefore, to reinforce legal and practical certainty on the transit of goods originated in or destined to Paraguay and to help to avoid the economic and political consequences that incidents such as the mentioned have to Paraguayan and its neighboring States actors, it is necessary to determine and analyze the existence and convenience of legal mechanisms within International Law that are available to Paraguay to resolve the disputes on freedom of transit of its goods with neighboring countries, which is the general objective of the present thesis.

In this sense, the objective requires a comprehensive analysis referring to the concepts of transit and freedom of transit, its historical development, the factual incidents and disputes between Paraguay and its neighboring countries in this regard, and its consideration in the current

international and regional legal framework and the pertinent case law on the subject, the mechanisms within the mentioned framework which are available and applicable to resolve the above-indicated disputes must also be studied, as well as the convenience to resort to them.

The reference to the conceptual approaches on freedom of transit and its relevance to land-locked developing countries, and in particular to Paraguay, is aimed to clarify the conceptual framework of the research and to determine the notions on such figure, its complexity, contents, and limits, as well as its origins and progressive consideration within International Law. Also, it seeks to demonstrate the practical relevance that such a figure has in world trade and, especially, for Paraguay as a land-locked developing State.

On the other side, a relation of the disputes related to freedom of transit of goods originated from or destined to Paraguay with its neighboring countries that occurred in the last years has the objective to establish the practical aspects of the problems that Paraguay faces concerning the transit of goods through the transit States that surround it, to take into account the legitimate interests and rights of such States, and to identify the negative aspects of the mechanisms used to solve those issues.

Furthermore, the considerations of freedom of transit in the current international and regional legal framework and the pertinent case law are meant to address the core of the working hypothesis as to determine the existence and the scope of such figure, as well as its consideration by the legal mechanisms provided by that framework which are available for Paraguay to help resol-

ve the disputes on freedom of transit of goods with its neighboring countries.

Finally, the research will address the convenience for Paraguay in recurring the legal mechanisms on International Law to resolve hypothetical situations of disputes regarding the freedom of transit of its goods through neighboring countries, taking into account the advantages and disadvantages of those mechanisms.

CHAPTER I: CONCEPT OF FREEDOM OF TRANSIT AND ITS RELEVANCE TO PARAGUAY

A. Conceptual considerations of “Freedom of Transit of goods” in International Law

1. THE CONCEPT OF “TRANSIT OF GOODS” IN INTERNATIONAL LAW

The Cambridge Dictionary defines “transit” as “the movement of goods or people from one place to another” (Cambridge University Press, 2020). Taking into account this general notion from a territorial point of view, transit can be internal or international. The first situation arises when the movement in issue occurs within the territory of a State as both the places of departure and arrival of goods or people are in such territory. On the other side, the transit is international when the movement occurs in the territories of two or more States because the State of the place of departure of goods or people is different than the place of arrival of them.

Despite the mentioned general notion, within International Law, as it results from the terminological approach

ches adopted by international instruments and courts, the concept of “transit” is focused on the meaning of the international transit when such movement of persons or goods occurs within the territory of more than two states.

Indeed, such conclusion results from the reading of the 1921 Barcelona Convention and Statute on Freedom of Transit (1921 Barcelona Convention) and some specific provisions of the United Nations Convention on the Law of the Sea (UNCLOS) and the General Agreement on Tariffs and Trade (GATT) regarding “traffic in transit”.¹

On this line, the 1921 Barcelona Convention, which is the instrument that influenced the definition of transit and the content of primary obligations set out in later treaties (Azaria, 2015, p. 53), provides the following:

Persons, baggage and goods, and also vessels, coaching and good stock, and other means of transport, shall be deemed to be in transit across territory under the sovereignty or authority of one of the Contracting States, when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey, beginning and terminating beyond the frontier of the State across whose territory the transit takes place.

1 For the present research, the mentioned instruments are used as a basis of the construction of the concept of “in transit”.

*Traffic of this nature is termed in this Statute
'traffic in transit'.²*

This definition of the “Traffic in transit” was reiterated, with some particular differences, by the GATT in 1947,³ the Convention on Transit Trade of Land-locked States of 1965⁴ (1965 New York Convention), and the UNCLOS in 1982.⁵ Despite such particular differences,⁶ the instruments coincide in the characteristic element required to consider the movement or traffic in issue as “in transit”, and that is “when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey, beginning and terminating beyond the frontier of the State across whose territory the transit takes place”. In this sense, although the above-mentioned provisions deal expressly with the notions of “traffic in transit”, the approaches adopted allow to determine that the concept of “transit”, in such

2 1921 Barcelona Convention. Statute. Article 1.

3 GATT. Article V:1.

4 Convention on Transit Trade of Land-locked States. Article 1(b).

5 UNCLOS. Article 124, 1(c).

6 The scope of the freedom of transit in the GATT, for instance, covers “[g]oods (including baggage), and also vessels and other means of transport”. The 1965 Convention on Transit Trade of Land-locked States has a more restrictive approach, as it implies “goods including unaccompanied baggage”. On the contrary, such scope within UNCLOS is broader, because it “includes persons, baggage, goods and means of transport”. These differences result from the context and purposes of each of the mentioned instruments.

framework, is related specifically to the type of transit of people, goods, baggage and means of transport from one State to another State passing through a third State.

Nonetheless, in International Law, the term “transit” is also used to refer to other types of movement. For instance, the UNCLOS refers to “transit passage” as the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.⁷

However, despite the diverse notions that may arise from the concept of “transit”, the present research will focus on the approach adopted by the mentioned relevant international instruments when referring to “transit in traffic”, in the sense of considering “transit” as the movement or passage across a territory of goods that implies a portion of a complete journey beginning and terminating beyond such territory.

Moreover, this conceptual perspective is in accordance with the definition of *de tránsito*, which is the translation of “in transit”, given by the Dictionary of the Spanish Language, as it is understood when goods “crosses a country located between the ones from the origin and arrival”.⁸

7 UNCLOS. Article 38. 2 (first part).

8 Dictionary of the Spanish Language: “Said of goods: that it crosses a country located between the ones from the origin and from destiny”. Original text: *Dicho de una mercancía: Que atraviesa un país situado entre el de origen y el de destino* (Real Academia Española, 2019) (translation by the author).

2. CONCEPT OF FREEDOM OF TRANSIT OF GOODS IN INTERNATIONAL LAW

As it happens with the term “transit”, the international instruments on the matter do not provide an explicit definition of “freedom of transit”. Moreover, an approach from the Municipal Law or Constitutional Law, as well as a Spanish-language perspective, could lead the issue to confusion, as its literal translation, *libertad de tránsito*, is more linked to the English concept of the constitutional “freedom of movement”.⁹

Even more, within the international instrument on “transit”, the term “freedom of transit” coexists with other figures, such as “right of transit” (or “right of free transit”), and “regime of transit” (or “transit regime”).

In this point, the 1921 Barcelona Convention, which is entitled “on Freedom of Transit”, recognizes *that it is well to proclaim the right of free transit and to make regulations thereon as being one of the best means of developing co-operation between States without prejudice to their rights of sovereignty or authority over routes available for transit*.¹⁰

9 For instance, article 41 of the Constitution of Paraguay is entitled “Right to transit and residence” and it provides, inter alia, that “inhabitants can transit freely through the national territory” (Original text: *Los habitantes pueden transitar libremente por el territorio nacional* [translation by the author]). This freedom is denominated “freedom of movement” or “right of movement” by other Constitutions, such as the Grundgesetz of Germany, whose article 11, entitled “freedom of movement”, states that “All Germans shall have the right to move freely throughout the federal territory” (Deutscher Bundestag, 2020).

10 1921 Barcelona Convention. Preamble.

Moreover, the GATT indicates that *There shall be freedom of transit through the territory of each contracting party (...) for traffic in transit to or from the territory of other contracting parties.*¹¹ Regarding this provision, during the *Colombia - Ports of entry* case within the dispute settlement mechanisms of the World Trade Organization (WTO), Panamá submitted that the definition of “freedom” means the “the unrestricted use of something” (*Colombia - Indicative Prices and Restrictions on Ports of Entry*, 2009, p. 7.399). The Panel upheld this meaning and held the following:

In light of the ordinary meaning of freedom and the text of Article V:2, the Panel concludes that the provision of “freedom of transit” pursuant to Article V:2, first sentence requires extending unrestricted access via the most convenient routes for the passage of goods in international transit... (Colombia - Indicative Prices and Restrictions on Ports of Entry, 2009, p. 7.401) (Emphasis added).

On the other side, the New York Convention indicates that *Freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport.*¹² Similarly, the UNCLOS states *land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.*¹³

11 GATT. Article V, 2.

12 Convention on Transit Trade of Land-locked States. Article 2, 1.

13 UNCLOS, article 125, 1.

Regarding the distinction of the terms “freedom of transit” and “right of transit”, Huarte indicates that although they are similar, they have a different connotation. In this point, the author argues that in order to have “freedom of transit of goods” it is necessary to first have the “right of transit of goods,” so that the involved State is entitled to claim such a “freedom”, that is, to claim the right on a free basis. Nonetheless, within the context of the WTO, she also mentions that art. V of the GATT establishes the “freedom of transit” as the paradigm of the “right of transit” in contemporary international law, which means that it establishes the basis of how the “right of transit”, as a right that exists independently of the will of the transit State, must be regulated. Thus, the author concludes that “freedom of transit should be understood as a right to exercise transit” (Huarte, 2015, p. 303).

3. DEVELOPMENT OF FREEDOM OF TRANSIT OF GOODS IN INTERNATIONAL LAW

The concern for freedom of transit, which had prevailed as commercial interests have been active, is reflected in treaties from the eleventh and twelfth centuries between States of the Italian Peninsula. In modern times, the main stage in the process of liberalization of traffic in rivers began in 1792, when France declared open the river Scheldt arguing that “a nation cannot without injustice pretend to the right of exclusively occupying the channel of a river, and hinder the neighboring peoples who border on its higher shores from enjoying the same advantages” (Lauterpacht, 1958, pp. 326, 327). In 1812, a Decree of the Supreme Board of Paraguay opened the rivers of that country to free navigation (González, 1990, p. 13). In 1815, the navigation on the Rhine was declared

free in its navigable part and that “cannot in respect of commerce be prohibited to anyone”. This was followed by numerous treaties relating to other rivers, such as the Elbe, the Weser, the Ems, and the Vistula. An important landmark was the Act of the Congress of Vienna of 1856 which stated that the navigation on the Danube “cannot be subjected to any impediment or charge not expressly provided in the following articles”. In the second half of the nineteenth century, the Paraguay and the Amazon rivers were opened, as well as the Congo River in Africa. Similar principles were incorporated in the instruments governing the navigation of the Panama, the Suez, and the Kiel Canals, as well as in the Strait of Magellan. Similarly, numerous nineteenth and twentieth century agreements referred to rights of transit over land (Lauterpacht, 1958, pp. 327, 328).

According to Azaria, after the two World Wars, freedom of transit represented a development brought about not just due to changes of geographical borders, but also “by the historical belief that trade and transit are pillars of peace”. In this sense, in article 23(e) of the Covenant of the League of Nations, the Members agreed to “make provision to secure and maintain freedom of communications and of transit”. To implement this article, it was held a general conference in Barcelona in 1921, which adopted the Convention on Freedom of Transit and the Convention on the Regime of Navigable Waterways of International Concern. Moreover, in 1923, the Geneva Conference adopted the Convention and Statute on the International Regime of Railways, the Electricity Transit Convention, and the Convention and Statute on the International Régime of Maritime Ports (Azaria, 2015, pp. 52, 53).

As mentioned previously, the first of the mentioned instrument, which is known as the “Barcelona Convention”, influenced the definition of transit and the content of primary obligations set out in later treaties. In this sense, the instrument constituted the basis of most of the trade agreements dealing with transit that were signed after the 1930s. Moreover, although not all of them refer specifically to the 1921 Barcelona Convention, in most the expressions “freedom of transit” and “free transit of goods” are considered to comply with the spirit of such convention (Uprety, 2006, p. 49).

4. RELATION BETWEEN FREEDOM OF TRANSIT OF GOODS AND SIMILAR FIGURES IN INTERNATIONAL LAW

i. Freedom of transit of goods and freedom of movement of goods

The figure of the freedom of movement of goods, also known as “free movement of goods” is considered one of the fundamental features towards the successful building of a free trade zone and a common market (Bertoni, 2017, p. 99). In this sense, the free movement of goods is considered a key element in creating and developing the internal market of the process of the European Union, where it is one of the economic freedoms stipulated by the Treaty establishing the European Community in its articles 28, 29 and 30¹⁴ (European Commission: Directorate-General for Enterprise and Industry, 2010, p. 8).

14 Treaty establishing the European Community. Article 28: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States”. Article 29: “Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Mem-

In the same way, the 1991 Treaty of Asunción that creates the Southern Common Market (MERCOSUR, by its Spanish acronym) indicates that such common market implies free movement of goods as follows:

*This Common Market implies: the free movement of goods, services and productive factors between the countries, through, among others, the suppression of custom rights and non-tariff restrictions to the circulation of good merchandise and other equivalent measures.*¹⁵

As it results from the legal text transcribed, the free movement of goods consists in the movement or circulation of goods as imports or exports between countries without restrictive measures, generally in an economic integration process.

On this point, although the figure of the transit of goods also implies, by concept, the idea of “movement”,

ber States”. Article 30: “The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

15 1991 Asunción Treaty. Article 1. Original text: “Este Mercado Común implica: -La libre circulación de bienes, servicios y factores productivos entre los países, a través, entre otros, de la eliminación de los derechos aduaneros y restricciones no arancelarias a la circulación de mercaderías y de cualquier otra medida equivalente” (traslation by the author).

in International Law it has a different meaning. Indeed, according to the international conventions on the subject, the concept of transit is applied specifically to a type of movement that represents only a portion of a complete journey, beginning and terminating beyond the frontier of the State across whose territory the transit takes place, while the free movement of goods consists in the circulation between countries without restrictive measures.

ii. Freedom of transit of goods and freedom of navigation of international

Oppenheim defines “international rivers” as “rivers that are navigable from the open sea, and at the same time either separate or pass through several States between their sources and their mouths” (Oppenheim, 2005, p. 315).

Nevertheless, as happens with other concepts within International Law, is difficult to find a precise definition of “freedom of navigation of international rivers”. In this sense, Johnson mentions that there are a lot of meanings surrounding the notion of “freedom of navigation of international waterways” and no one has ever successfully settled the definition, although he concluded that the most commonly intended meaning of the term is the “physical freedom, plus complete *laissez-faire* opportunity for trading among riparian countries” (Johnson, 1964, p. 465).

Moreover, according to some authors, the freedom of navigation in international rivers is still not a customary international law (Aust, 2010, p. 337). Oppenheim indicates that International Law recognizes the freedom of navigation in time of peace of all international rivers in Europe and on many of them outside such continent

for merchantmen of all nations, but rejects that free navigation on all international rivers of the world as a recognized rule of the Law of Nations although such universal rule will be certainly be proclaimed in the future (Oppenheim, 2005, pp. 315, 320). Moreover, Uprety states that despite the 1921 Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concern is insufficient, it can be considered an important step for the international community toward the formation of a universal law as well as a set of minimum standards (Uprety, 2006, p. 50). On the other side, the Constitution of Paraguay enshrines the freedom of navigation of international rivers as one principle in the foreign relations of the country.¹⁶

The concepts of freedom of transit and freedom of navigation have different meanings, as the latter refers to the physical and trade freedom among riparian countries while the first is related with the passage, whether by land or river, through the territory of a State of persons or goods that implies only a portion of a complete journey, beginning and terminating beyond the frontier of the State. Nonetheless, from a pragmatic perspective, the application of the freedom of transit in fluvial courses has some practical coincidences with the freedom of navigation of international rivers, in the sense that both

16 Constitution of Paraguay. Article 143: "The Republic of Paraguay, in its international relations, accepts International Law and it adjusts to the following principles: (...) 6. The free navigation of international rivers". Original text: *La República del Paraguay, en sus relaciones internacionales, acepta el derecho internacional y se ajusta a los siguientes principios: (...) 6. la libre navegación de los ríos internacionales.*

figures imply freedoms of physical passage through the territory of another State.

However, both concepts had a joint historical development, as their origins and progress can be traced in treaties of the eleventh and twelfth centuries between States of the Italian Peninsula and in the legal regimes adopted for European international rivers in the nineteenth century. In this framework there are principles which underlie the concept of freedom of transit, namely, the absence of charges for mere passage and the acknowledgment that transit is subject to regulation properly incidental to navigation. Furthermore, the principles of free transit were not restricted to maritime matters, as numerous nineteenth and twentieth century agreements deal with rights of transit over land (Lauterpacht, 1958, pp. 327, 328).

But, while the status of the freedom of navigation of international rivers as a general rule of International Law is contested by several academics, as previously mentioned, the freedom of transit has greater acceptance as a general rule. In this sense, Lauterpacht indicates that there is no warrant for asserting that every series of uniform treaties and clauses on freedom of navigation of international rivers can be regarded as evidence of the existence of rules of customary international law in the terms of their content and such rules can develop out of the practice of states only when it is pursued out of a sense of legal obligation. However, concerning the freedom of transit, he argues that “there is clearly a distinct measure of support for the proposition that, at least in some respects, the treaty development may be read as constitutive of general rules” (Lauterpacht, 1958, p. 326).

B. Importance of freedom of transit for Paraguay

According to the official statistics on foreign trade of Paraguay, the exports of goods from that country with destiny to its neighboring countries in the last decade, in terms of value, has been as follows:

Exports from Paraguay (in thousand US\$ FOB)

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Argentina	692128	545980	688065	653613	570269	855959	1134927	2170040	1663369	1904225
Bolivia	55660	89078	74964	106751	69158	53589	48013	54514	50697	32990
Brazil	2500098	2877204	2849963	2956269	2622626	3011179	2775043	2808904	2836144	2119423
Uruguay	83950	108131	184670	181696	151897	163858	214243	145274	102916	127736
Total	3331836	3620394	3797662	3898329	3413951	4084586	4172226	5184732	4653127	4184375
Total exp.	7776434	7283438	9456342	9635886	8327546	8501877	7967805	9042156	7967805	6314535
Percentage	42,85	49,71	40,16	40,46	41,00	48,04	52,36	57,34	58,40	66,27

Source: Central Bank of Paraguay (BCP, 2020).

With reference to the imports to Paraguay of goods originated in its neighboring countries in the last decade, the official statistics display the following values:

Imports from Paraguay (in thousand US\$ FOB)

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Argentina	1285365	1270.021	1234827	1231795	1115151	986371	1128709	1238267	1238267	610133
Bolivia	23714	26428	40007	61242	34417	36547	44401	47990	47990	24091
Brazil	2872146	2512025	2883151	3073565	2396594	2199396	2564057	2801025	2801025	1557575
Uruguay	169122	134.364	137211	118381	94227	101598	104826	134181	134181	71486
Total	4350347	3942.839	4295196	4484982	3640389	3323913	3841993	4221464	4221464	2263286
Total Imp.	11548963	10756.391	11302069	11299327	9529305	9040325	11027379	12433880	11755149	6896266
Percentage	37,67	36,66	38,00	39,69	38,20	36,77	34,84	33,95	35,91	32,82

Source: Central Bank of Paraguay (BCP, 2020).

The mentioned detailed data provides the values of the exports and imports of Paraguay from neighboring countries and the proportion of such exchange in the total Paraguayan foreign trade. An interpretation *a contrario sensu* provides the values of the exports of Paraguayan products destined to countries other than its neighboring States, as well as the imports of goods originating from such countries that have been placed in the Paraguayan market. The results of this interpretation are as follows:

Exports from Paraguay to non-neighboring States (in thousand US\$ FOB)

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Total	4444597	3663044	5658680	5737557	4913595	4417291	3795579	3857424	3314678	2130160
Total exp.	7776434	7283438	9456342	9635886	8327546	8501877	7967805	9042156	7967805	6314535
Percentage	57.15	50.29	59.84	59.54	59.00	51.96	47.64	42.66	41.60	33.73

Imports to Paraguay from non-neighboring States (in thousand US\$ FOB)

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Total	7198616	6813553	7006873	6814345	5888916	5716411	7185385	8212416	7539685	4632980
Total imp.	11548963	10756391	11302069	11299327	9529305	9040325	11027379	12433880	11755149	6896266
Percentage	62.33	63.34	62.00	60.31	61.80	63.23	65.16	66.05	64.09	67.18

The above-detailed statistics give an idea of the value of the goods exported and imported to Paraguay that have been subject to the regime of “traffic in transit”. Indeed, considering that Paraguay is a landlocked country and that the foreign trade through air transport is petite (0.01% of the export weight volume in 2015¹⁷), an average of 50.34% of exports and 63.54% of imports of Paraguayan were under such regime, as they had to

17 “When considering the volume (in weight) of the transported goods, in 2015 73.25% of exporters sent their products through water, 26.74 by trough road and 0.01% by air” (Suárez, 2018, p. 17) (translation by the author).

cross through territories of countries which are not places of origin or destiny of those exports and imports.

C. Historical background about freedom of transit of Paraguayan goods

During most of the Colonial era and the first decades of Paraguay as an independent State, the main trade product of the country was the yerba mate. By the 1630s, the early exports of the country, which consisted mostly of cereals, sugar and, wines, began to be displaced by the mentioned plant (Pastore, 1997). Soon after, by 1680, new taxes were applied on the Paraguayan yerba mate trade, with the purpose to fortify the city of Buenos Aires against the threat of pirate attacks. Such taxes were paid in the city of Santa Fe and consisted of half a *peso* for every arroba¹⁸ of yerba mated introduced and one *peso* for the destined to Peru and Tucumán (Durán Estragó, 2010). This tax was suppressed in 1779. Similarly, as the yerba mate, tobacco was another important product during that period and was only produced

18 “Arroba” was a custom unit of weight used in the Spanish and Portuguese realms. It was equivalent to 11,502 kg (12.5 kg. in the kingdom of Aragon) (ASALE & RAE, n.d.)502 kg. 2. f. En Aragón, peso equivalente a 12,5 kg. 3. f. Pesa de una arroba. 4. f. Medida de líquidos que varía de peso según las zonas geográficas y los mismos líquidos.”,“container-title”:“«Diccionario de la lengua española» - Edición del Tricentenario”,“language”:“es”,“title”:“arroba | Diccionario de la lengua española”,“URL”:“https://dle.rae.es/arroba”,“author”: “[{“family”:“ASALE”,“given”:“RAE-”},{“family”:“RAE”,“given”:“”}],“accessed”:{“date-parts”:[[“2020”,12,16]]}],“schema”:“https://github.com/citation-style-language/schema/raw/master/csl-citation.json”} .

in Paraguay, and after the Borbonic reforms in the last decades of the XVIII century, its trade was monopolized by the crown, through the “Royal Office for Tobacco and Cards”, within a State monopoly system in the Viceroyalty of the Río de la Plata (Telesca, 2010) In the context of the trade of both products, between the metropolis and Asunción, a third actor interfered and exercised abusive controls, the port city, the main city, erected as a sub-metropolis, Buenos Aires, and in it the group of merchants linked to exports (Areces & Bouvet, Nora E., 2002). Therefore, the colonial system on yerba mate and tobacco implied several measures that prevented the freedom of transit of such Paraguayan goods through the territories of neighboring regions, despite the fact they were all parts of the same State, Spain.

The independence process in Paraguay started with the Revolution of May 1811 against the Spanish Governor and measures against the Paraguayan trade barrier were adopted rapidly. The “Supreme Governing Board” sent a note on 20 June 1811 a note to the Governing Board of Buenos Aires stating some conditions to an eventual union with the mentioned city within a confederated community of the former provinces of the region of the Río de la Plata. Among those conditions were the suppression of the taxation on the Paraguayan yerba mate and the abolition of the State monopoly over the tobacco. These conditions were accepted by the Government of Buenos Aires (Cooney, 2012, pp. 143-146) and were enshrined in the Treaty of October 12, 1812, between the two governments. This instrument ended the previous taxes collection over the Paraguayan yerba mate in the port of Buenos Aires, although some “moderate taxes in urgent cases” were allowed to the latter to the maximum of “a *real* and a half for a third of yer-

ba” and “another *real* and a half for arroba of tobacco” (Treaty of October 12, 1811). Nonetheless, soon after, the Government of Buenos Aires established that all foreign tobaccos would pay double of taxes than the national ones, making the tax on Paraguayan tobacco collectible up to three *reales* for arroba (Cardozo, 2011, p. 72). After diplomatic protests against the mentioned measures and threats of “economic suffocation or war” by Buenos Aires representatives, a Paraguayan General Congress in October 1813 proclaimed the independence of Paraguay as a Republic (Cardozo, 2011, pp. 82-83).

For the period of the dictatorship of José Gaspar Rodríguez de Francia (1814-1840) Paraguay closed and protected its borders to face the instability of the region, making that isolation a conditioning element of the dictatorship policy. Nonetheless, the freedom of navigation of the rivers was an objective of the dictator (Areces, 2010). In the first years of the mentioned period, the Paraguayan vessels were constantly registered and pillaged in neighboring regions. With the aim to grant the freedom of navigation to Paraguayan trade with Great Britain, Francia ordered military campaigns against the Argentinian province of Corrientes. But, in the end, he prohibited all trade navigation to the Río de la Plata (Cardozo, 2011. pp. 99-101).

After the end of the dictatorship due to the death of Francia, Paraguay started complex reinsertion to the international policy. After an agreement on friendship, trade, and navigation with Corrientes, Paraguay re-established trade relations with Buenos Aires, although its Governor, Juan Manuel de Rosas, did not accept the independence of the country and stated in 1843 that Buenos Aires was willing to grant permissions to foreigners and Uruguayans to trade with Paraguay but under no

instrument and with Argentinian flag, as the Río de la Plata and the Paraná “belonged to Buenos Aires *de facto* and *de jure* from coast to coast” (Cardozo, 2011, pp. 134-135). Later, after several incidents by authorities of Corrientes, a province of Argentina, that affected the navigation between Asunción and Buenos Aires, a treaty was signed in December 1844 between Paraguay and Corrientes, which regulated the inspection rights and enshrined the principle. Rosas reacted against the mentioned agreement by closing the ports of Argentina to vessels coming from Paraguay (Cardozo, 2011, p. 142).

With the defeat of Rosas and the rise of Justo José de Urquiza to the Argentinian Government, the independence of Paraguay was recognized by Argentina in 1852. In the following years, Paraguay maintained tense negotiation with Brazil and Argentina regarding the boundaries and the navigation that ended in treaties in 1855 and 1856, respectively, although they did not end solving the problems. The granting of the freedom of navigation after the Rosas blockade produced a duplication of Paraguayan foreign trade in those years (Cardozo, 2011, pp. 195, 198 and 210-211). Nonetheless, the unsolved problems, as well as political issues of the region, ended in the Paraguayan War (1864-1870), where Paraguay fought against an Alliance between Argentina, Brazil, and Uruguay. During the conflict, the country suffered once more a blockade. At the end of the conflict with the Paraguayan defeat and the death of more than half of its population, new agreements on boundaries and navigation were signed between Paraguay and its neighbors. In the agreement with Brazil in 1872, Paraguay granted freedom of transit of Brazilian goods through the Paraguay River (Brezza, 2010). In the same way, in the Peace Agreement Paraguay-Argentina, in

1876, freedom of navigation was granted between both countries through the rivers Paraguay, Paraná, and Uruguay. Moreover, the instrument provided that merchant vessels on transit were not subject to the payment of any tax, but it stated that what they do were subject to laws and regulations of a State when the passage of the river areas where both margins belonged to such State (Peace Treaty Argentina - Paraguay, 1876).

After the mentioned war and during the XX century, Paraguay signed several bilateral agreements on navigation with its neighboring countries, although the ones signed with Argentina on Navigation Facilitation in 1942 and on Navigation in 1967 are the only ones of them which are currently in force (Ministry of Foreign Affairs of Paraguay, 2020). The latter is very relevant because it settles the freedom of navigation for Argentinian and Paraguayan vessels through the rivers Paraguay, Paraná, and de la Plata within the jurisdictions of both States, on equality of conditions, as well as the current legal framework for the application of such figure (Tratado de Navegación [Treaty of Navigation], 1967).

Furthermore, the last decades of the XX century were characterized by the involvement of Paraguay in process of economic integration with the countries of its region that ended in multilateral treaties and rules on navigation, land transport, and transit. An important instrument in this context was the 1980 Treaty of Montevideo that established the Latin American Integration Association (ALADI), which was the basis of the International Land Transport Agreement (ATIT) of 1990 and the Paraguay – Paraná Waterway Agreement of 1992. The mentioned instruments are very relevant for the transit of Paraguayan goods by land and fluvial ways through its neighboring countries.

CHAPTER II: RECENT DISPUTES

A. Recent problematic situations between Paraguay and its neighboring countries on freedom of transit of Paraguayan goods

“THE SOMU BLOCKADE”

In October 2010, the appointment of Enrique Omar Suárez as General Secretary of the “United Maritime Workers Syndicate” (SOMU, by its acronym in Spanish) of Argentina implied a threat to the transit of goods of Paraguay through the Paraguay - Paraná waterway.¹⁹ On December 1st of that year, it was announced that ships transporting goods to the territory of Paraguay would not receive the assistance of tugboats at the ports of Buenos Aires, after a letter from the Regional Secretary of the International Transports Federation. The action was

19 Since Enrique Omar Suarez was also Director of a shipping line that operated the Paraguay - Paraná Waterway and that the Argentinian fleet in that area was very weak at that moment, there was the fear by the Paraguayan press that the Government of Argentina had the aim to recover its presence on the waterway at the expense of Paraguay (ABC Color, 2010a).

depicted as a measure of strength in “solidarity” with the “United Maritime Workers Syndicate of Paraguay” (SOMUPA, by its acronym in Spanish), an affiliated entity of the Argentinian SOMU, to claim fair working conditions and wages in Paraguay. Nonetheless, according to the Center of Fluvial and Maritime Boatmen of Paraguay (CAFYM, by its acronym in Spanish), it had the objective to “destroy the Paraguay fluvial fleet” rather than the working claim “that was well satisfied” (ABC Color, 2010b). From that day, the operations of the Paraguayan shipping companies in Argentinian ports through the waterway were affected. Although such companies challenged the situation by moving some containers to Uruguay as well as putting some of them in ships used for iron ores transportation, it was estimated that some 2.000 containers destined to Paraguay remained delayed in ports of Argentina, such as Buenos Aires, Rosario and Zárate (ABC Color, 2010c).

Some days later, on December 4, the CAFYM claimed that the situation of the goods destined to Paraguay exacerbated despite the intervention of Argentinian and Paraguayan authorities through diplomatic negotiations. According to the guild, 2.000 containers were stalled in vessels and 5.000 on land in the port of Buenos Aires (Paraguay.com, 2010).

Finally, on December 13, the SOMU lifted the blockade “temporally” after meetings with representatives of the Government of Argentina, which intervened after “especial request” of the Government of Paraguay (ABC Color, 2010d). Days before, the General Secretary of SOMU had mentioned that there was an order from the President of Argentina to establish a boycott of 5 days against the trade of Paraguay “as a gesture of solidarity with the Paraguayan unions that navigate through

maritime ways” (Última Hora, 2010). At the same time, authorities of Paraguay had conditioned their participation in the MERCOSUR Meeting of Head of States that was going to be celebrated back then with the solution of the issue (MundoMarítimo, 2010a).

Days later, the Government of Paraguay announced that Argentina had lifted permanently the obstacles against the Paraguayan vessels (MundoMarítimo, 2010a). Equally, the authorities and businessmen of Paraguay expressed that they were starting to analyze the use of Uruguayan ports as an “alternative” for the products of the mentioned country (MundoMarítimo, 2010b). By June 2011, there was a reported increase in the foreign trade of Paraguay through the port of Montevideo (MundoMarítimo, 2011).

According to the Paraguayan private sector, the blockade of the SOMU of 2010 implied a loss of at least USD 250 million for such sector (MundoMarítimo, 2010b).

Moreover, during the following years, the tense situation with SOMU continued. In 2011, there were threats of new blockades against the Paraguayan transit through the waterway by the representatives of the Argentinian syndicate (ABC Color, 2011a), and it was reported that one shipping company of Paraguay was subject of such measure by not receiving the assistance of tugboats in ports of Argentina due instructions of SOMU (ABC Color, 2011b). Furthermore, in 2013 the mentioned syndicate established a brief blockade against trade operation of Paraguay that did not have direct effects (ABC Color, 2013).

Years later, the SOMU was intervened by the Justice of Argentina due to denounces of extortion by Ar-

gentinian boatmen and former members of the syndicate (Infobae, 2016), and its General Secretary ended up in prison under charges of corruption (ABC Color, 2016).

ISSUES ON “PILOTS”

Madeleine I (2011)

In December 2011, the Paraguayan ship *Madeleine I* was forced to anchor by the Argentine Naval Prefecture (PNA), which requested the embarkation of pilots of Argentinian nationality to continue the navigation through the waterway. The vessel was liberated once the owner company accepted such a requirement (Ministry of Foreign Affairs of Paraguay, 2019, p. 7).

Ña Cholita (2012)

A similar situation of the *Madeleine* occurred shortly after with the *Ña Cholita*, a Paraguayan ship that was forced to anchor by the PNA in January 2012 to require the embarkation of Argentinian pilots. The delay, which lasted a week, produced the loss of US\$ 30.000 to the ownership company (Última Hora, 2012).

In this sense, the Ministry of Foreign Affairs of Paraguay asked the Embassy of Argentina in Asunción to provide good offices in order to allow the navigation of the *Ña Cholita* through the river. Nonetheless, the latter replied rejecting the Paraguayan arguments and informing the position of the pertinent authorities of Argentina of requiring the presence of Argentinian pilots (Ministry of Foreign Affairs of Paraguay, 2019, p. 8).

Doña Magda (2014)

The Paraguayan vessel *Doña Magda* was the object of some incidents in the past years. Indeed, in April 2014 and in October 2014 the ship was forced to anchor by the PNA and require to embark Argentinian pilots. Nonetheless, the ownership company obtained a provisional measure by Courts in Argentina to keep operating without those pilots. Moreover, the incidents regarding the *Doña Magda* caused several diplomatic negotiations between representatives of Argentina and Paraguay towards an agreement on the interpretation of the 1967 Navigation treaty between those countries (Ministry of Foreign Affairs of Paraguay, 2019, pp. 10-11).

Doña Annette (2018)

In November 2018, the *Doña Annette*, a Paraguayan ship, was forced by the PNA to anchor in the port of Paraná. The measure was based on the requirement of Argentinian authorities that maritime pilots of that country should be on board in order to continue the trip to Buenos Aires, from where the ship must transport oil to Paraguay (ABC Color, 2018a).

The *Doña Annette* was detained for more than two weeks in Paraná, a situation that, as said by representatives of the owners of the ship, produced losses of US\$ 750.000 to the company (Radio Ñanduti, 2018). Finally, the *Doña Annette* was released, after the fulfillment of some conditions imposed by Argentinian authorities to exclude the requirement of pilots of their country, such as the designation of a more experimented captain (ABC Color, 2018b).

ISSUES ON DOCUMENTATION

In 2014, some tugboats and barges owned by Paraguayan shipping companies were retained by custom authorities of Argentina due to the existence of “documentary irregularities”. After protests from the Ministry of Foreign Affairs of Paraguay, authorities of Argentinian held that some of the detentions were related to “custom proceedings” that were under judicial prosecution at that moment. The Paraguayan Government replied that the action implied a violation of the freedom of transit provided in several regional and international instruments. (Ministry of Foreign Affairs of Paraguay, 2019, p. 10).

Judicial orders

In November 2014, a collision occurred in the Paraná River between an Argentinian motorboat and the Paraguayan tugboat *Aureliano G* and 5 barges. Due to this incident, a Federal Court of Paraná (Argentina) ordered the detention of all the ships of the convoy. Afterward, the Ministry of Foreign Affairs of Paraguay asked the Embassy of Argentina in Asunción the liberation of all the not involved ships, as the delays and the cost overrun affecting the oil transportation to Paraguay, Some days later, the Argentinian embassy replied that the tugboat and barges departed to Uruguay (Ministry of Foreign Affairs of Paraguay, 2019, p. 9).

In October 2015, a Paraguayan convoy was detained by the PNA in the Paraná River. After requests for information by the Ministry of Foreign Affairs of Paraguay. The Argentinian authorities replied in February 2016, stating that the interdictions on the Paraguayan vessels were lifter after the legal representatives of the affected shipping company presented sufficient guarantee due to an alleged violation of the Argentinian Law

on Navigation and Trade in domestic cabotage (Ministry of Foreign Affairs of Paraguay, 2019).

Delays in the port of Montevideo

In early November 2017, the Paraguayan goods suffered a delay at the port of Montevideo, due to the priority given by the operators of the mentioned port to trans-oceanic ships over the vessels of Paraguay (Infobae, 2017). The operational delay lasted more than three weeks and it affected 15 Paraguayan ships and more than 2.000 containers. It was solved after the complementation of the private operators of the ports and an agreement with the workers (ABC Color, 2017).

This incident was not considered isolated by the Paraguayan shipping companies, as they argued that port congestion was a constant during the year 2017 (ABC Color, 2017) and that implied losses of approximately USD 3 million (ASAMAR, 2017), according to the Paraguayan maritime agents. After this event, an important part of the Paraguayan shiploads in the port of Montevideo, which was approximately 40% of the total operated cargo in the mentioned port (El País, 2019) started a migration back to the port of Buenos Aires. Besides the delays in the Uruguayan port, another factor considered by the Paraguayan shipping companies was the lifting of restrictions by the Argentinian authorities (Agencia Uruguay de Noticias, 2019).

Covid related incidents

In June 2020, authorities of the Province of Jujuy, Argentina, adopted a measure against the transit of foreign trucks through their territory, which affected the transit of Paraguayan goods to Chile, within the context of

the Covid-19 pandemic, as one foreign truck driver was tested positive with the virus. The problem was solved after an intervention of the Government of Paraguay (La Nación, 2020).

In September 2020, some protests in the Argentinian city of Clorinda against the restrictions adopted by the Government of Argentina due to the Covid-19 pandemic originated roads blockades that lasted for days which forced more than 150 Paraguayan refrigerated trucks with meat destined to Chile to divert to another road (ABC Color, 2020), which is longer than the passage through Clorinda. The affected businessman claimed that the event implied delays to perishable food as well as relevant economic overruns due to the necessity to maintain the cold chain with fuel (Campo Agropecuario, 2020). Finally, the incident was solved after negotiations of the pertinent Paraguayan Consulate (ABC Color, 2020).

B. Mechanisms used to resolve the recent disputes

As seen from the details of the several disputes between Paraguay and its neighboring countries related to the transit of goods mentioned in the previous, the nature and development of such disputes differ among them. For instance, the SOMU blockade was originated and maintained due to trade unionist and political reasons, while the issues on pilots and documentation have their roots in the interpretation and application of domestic regulations.

In the same way, the disputes at issue were resolved in different ways, some of which did not even enter within

the scope of the traditional International Law dispute settlement methods.

Indeed, several incidents were resolved after negotiations between Paraguay and the neighboring countries, through different diplomatic channels of the Ministry of Foreign Affairs. According to some academics, negotiation is the principal means of handling all international disputes and, in practice, is employed more frequently than all other methods put together. Moreover, they consider it habitually the only means employed, as it is the first to be tried and is often successful as well as States may believe its advantages to be so great as to avoid the use of other methods. Besides, when another means is employed, negotiation is not displaced but directed towards instrumental issues (Merrills, 2005, p. 2).

Regarding the concept of negotiations, within the context of International Law, the International Court of Justice (ICJ) in the *Georgia v. Russian Federation* provides interesting considerations in determining what constitutes negotiations. In this sense, the ICJ states that the concept in issue is distinct from mere protests or disputations, as it requires “a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party with a view to resolving the dispute”, although the evidence of such attempt to negotiate does not require the reaching of an actual agreement between the disputing parties (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, 2011, para. 157).

As some authors notice, negotiation takes different forms in practice. In this point, bilateral negotiation is directly performed by duly appointed representatives

or delegations of parties to a dispute or through written correspondence. The failure of such forms may give rise to summit diplomacy between heads of State or foreign ministers in order to attempt to break the deadlock. Nowadays negotiations can be conducted in multiple ways due to the development of communication technology (Tanaka, 2018, p. 31). In the case of the disputes indicated in the previous section, the negotiations between Paraguay and the neighboring countries were conducted mainly in the form of written correspondence.

Nevertheless, despite the negotiations, some of the mentioned situations were resolved only after the fulfillment of conditions requested by the transit State (such as the *Madeleine I* and the *Doña Annette* incidents), while others were solved through domestic judicial proceedings in such transit State (i.e. the *Doña Magda* case).

C. Negatives issues on the mechanisms used

An important negative feature of the mechanisms of the disputes employed is that, despite the efforts made by Paraguayan State representatives or private companies, the resolution of such disputes was subordinated entirely to the action or omission of the official or private actors of the neighboring countries. This situation highlights the very scarce capacity of Paraguayan representatives and companies to resolve the disputes by themselves and their obligation to recur to the goodwill of actors of the neighboring countries, which may be narrowed due to internal political tensions.

Other issues, more connected to the existence of the disputes on freedom of transit by themselves rather than the mechanisms employed to resolve them, is the genera-

tion of economic losses and uncertainty for carriers and producers, with the negative consequences that both situations have for the entire economy of Paraguay, which is extremely dependent of the export of primary goods, especially soybeans and meat.

CHAPTER III: AVAILABLE LEGAL MECHANISMS ON INTERNATIONAL LAW ON FREEDOM OF TRANSIT

A. International Legal framework regarding Freedom of Transit of goods

1. 1921 BARCELONA CONVENTION

As mentioned in Chapter I, the Convention and Statute on Freedom of Transit was elaborated in Barcelona in 1921 within the framework of the League of the Nations, towards the implementation of the obligation to make rules to secure and maintain freedom of communications and transit provided by the Covenant of such organization.

In this sense, the 1921 Barcelona Convention consists of a preamble and nine articles on the operation of the treaty, as well as an annex, the Statute on Freedom of Transit (“Barcelona Statute”). The rules regarding freedom of transit are contained in the Statute.

Besides the already transcribed definition of “transit in traffic” provided by the 1921 Barcelona Convention,²⁰ whose core was reflected in later treaties on transit, the instrument contains relevant rules on transit that were also replicated by such treaties.

In this sense, the 1921 Barcelona Convention stipulates that measures taken by States for regulating and forwarding traffic across territory under their sovereignty or authority shall facilitate free transit by rail or waterway on routes in use convenient for international transit.²¹

Equally, the instrument provides a rule of no discrimination regarding the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ow-

20 See cit. 1.

21 Convention and Statute on Freedom of Transit - Statute on Freedom of Transit – Article 2. “Subject to the other provisions of this Statute, the measures taken by Contracting States for regulating and forwarding traffic across territory under their sovereignty or authority shall facilitate free transit by rail or waterway on routes in use convenient for international transit. No distinction shall be made which is based on the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods or of vessels, coaching or goods stock or other means of transport.

In order to ensure the application of the provisions of this Article, Contracting States will allow transit in accordance with the customary conditions and reserves across their territorial waters”.

nership of goods or of vessels, coaching or goods stock or other means of transport.²²

In the same way, the 1921 Barcelona Convention states the rule that traffic in transit shall not be subject to any special dues in respect of transit as well as the pertinent exception of the dues intended solely to defray expenses of supervision and administration entailed by such transit, which must correspond as nearly as possible with the expenses which they are intended to cover and be imposed under conditions of equality. Yet, the instrument allows that in certain routes, the dues in issue may be reduced or even abolished on account of differences in the cost of supervision.²³

Furthermore, article 4 provides that States shall apply reasonable tariffs to transit on routes as regards both their rates and the method of their application and that tariffs shall be so fixed as to facilitate international traffic as much as possible, under a non-discriminatory basis.²⁴

22 Idem.

23 Convention and Statute on Freedom of Transit - Statute on Freedom of Transit – Article 3 – “Traffic in transit shall not be subject to any special dues in respect of transit (including entry and exit). Nevertheless, on such traffic in transit there may be levied dues intended solely to defray expenses of supervision and administration entailed by such transit. The rate of any such dues must correspond as nearly as possible with the expenses which they are intended to cover, and the dues must be imposed under the conditions of equality laid down in the preceding Article, except that on certain routes, such dues may be reduced or even abolished on account of differences in the cost of supervision”.

24 Convention and Statute on Freedom of Transit - Statute on Freedom of Transit – Article 4. “The Contracting States un-

For its part, article 5 of the 1921 Barcelona Convention refers to sovereign issues, as it allows the transit State to reject the transit of goods which importation is prohibited, due reasons of public health, security, and precaution against diseases of animals or plants, as well as to adopt the reasonable precautions to ensure that subjects and objects are really in transit and to prevent the safety of the routs and means of communication being endangered. In the same way, the article states that the instrument does not affect the measures a State “may feel” called upon to take in pursuance of international obligations on particular kinds of articles (drugs, arms, counterfeit products, etc.)²⁵

dertake to apply to traffic in transit on routes operated or administered by the State or under concession, whatever may be the place of departure or destination of the traffic, tariffs which, having regard to the conditions of the traffic and to considerations of commercial competition between routes, are reasonable as regards both their rates and the method of their application. These tariffs shall be so fixed as to facilitate international traffic as much as possible. No charges, facilities or restrictions shall depend, directly or indirectly, on the nationality or ownership of the vessel or other means of transport on which any part of the complete journey has been or is to be accomplished”.

- 25 Convention and Statute on Freedom of Transit - Statute on Freedom of Transit – Article 5. “No Contracting State shall be bound by this Statute to afford transit for passengers whose admission into its territories is forbidden, or for goods of a kind of which the importation is prohibited, either on grounds of public health or security, or as a precaution against diseases of animals or plants.

Each Contracting State shall be entitled to take reasonable precautions to ensure that persons, baggage and goods, particularly goods which are the subject of a monopoly, and also ves-

The instrument contemplates at its article 6 a distinction toward its application with non-Contracting States. It sets the general rule that contracting States are not obliged to grant freedom of transit to non-Contracting States, except when a valid reason is shown by one of another Contracting States on such transit.²⁶

sels, coaching and good stock and other means of transport, are really in transit, as well as to ensure that passengers in transit are in a position to complete their journey, and to prevent the safety of the routes and means of communication being endangered.

Nothing in this Statute shall affect the measures which one of the Contracting States may feel called upon to take in pursuance of general international Conventions to which it is a party, or which may be concluded hereafter, particularly Conventions concluded under the auspices of the League of Nations, relating to the transit, export or import of particular kinds of articles, such as opium or other dangerous drugs, arms or the produce of fisheries, or in pursuance of general Conventions intended to prevent any infringement of industrial, literary or artistic property, or relating to false marks, false indications of origin, or other methods of unfair competition.

Any haulage service established as a monopoly on waterways used for transit must be so organised as not to hinder the transit of vessels”

26 Convention and Statute on Freedom of Transit - Statute on Freedom of Transit – Article 6. “This Statute does not of itself impose on any of the Contracting States a fresh obligation to grant freedom of transit to the nationals and their baggage, or to the flag of a non-Contracting State, nor to the goods, nor to coaching and goods stock or other means of transport coming or entering from, or leaving by, or destined for a non Contracting State, except when a valid reason is shown for such transit by one of the other Contracting States concerned. It is understood that for the purposes of this Article, goods in transit

On the other side, articles 7 and 8 of the 1921 Barcelona Convention deal with “unusual circumstances”. In cases of emergency, a Contracting State may deviate from the granting of freedom of transit²⁷ and in times of war the rights and duties of belligerents and neutrals are not prescribed and the instrument shall continue in force in time of war so far as such rights and duties permit.²⁸

Also, the 1921 Barcelona Convention states that it does not imply the withdrawal of transit facilities agreed or that can be agreed in the future between the States which are greater than those provided for in that instrument.²⁹

under the flag of a Contracting State shall, if no transshipment takes place, benefit by the advantages granted to that flag”.

- 27 Convention and Statute on Freedom of Transit - Statute on Freedom of Transit – Article 7. “The measures of a general or particular character which a Contracting State is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may in exceptional cases, and for as short a period as possible, involve a deviation from the provisions of the above Articles; it being understood that the principle of freedom of transit must be observed to the utmost possible extent”.
- 28 Convention and Statute on Freedom of Transit - Statute on Freedom of Transit – Article 8. “This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit”.
- 29 Convention and Statute on Freedom of Transit - Statute on Freedom of Transit – Article 11. “This Statute does not entail in any way the withdrawal of facilities which are greater than those provided for in the Statute and have been granted, under conditions consistent with its principles, to traffic in

2. 1965 NEW YORK CONVENTION

The Conference of Plenipotentiaries of Transit Trade of Landlocked Countries was held in New York in 1965. This meeting of 58 States, 23 of which were LLS (landlocked States), examined a draft on transit trade of landlocked States which had its origins in an initiative of some Asian landlocked countries during the Ministerial Conference on Economic Cooperation in Asia of the Economic Commission for Asia and the Far East (ECAFE) and was supported as a draft by African States in a UNCTAD meeting. Finally, the New York Transit Trade Conference adopted the Convention on the Transit Trade of Land-locked States, which entered into force on June 9, 1967. (Uprety, 2006, pp. 66, 67, 69 and 71).

The Convention enshrined eight principles, regarding topics such as recognition of the right of each land-locked State of free access to the sea, identical rights, and identical treatment between vessels flying the flag of land-locked countries and vessels flying the flag of coastal States other than the territorial States, and the obligation to afford free and unrestricted transit to land-locked States by all States, based on reciprocity, in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods.³⁰

transit across territory under the sovereignty or authority of a Contracting State. The Statute also entails no prohibitions of such grant of greater facilities in the future”.

30 Convention on Transit Trade of Land-locked States. Preamble. “The States Parties to the present Convention, (...) Reaffirming, the following principles adopted by the United Nations Conference on Trade and Development with the understanding

With relation to the definition of “traffic in transit” the Convention on Transit Trade of Land-locked States indicates that, for such instrument, the term means “the passage of goods including unaccompanied baggage across the territory of a Contracting State between a land-locked State and the sea when the passage is a

that these principles are interrelated and each principle should be construed in the context of the other principles:

Principle I

The recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development.

Principle II

In territorial and on internal waters, vessels flying the flag of land-locked countries should have identical rights and enjoy treatment identical to that enjoyed by vessels flying the flag of coastal States other than the territorial States.

Principle III

In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea. To this end States situated between the sea and a State having no sea-coast shall by common agreement with the latter and in conformity with existing international conventions accord to ships flying the flag of that State treatment equal to that accorded to their own ships or to the ships of any other State as regards access to seaports and the use of such ports.

Principle IV

In order to promote fully the economic development of the land-locked countries, the said countries should be afforded by all States, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regio-

portion of a complete journey which begins or terminates within the territory of that land-locked State and

nal and international trade in all circumstances and for every type of goods.

Goods in transit should not be subject to any customs duty.

Means of transport in transit should not be subject to special taxes or charges higher than those levied for the use of means of transport of the transit country.

Principle V

The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind.

Principle VI

In order to accelerate the evolution of a universal approach to the solution of the special and particular problems of trade and development of land-locked countries in the different geographical areas, the conclusion of regional and other international agreements in this regard should be encouraged by all States.

Principle VII

The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause.

Principle VIII

The principles which govern the right of free access to the sea of the land-locked State shall in no way abrogate existing agreements between two or more contracting parties concerning the problems, nor shall they raise an obstacle as regards the conclusions of such agreements in the future, provided that the latter do not establish a regime which is less favourable than or opposed to the above-mentioned provisions”.

which includes sea transport directly preceding or following such passage”.³¹ This definition is coherent with the trade-based approach of the instrument, which is a clear distinction with the wider perspective of the 1921 Barcelona Convention.

In this sense, the 1965 New York Convention states that freedom of transit shall be granted for traffic in transit and means of transport, that the measures taken by the Contracting States for regulating and forwarding traffic across their territory shall facilitate traffic in transit on routes in use mutually acceptable for transit to the Contracting States concerned, and that no discrimination shall be exercised.³² Moreover, the instrument con-

31 Convention on Transit Trade of Land-locked States. Article 1. “Definitions For the purpose of this Convention, (...) b. the term “traffic in transit” means the passage of goods including unaccompanied baggage across the territory of a Contracting State between a land-locked State and the sea when the passage is a portion of a complete journey which begins or terminates within the territory of that land-locked State and which includes sea transport directly preceding or following such passage. The trans-shipment, warehousing, breaking bulk, and change in the mode of transport of such goods as well as the assembly, disassembly or reassembly of machinery and bulky goods shall not render the passage of goods outside the definition of “traffic in transit” provided that any such operation is undertaken solely for the convenience of transportation.

Nothing, in this paragraph shall be construed as imposing an obligation on any Contracting State to establish or permit the establishment of permanent facilities on its territory for such assembly, disassembly or reassembly”.

32 Convention on Transit Trade of Land-locked States. Article 2. “1. Freedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport.

templates that the rules governing the use of means of transport during the transit shall be established by command agreement among the Contracting States concerned, by multilateral international conventions applicable to such parties³³ and that passage of persons whose movement is necessary for traffic in transit must be authorized within the territory of the Contracting States by them per its laws and regulations.³⁴

Most of the provisions of the Convention derive from the 1921 Barcelona Convention and some of them are identical. However, as Uprety notes, what distinguishes the 1965 New York Convention from the 1921 Barcelo-

Subject to the other provisions of this Convention, the measures taken by Contracting States for regulating and forwarding traffic across their territory shall facilitate traffic in transit on routes in use mutually acceptable for transit to the Contracting States concerned. Consistent with the terms of this Convention, no discrimination shall be exercised which is based on the place of origin, departure, entry, exit or destination or any circumstances relating to the ownership of the goods or the ownership, place of registration or flag of vessels, land vehicles or other means of transport used".

- 33 Convention on Transit Trade of Land-locked States. Article 2. "2. The rules governing the use of means of transport, when they pass across part or the whole of the territory of another Contracting State, shall be established by command agreement among the Contracting States concerned, with due regard to the multilateral international conventions to which these States are parties".
- 34 Convention on Transit Trade of Land-locked States. Article 2. "3. Each Contracting State shall authorize, in accordance with its laws, rules and regulations, the passage across or access to its territory of persons whose movement is necessary for traffic in transit".

na Convention is its specificity, as it deals with LLS access to and from the sea (Uprety, 2006, p. 73). According to this author, this instrument is the first multilateral agreement on the specific problems of transit, although it does not contain any significant innovation, and has two advantages: it shows the enforceable rules for transit rights of landlocked States can be indeed be formulated in the framework of a multilateral convention intended to be universal in scope and it served as a basis for negotiations on the question of the transit of such States in the negotiations of the United Nations Convention on the Law of the Seas (Uprety, 2006, p. 74 and 75).

3. UNCLOS

The United Nations Convention on the Law of the Seas (UNCLOS) is considered, as Treves points it out, the “constitution of the oceans” and it “represents the result of an unprecedented, and so far never replicated, effort at codification and progressive development of international law” (Treves, 2008).

In Section 2 of its Part III, the UNCLOS deals with the “transit passage”. Nonetheless, the right comprehended by this figure, the right of transit passage, differs from the freedom of transit as it applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.³⁵

35 UNCLOS. Article 37. “Scope of this section. This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”.

The UNCLOS addresses the issue of the freedom of transit in its Part X, where it is enshrined together with the right of access of land-locked States to and from the sea.

In this sense, the UNCLOS provides important definitions. Indeed, besides “land-locked State”, “transit State” and “means of transport”, the instrument reflects the definition of “transit in traffic” given by the GATT with the difference that it expands the scope to the transit of persons and not just goods, baggage and means of transport.³⁶

About the freedom of transit within UNCLOS, article 125 is a key provision to understand the scope and effects of such a figure. The mentioned article grants land-locked States the right of access to and from the sea to exercise the rights provided for the Convention (which includes those relating to the freedom of the high seas and the common heritage of mankind). On this point, freedom of transit through the territory of transit States by all means of transport is provided to the exercise of land-locked States, to accomplish the objective of access to and from the sea.³⁷ Therefore, the freedom of transit

36 UNCLOS. Article 124. “Use of terms. 1. For the purposes of this Convention: (c) “traffic in transit” means transit of persons, baggage, goods and means of transport across the territory of one or more transit States, when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk or change in the mode of transport, is only a portion of a complete journey which begins or terminates within the territory of the land-locked State”.

37 UNCLOS. Article 125. “Right of access to and from the sea and freedom of transit. 1. Land-locked States shall have the right of access to and from the sea for the purpose of exerci-

within UNCLOS can be seen as a mean for land-locked States towards the end of their right of access to the sea.

Moreover, art. 125 states that 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. It also grants transit states the right to take all measures necessary to ensure that the rights and facilities provided for land-locked States shall in no way infringe their legitimate interests.³⁸

In the same way, the UNCLOS considers the principle provided by the GATT that traffic in transit shall not be subject to charges other than the levied for specific services rendered in connection with such traffic. This rule is expanded in UNCLOS to means of transport in transit and other facilities provided for and used by land-locked States.³⁹ Equally, the UNCLOS extends the principle

sing the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom”.

38 UNCLOS. Article 125. “Right of access to and from the sea and freedom of transit: (...) 2. 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. 3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests”.

39 UNCLOS. Article 127. “Customs duties, taxes and other charges. 1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific

regarding the duty of transit States to adopt all appropriate measures in order to avoid delays, as it considers also “other difficulties of a technical nature in traffic in transit”, and that in cases of the existence of such delays or difficulties, the competent authorities of the transit States and land-locked States concerned shall cooperate towards their expeditious elimination.⁴⁰

On the other side, differently as contemplated within the GATT framework, the UNCLOS excludes the application of the most-favoured-nation clause to such instrument and special agreements on the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States.⁴¹ However, the instrument

services rendered in connection with such traffic. 2. Means of transport in transit and other facilities provided for and used by land-locked States shall not be subject to taxes or charges higher than those levied for the use of means of transport of the transit State”.

40 UNCLOS. Article 130. “Measures to avoid or eliminate delays or other difficulties of a technical nature in traffic in transit. Transit States shall take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit. 2. Should such delays or difficulties occur, the competent authorities of the transit States and land-locked States concerned shall cooperate towards their expeditious elimination”.

41 UNCLOS. Article 126. “Exclusion of application of the most-favoured-nation clause. The provisions of this Convention, as well as special agreements relating to the exercise of the right of access to and from the sea, establishing rights and facilities on account of the special geographical position of land-locked States, are excluded from the application of the most-favoured-nation clause”.

sets the principle of equal treatment in maritime ports between ships of land-locked States and other States.⁴²

Furthermore, the UNCLOS includes provisions regarding the possibility of agreements on free zones and other customs facilities for the transit on traffic to and from land-locked States,⁴³ as well as on cooperation in the construction and improvement of means of transport to give effect to such transit.⁴⁴

Lastly, the UNCLOS express that it does not imply the withdrawal of transit facilities agreed or that can be agreed in the future between the States which are greater than those provided for in that instrument.⁴⁵

42 UNCLOS. Article 131. "Equal treatment in maritime port. Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports. Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports".

43 UNCLOS. Article 126. "Free zones and other customs facilities. For the convenience of traffic in transit, free zones or other customs facilities may be provided at the ports of entry and exit in the transit States, by agreement between those States and the land-locked States".

44 UNCLOS. Article 129. "Cooperation in the construction and improvement of means of transport. Where there are no means of transport in transit States to give effect to the freedom of transit or where the existing means, including the port installations and equipment, are inadequate in any respect, the transit States and land-locked States concerned may cooperate in constructing or improving them".

45 UNCLOS Article 132. "Grant of greater transit facilities This Convention does not entail in any way the withdrawal of transit facilities which are greater than those provided for in this Convention and which are agreed between States Parties to

4. WTO

i. GATT

The General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO) provides for freedom of transit in its Article V.

The first paragraph contains a definition of “traffic in transit”, as that term refers to the traffic of goods, including baggage, and means of transport across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes.⁴⁶

The second paragraph grants the freedom of transit for the traffic in transit and links it with the condition that the transit shall be made through routes most convenient for international transit. Moreover, the provision includes a non-discrimination clause regarding the flag of vessels, the place of origin, departure, entry, exit, des-

this Convention or granted by a State Party. This Convention also does not preclude such grant of greater facilities in the future”.

46 GATT: Art. V. “Freedom of Transit. 1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article ‘traffic in transit’”.

tinuation or on any circumstances related to the ownership of goods or the means of transport.⁴⁷

The third paragraph contemplates the right of the contracting parties to require that traffic in transit through its territory be entered at the proper custom house. Nevertheless, it also regulates that, excluding cases of failure to comply with applicable customs laws and regulation, such traffic shall not be subject to any unnecessary delays or restrictions as well as shall be exempt from customs and transit duties or other charges imposed regarding transit, except from those charges related to transportation or administrative expenses entailed by transit or with the cost of services rendered.⁴⁸ Furthermore, the following paragraph provides for reasonability on the imposition of the mentioned charges and regula-

47 GATT: Art. V:2. "There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport".

48 GATT: Art. V:3. "Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered".

tions on traffic in transit, considering also the conditions of the traffic.⁴⁹ For its part, the fifth paragraph implies the application of the principle of most favored nation, one of the most relevant principles within the WTO framework, to the specific context of traffic in transit.⁵⁰

On the other side, the sixth paragraph obligates contracting parties to give goods that have been in transit through the territory of the other contracting party a treatment no less favourable than that in case that such transit in traffic would not occur. Yet, the provision upholds the rights of the contracting parties regarding requirements of direct consignment existing on the date of the GATT.⁵¹

49 GATT: Art. V:4. “All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic”.

50 GATT: Art. V:5. “With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country”.

51 GATT: Art. V:6. “Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty

The last paragraph of the article excludes the application of its provisions to the operation of aircraft in transit but maintained that application to air transit of goods.⁵²

ii. TFA

The institution of freedom of transit and the concepts derived from it have importance within the Trade Facilitation Agreement (TFA). As results of the reading of its preamble,⁵³ this instrument is viewed with the purpose of clarifying and improving relevant aspects of Articles V, VIII⁵⁴ and X⁵⁵ of the GATT to further expedi-

or has relation to the contracting party's prescribed method of valuation for duty purposes".

- 52 GATT: Art. V:7. "The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage)".
- 53 Agreement on Trade Facilitation. Preamble. "Member (...) Desiring to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit".
- 54 Article VIII of the GATT deals with "Fees and Formalities connected with Importation and Exportation" and contains the general rule that all fees and charges of whatever character related to importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent indirect protection to domestic products or taxation of imports or exports for fiscal purposes.
- 55 Article X of the GATT refers to "Publication and Administration of Trade Regulations" and provides to the contracting parties the obligation to publish promptly and adequately its effective laws, regulations, judicial decisions, and administrative rulings of general application related to trade issues.

ting the movement, release and clearance of goods, including goods in transit.

In this sense, the TFA contains several rules and principles for contracting parties regarding issues like publication and availability of information, procedures, and cooperation on trade among them. Within the covered subjects is the transit of goods, as a lot of the provisions of the instrument refer to that figure.

For instance, the obligation established in paragraph 1.1 of Article 1 of the TFA of publishing promptly information in a non-discriminatory and easily accessible manner in order to enable governments, traders, and other interested parties to become acquainted with them implies procedures for transit (including port, airport, and other entry-point procedures), required forms and documents; fees and charges imposed by or for governmental agencies on or in connection with transit; restrictions or prohibitions on transit; penalty provisions for breaches of transit formalities; and agreements or parts thereof with any country or countries relating to transit.

A key element of the TFA is Article 11, which is dedicated to the freedom of transit. The first paragraph of this article provides that regulations or formalities related to traffic in transit imposed by a Member shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a reasonably available less trade-restrictive manner, nor be applied in a manner that would constitute a disguised restriction on traffic in transit.⁵⁶

⁵⁶ TFA. Article 11:1. "Any regulations or formalities in connection with traffic in transit imposed by a Member shall not be:

The second paragraph of Article 11 of TFA is linked with the third paragraph of Article V of the GATT because it provides for charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered as the only exception upon collection of any fees or charges imposed in respect of transit.⁵⁷ Similarly, the fourth paragraph of Article 11 of TFA refers to the obligation of the contracting parties to give goods that have been in transit through the territory of another contracting party a treatment no less favorable than that in case that such transit in traffic would not occur, which is provided by the GATT in the sixth paragraph of its Article V.⁵⁸

The third paragraph of Article 11 of TFA forbids members to seek, take, or maintain any voluntary restraints or any other similar measures on traffic in transit. Such rule is without prejudice to existing and future national regulations, bilateral or multilateral arran-

(a) maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a reasonably available less trade-restrictive manner; (b) applied in a manner that would constitute a disguised restriction on traffic in transit”.

57 TFA. Article 11:2. “Traffic in transit shall not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered”.

58 TFA. Article 11:4. “Each Member shall accord to products which will be in transit through the territory of any other Member treatment no less favourable than that which would be accorded to such products if they were being transported from their place of origin to their destination without going through the territory of such other Member”.

gements related to regulating transport whenever they are in accordance with WTO rules.⁵⁹

The rest of Article 11 of TFA involves rules and procedures regarding freedom of transit, especially about practical aspects of that freedom, which are not expressly contemplated by the GATT. Some of these provisions are relevant procedural provisions, such as the rule indicated by the sixth paragraph that formalities, documentation requirements, and customs controls related to traffic in transit shall not be more burdensome than necessary for the identification of the goods and to ensure fulfillment of transit requirements.⁶⁰

Furthermore, the Article incorporates other obligations to contracting parties where the traffic in transit is made. For example, goods in transit shall not be subject to any customs charges nor unnecessary delays or restrictions until they conclude their transit at the point of destination within the member's territory,⁶¹ nor shall

59 TFA. Article 11:3. "Members shall not seek, take, or maintain any voluntary restraints or any other similar measures on traffic in transit. This is without prejudice to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport, consistent with WTO rules".

60 TFA. Article 11:6. "Formalities, documentation requirements, and customs controls in connection with traffic in transit shall not be more burdensome than necessary to: (a) identify the goods; and (b) ensure fulfilment of transit requirements".

61 TFA. Article 11:7. "Once goods have been put under a transit procedure and have been authorized to proceed from the point of origination in a Member's territory, they will not be subject to any customs charges nor unnecessary delays or restrictions until they conclude their transit at the point of destination within the Member's territory".

be subject to the application of technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade.⁶² In the same way, the mentioned members are obligated to allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods,⁶³ as well as to terminate the transit operation if transit requirements have been met, through its customs office where the goods in transits exit its territory once they reach there.⁶⁴

In the same line, the TFA allows to member the possibility to require a guarantee for traffic in transit, aimed to ensure that requirements arising from such traffic in transit are fulfilled⁶⁵ and that must discharged without delay as soon as such member has determined that those

62 TFA. Article 11:8. “Members shall not apply technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade to goods in transit”.

63 TFA. Article 11:9. “Members shall allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods”.

64 TFA. Article 11:10. “Once traffic in transit has reached the customs office where it exits the territory of a Member, that office shall promptly terminate the transit operation if transit requirements have been met”.

65 TFA. Article 11:11. “Where a Member requires a guarantee in the form of a surety, deposit or other appropriate monetary or non-monetary instrument for traffic in transit, such guarantee shall be limited to ensuring that requirements arising from such traffic in transit are fulfilled”.

requirement were satisfied.⁶⁶ The instrument also compels members to allow comprehensive guarantees⁶⁷ as well as to make publicly available the relevant information regarding the guarantee.⁶⁸ The fifteenth paragraph, for its part, states that in cases when compliance with customs regulations cannot be ensured through guarantees or in circumstances of high risks, the member may require the use of customs convoys or customs escorts for traffic in transit.⁶⁹

Lastly, Article 11 compels members to seek cooperation and coordination among them to enhance freedom of transit⁷⁰ as well as to appoint a national transit coor-

66 TFA. Article 11:12. "Once the Member has determined that its transit requirements have been satisfied, the guarantee shall be discharged without delay".

67 TFA. Article 11:13. "Each Member shall, in a manner consistent with its laws and regulations, allow comprehensive guarantees which include multiple transactions for same operators or renewal of guarantees without discharge for subsequent consignments".

68 TFA. Article 11:14. "Each Member shall make publicly available the relevant information it uses to set the guarantee, including single transaction and, where applicable, multiple transaction guarantee".

69 TFA. Article 11:15. "Each Member may require the use of customs convoys or customs escorts for traffic in transit only in circumstances presenting high risks or when compliance with customs laws and regulations cannot be ensured through the use of guarantees. General rules applicable to customs convoys or customs escorts shall be published in accordance with Article 1".

70 TFA. Article 11:16. "Members shall endeavour to cooperate and coordinate with one another with a view to enhancing freedom of transit. Such cooperation and coordination may include, but

dinator to address all enquiries and proposals by other members on transit operations.⁷¹

5. ALADI

The Treaty of Montevideo of 1980 established the Latin American Integration Association (ALADI, in its Spanish acronym). It is an organization that implies a process of integration towards the promotion of harmonic and balanced social and economic development of the region, which has as a long-term objective the gradual and progressive establishment of a common Latin American market.⁷²

is not limited to, an understanding on: (a) charges; (b) formalities and legal requirements; and (c) the practical operation of transit regimes”.

71 TFA. Article 11:17. “Each Member shall endeavour to appoint a national transit coordinator to which all enquiries and proposals by other Members relating to the good functioning of transit operations can be addressed”.

72 1980 Montevideo Treaty. Article 1. “Through this treaty, the Contracting Parties prosecute the process of integration geared to promote the harmonic and balanced social and economic development of the region and, to that effect, they institute the Latin American Integration Association (hereinafter, the “Association”), which is based in the city of Montevideo, Oriental Republic of Uruguay. This process will have as a long-term objective the establishment, gradually and progressively, of a common Latin American market”. Original text: Por el presente Tratado las Partes Contratantes prosiguen el proceso de integración encaminado a promover el desarrollo económico - social, armónico y equilibrado de la región y, para ese efecto instituyen la Asociación Latinoamericana de Integración (en adelante denominada “Asociación”), cuya sede es la ciudad de Montevideo, República Oriental del Uruguay. Dicho proceso

In this sense, the mentioned instrument states in its article 51 that imported or exported goods of member countries shall enjoy freedom of transit within the territory of the others members and that they will be subject exclusively to the payment of fees that are normally applied for the provision of services.⁷³

i. Paraguay - Paraná Waterway Agreement

In 1992, the countries of the Plata Basin, Argentina, Bolivia, Brazil, Paraguay, and Uruguay signed the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway, an instrument also known as the Treaty of Santa Cruz de la Sierra, due to the name of the Bolivian city where it was subscribed. This agreement, as well as its seven additional protocols and its fourteen regulations, are framed under the 1980 Treaty of Montevideo (Acuerdo de la Hidrovía Paraguay - Paraná [Paraguay - Paraná Waterway Agreement], 1992).

In Article 9, the 1992 Treaty of Santa Cruz de la Sierra recognizes freedom of transit of vessels, goods, and people of the Signatory States through the waterway Paraguay - Paraná, and allowing just fees and charges for services rendered. Equally, the provision recognizes also the freedom of transference of shipment, unloading, transshipment, and deposit in all the facilities pre-

tendrá como objetivo a largo plazo el establecimiento, en forma gradual y progresiva, de un mercado común latinoamericano (translation by the author).

73 1980 Montevideo Treaty. Article 53. Original text: *Los productos importados o exportados por un país miembro gozarán de libertad de tránsito dentro del territorio de los demás países miembros y estarán sujetos exclusivamente al pago de las tasas normalmente aplicables a las prestaciones de servicios* (translation by the author).

pared to such effect, forbidding any kind of discrimination due to the place of origin, the points of departure, entry, exit, and destination or on any circumstances related to the ownership of goods and vessels or the nationality of the people.⁷⁴

Moreover, the First Protocol of the Santa Cruz de la Sierra Agreement, which deals with custom matters, applies also to the transport of goods between the Signatories States that goes or come from third countries that are not Parties of the instrument,⁷⁵ but it also gives the term “transit” a broader definition than other agreements, such as the GATT, which specifies it to a passage through a territory that is not origin nor destiny of the goods in issue. In this sense, the First Protocol defines “international custom transit” as “the regimen under which the goods under custom control are transported

74 Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway. Original text. Artículo 9. *Se reconoce la libertad de tránsito por la Hidrovía de las embarcaciones, bienes y personas de los países signatarios y sólo podrá cobrarse la tasa retributiva de los servicios efectivamente prestados a los mismos. Igualmente se reconoce entre los países signatarios, la libertad de transferencia de carga, alije, transbordo y depósito de mercancías en todas las instalaciones habilitadas a dichos efectos, no pudiéndose realizar discriminación alguna a causa del origen de la carga de los puntos de partida, de entrada, de salida o de destino o de cualquier circunstancia relativa a la propiedad de las mercancías, de las embarcaciones o de la nacionalidad de las personas* (translation by the author).

75 First Protocol of the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway. Original text: “Artículo 2. (...) Los términos de este Protocolo son aplicables al transporte de mercancías entre los países signatarios y al proveniente o destinado a terceros países que no sean parte en el mismo” (translation by the author).

from a custom house in the same operation to another through one or more national borders”.⁷⁶

Nevertheless, the First Protocol adopts the principle of “fees for rendered services only” contemplated in the Santa Cruz de la Sierra Agreement, as it indicates that goods transported under its application shall not be subject to required charges to export or import during the transit operation, except de payment of fees for rendered services.⁷⁷ Furthermore, the mentioned instrument contains provisions regarding technical conditions required for means of transport, custom seals, declarations on goods and liability, guarantees, and custom formalities.

ii. ATIT

On January 1, 1990, the States members signed the Agreement on International Land Transport (ATIT, in its Spanish acronym), which is applied to the international land transport between the signatory countries, both in

76 First Protocol of the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway. Original text: “Artículo 1. A los fines del presente Protocolo, se entiende por: Tránsito aduanero internacional: Régimen bajo el cual las mercancías sujetas a control aduanero son transportadas de un recinto aduanero a otro en una misma operación, en el curso de la cual se cruzan una o varias fronteras” (translation by the author).

77 First Protocol of the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway. Original text: “Artículo 4 - Las mercancías transportadas en tránsito aduanero internacional al amparo del presente Protocolo, no estarán sujetas al pago de gravámenes a la importación o a la exportación eventualmente exigibles mientras dure la operación de tránsito, con excepción del pago de tasas por servicios efectivamente prestados” (translation by the author).

direct transport or in transit to a third country.⁷⁸ As happens with the Paraguay – Paraná Waterway Agreement, the ATIT is framed within the 1980 Treaty of Montevideo (ALADI, n.d.-d).

In this sense, the ATIT contains several provisions in order to make operational the transit of land transport, like the that each signatory State will grant the original and complementary permits to carry out the transport bilaterally or in transit within the limits of its territory, according to requirements, terms of validity and conditions indicated by the instrument.⁷⁹

6. MERCOSUR

The “Southern Common Market” (MERCOSUR, in its Spanish acronym) is an integration process established by the Treaty of Asunción of 1991 between Argentina, Brazil, Paraguay, and Uruguay. Venezuela joined the bloc in 2013 but was later suspended in 2016.

According to the mentioned Treaty, one of the objectives of the common market established implies the free movement of goods, services, and productive factors between countries, through the elimination of customs

78 ATIT. Article 1. Original text: “Los términos de este Acuerdo se aplicarán al transporte internacional terrestre entre los países signatarios, tanto en transporte directo de un país a otro como en tránsito a un tercer país” (translation by the author).

79 ATIT. Article 21. Original text: “Cada país signatario otorgará los permisos originarios y complementarios para la realización del transporte bilateral o en tránsito dentro de los límites de su territorio. Las exigencias, términos de validez y condiciones de estos permisos serán los que se indican en las disposiciones del presente Acuerdo”. (translation by the author).

duties and non-tariff restrictions on the movement of goods and any other measure to the same effect.⁸⁰

Decision CMC N° 19/11

Although the freedom of transit was not expressly considered in the foundation instruments of MERCOSUR, in 2011 the “Council of the Common Market”, one of the bodies of the bloc with decision-making capacities, issued the Decision CMC N° 19/11, entitled “Freedom of Transit”. This decision was the result of the interest of Paraguay towards a proposal regarding the transit of goods, with special consideration to LLS (Interamerican Bank of Development, 2011, p. 91).⁸¹

In its considerations, the Decision CMC N° 19/11 refers to the necessity of generating common instruments that grants the smooth flow of trade due to the recognition made to freedom of transit within the framework of the ALADI, as well as the special attention that the treatment of such figure, particularly for arti-

80 Article 1 of the Treaty of Asuncion. Original text: (...) *Este Mercado Común implica: La libre circulación de bienes, servicios y factores productivos entre los países, a través, entre otros, de la eliminación de los derechos aduaneros y restricciones no arancelarias a la circulación de mercaderías y de cualquier otra medida equivalente...* (translation by the author).

81 Original text: *En el marco de la reunión de Coordinadores Nacionales del GMC celebrada en febrero de 2011, Paraguay adelantó su interés en avanzar en una propuesta en relación con el libre tránsito de bienes, con especial consideración para los países sin litoral marítimo.* (translation by the author).

cle V of GATT, has received since the negotiations inside the WTO.⁸²

The decision in issue indicates that goods, as well as the Member States fluvial and land means of transport, will enjoy the freedom of transit within the territory of the other Member States, in accordance with national legislation and without prejudice of the article 50 of the Montevideo Treaty of 1980.⁸³⁸⁴ The rule excludes its application on the maritime and air transports.⁸⁵

The second article of the Decision CMC N° 19/11 contains a similar, yet more simplified, definition of “transit” provided in the GATT, in the sense that is considered so the goods and means of land and fluvial transport through the territory of a Member State, when the passage through such territory is only a portion of a complete journey beginning and terminating beyond

82 MERCOSUR Decision CMC N° 19/11. Original text: *LIBERTAD DE TRÁNSITO (...) CONSIDERANDO: Que en el marco de la ALADI se ha reconocido la libertad de tránsito y que ello conlleva la necesidad de generar instrumentos comunes que garanticen la fluidez del comercio (...) Que el tratamiento de la temática de la libertad de tránsito, en particular lo relativo al artículo V del GATT, ha recibido especial atención a partir de las negociaciones en el marco de la Organización Mundial del Comercio* (translation by the author).

83 MERCOSUR Decision CMC N° 19/11. Article 1 (translation by the author).

84 Article 50 of the 1980 Montevideo Treaty deals with the exceptions of the application of the instrument in circumstances such as the protection of public morality and the application of security laws and regulations.

85 MERCOSUR Decision CMC N° 19/11. Article 8 (translation by the author).

the frontier of the contracting party across whose territory the traffic passes. Thus, “transit in traffic” is considered such type of transit.⁸⁶

Between its Articles 3 and 7, the Decision CMC N° 19/11 contemplates relevant substantive rules regarding freedom of transit. The first sets that no distinction shall be made based on the flag of the fluvial vessels, the place of origin, the points of departure, entry, exit or destination or on any circumstances related to the ownership of goods or the means of land and fluvial transport.⁸⁷ This disposition is based on the second paragraph of Article V of the GATT.

Equally, Article 4 of the Decision CMC N° 19/11 contemplates the right of the contracting parties to require that traffic in transit through its territory be entered at the proper custom house, as the first sentence of the third paragraph of Article V of the GATT contemplates, but it also expresses that such traffic will be subject to the penalties for inobservance of applicable custom laws and regulations.⁸⁸

For its part, Article 5 states that the Member States will give to traffic in transit from the territory of other Member States or destined to it a treatment non less favorable, in terms of cargos, regulations, and formalities related to transit that the one granted to the traffic of

86 MERCOSUR Decision CMC N° 19/11. Article 2 (translation by the author).

87 MERCOSUR Decision CMC N° 19/11. Article 3 (translation by the author).

88 MERCOSUR Decision CMC N° 19/11. Article 4 (translation by the author).

merchandises from a non-MERCOSUR State or destined to it.⁸⁹

On the other hand, Decision CMC N° 19/11 on its Article 6 declares that it does not exempt Member States from the application of other agreements and instruments between them or concerning third States. It mentions, in that sense, the instruments within the framework of WTO, ALADI, ATIT, and the Paraguay-Paraná Waterway Agreement.⁹⁰

Moreover, the decision included a particularity regarding the fluvial vessels, as it mentions that the legislations related to cabotage and, whereas relevant, the disposals of the State Member of the flag of such vessels, shall be contemplated.⁹¹

In its last article, the Decision CMC N° 19/11 states that it had to be incorporated into the legal order of the Member States before 2012.⁹² This provision responds to the intergovernmental character of MERCOSUR and its legal and institutional nature. Indeed, Article 2 of the Protocol of Ouro Preto of 1994, the instrument that establishes the institutional structure of the bloc, indicates that the Council of the Common Market is one of

89 MERCOSUR Decision CMC N° 19/11. Article 5 (translation by the author).

90 MERCOSUR Decision CMC N° 19/11. Article 6 (translation by the author).

91 MERCOSUR Decision CMC N° 19/11. Article 7 (translation by the author).

92 MERCOSUR Decision CMC N° 19/11. Article 9 (translation by the author).

the three “bodies with decision-making capacity, of intergovernmental nature” of MERCOSUR.⁹³

Furthermore, the Protocol of Ouro Preto contemplates that Member States shall adopt the necessary measures to incorporate the rules deriving from the MERCOSUR bodies with decision-making capacity to its national legislation.⁹⁴ At the same time, the instrument points that the mentioned rules shall have obligational character and that they shall be incorporated into national legislations, when necessary, through the procedures contemplated in the legal order of each Member State.⁹⁵

These provisions underline the character of MERCOSUR as an intergovernmental organization. Its founders insisted that all decisions would have to be made through a process that exclusively involved national officials, with unanimous consent as the only decision rule, and as there is neither community law nor direct effect, all significant decisions have to be transposed into the domestic legislation of every member country to take effect (Malamud, 2010, p. 26).

From the consideration of the requirement of incorporation into the domestic legislation of the Member States disposed by the Decision CMC N° 19/11 and the Protocol of Ouro Preto, as well as the fact that the mentioned rule has not yet been incorporated by any of the Member States, it results that the decision in issue is not in force within the MERCOSUR legal framework

93 Protocol of Ouro Preto. Article 2 (translation by the author).

94 Protocol of Ouro Preto. Article 40 (translation by the author).

95 Protocol of Ouro Preto. Article 42 (translation by the author).

and thus has not been referred yet by the dispute settlement system of the organization.

As a conclusion of the previous paragraphs, it can be argued that the figure of freedom of transit, as it is conceived within general International Law and in organizations like WTO or ALADI, does not have a solid consideration at the MERCOSUR legal system, at least in the manner that such figure is considered in the mentioned legal systems. Nonetheless, it is also important to indicate that, as all State Members of MERCOSUR are parties in such legal systems, their provisions are applicable to them.

B. Mechanisms of dispute settlement in International Law in the international legal framework regarding Freedom of Transit

1. INTERNATIONAL LAW

The mechanisms or means of settlement of disputes are an important subject in International Law. In this sense, such mechanisms can be found as tracking down the origins of International Law, since the origins of the existence of political organizations of populations there has been conflicts as well as pacific and non-pacific means applied in order to solve such conflicts.⁹⁶ According to Collier and Lowe, disputes or, more strictly, the conflicts

96 A clear example of dispute settlement in that era can be found in the Treaty of Kadesh, signed in 1258 BCE between the Egyptian pharaoh Ramses II and the Hittite king, Hattusilis III after the Battle of Kadesh, which ended a war between the New Kingdom of Egypt and the Hittite Empire (Turner, 2010).

from which they emerge, are not wholly undesirable but have certain valuable characteristics and the law has the proper function of managing rather than suppressing or resolving, such conflict (Collier & Lowe, 2000, p. 2).

From those uncertain historical origins to more precise roots in the eighteenth and nineteenth centuries, a mechanism of State-to-State dispute settlement called arbitration grew. Finally, the efforts resulted in the establishment of the Permanent Court of Arbitration (PCA) by the Hague Convention of 1899 as amended in 1907. Some authors mention that these instruments set out the foundation for more formal inter-state adjudication, the PCA and the International Court of Justice (ICJ) (Kidane, 2017, p. 23). Furthermore, by 1945, the relevance of the pacific mechanisms to resolve disputes in International Law, and especially the arbitration, has developed to the point that the Charter of United Nations, approved that year, provided the principle of the obligation of the member States to seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice, to resolve disputes which may endanger the maintenance of international peace and security. Even more, the Charter established the ICJ as the principal judicial organ of the United Nations and provides for a Statute based in the Statute of the Permanent Court of International Justice.

Nonetheless, as Cançado points out, a fundamental and unresolved problem since the establishment of the PCA related to the peaceful settlement of international disputes remains the question of the compulsory jurisdiction, as in one hand there is a general principle of the duty of member States of peaceful settlement of disputes which may put at a risk international peace, while

on the other hand, such duty coexists with the prerogative of the choice left to the parties on a dispute of adoption of one of the means of peaceful settlement of disputes (Cançado Trindade, 2004, p. 3).

However, the establishment of both the PCA and the ICJ, as well as of its predecessor, the Permanent Court of Justice, have been milestones in the development towards consolidating alternatives of international adjudication in the framework of the pacific resolution of international disputes. Indeed, the 1899 Hague Convention established the “Permanent Court of Arbitration”, which is a list of arbitrators, and created a bureau with premises, library, and staff, which still exists to facilitate arbitration and other forms of peaceful settlement. After a period of neglect, the relevant role of such institution has recently been giving renewed attention (Merrills, 2005, p. 93).

For its side, the International Court of Justice had an active role since its beginnings, as between 22 May 1947 and 11 November 2019, 178 cases were entered in the General list of cases, although some of them were discontinued or are still in progress (International Court of Justice, 2021). The jurisdiction of the mentioned court is provided by Article 36 of its Statute, which states that such jurisdiction “comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force”.

Regarding the 1921 Barcelona Convention, this instrument provides in its article 13 that any dispute referred to the interpretation or application of the Statute, which is not settled directly between the parties themselves, shall be brought before the Permanent Court of

International Justice, unless, under a special agreement or a general arbitration provision, steps are taken for the settlement of the dispute by arbitration or some other means.⁹⁷ On the other side, the 1965 New York Convention provides in its Article 16 that disputes on the interpretation of application of such instrument which is not settled by negotiation or by other peaceful means of settlement within a period of nine months shall, at the request of either party, be settled by an arbitration mechanism detailed in the mentioned article.⁹⁸

97 Convention and Statute on Freedom of Transit. Statute on Freedom of Transit. Article 13. "Any dispute which may arise as to the interpretation or application of this Statute which is not settled directly between the parties themselves shall be brought before the Permanent Court of International Justice, unless, under a special agreement or a general arbitration provision, steps are taken for the settlement of the dispute by arbitration or some other means.

Proceedings are opened in the manner laid down in Article 40 of the Statute of the Permanent Court of International Justice.

In order to settle such disputes, however, in a friendly way as far as possible, the Contracting States undertake, before resorting to any judicial proceedings and without prejudice to the powers and right of action of the Council and of the Assembly, to submit such disputes for an opinion to any body established by the League of Nations as the advisory and technical organisation of the Members of the League in matters of communications and transit. In urgent cases a preliminary opinion may recommend temporary measures intended in particular to restore the facilities for freedom of transit which existed before the act or occurrence which gave rise to, the dispute".

98 Convention on Transit Trade of Land-locked States. Article 16. "Settlement of disputes.

2. UNCLOS

The dispute settlement provisions under the United Nations Convention on the Law of the Seas are scattered throughout the instrument, but the most relevant rules and principles on the matter are in its Part XV, which is divided in three sections: general provisions, compulsory procedures entailing binding decisions, and limitations and exceptions to the applicability of such compulsory procedures. Other provisions are found in Part XI, which deals with seabed mining activities, and in five annexes to the Convention (Karaman, 2012, p. 6).

1. Any dispute which may arise with respect to the interpretation of application of the provisions of this Convention which is not settled by negotiation or by other peaceful means of settlement within a period of nine months shall, at the request of either party, be settled by arbitration. The arbitration commission shall be composed of three members. Each party to the dispute shall appoint one member to the commission, while the third member, who shall be the Chairman, shall be chosen in common agreement between the parties. If the parties fail to agree on the designation of the third member within a period of three months, the third member shall be appointed by the President of the International Court of Justice. In case any of the parties fail to make an appointment within a period of three months the President of the International Court of Justice shall fill the remaining vacancy or vacancies.

2. The Arbitration commission shall decide on the matter placed before it by simple majority and its decisions shall be binding on the parties.

3. The Arbitration commission or other international bodies charged with settlements of disputes under this Convention shall inform, through the Secretary-General of the United Nations, the other Contracting States of the existence and nature of disputes and of the terms of their settlements”.

Regarding Part XV, it is considered a complex dispute settlement system that implies both traditional consent-based processes as well as mandatory procedures (Klein, 2004, p. 29) The first principle of the UNCLOS is peaceful settlement with free choice of means. Regarding the compulsory procedures entitling binding decisions, the mentioned principle takes form as a principle of a choice of methods of binding settlement. In this sense, the UNCLOS provides for States to make a written declaration accepting that disputes may be referred to one or more of the following tribunals: a new “International Tribunal for the Law of the Sea” (ITLOS), the International Court of Justice, an arbitral tribunal or an especial arbitral tribunal, with both forms of arbitral tribunal to be constituted as indicated by the UNCLOS. According to article 287 of that instrument, when both parties of a dispute have accepted the same procedure, that mechanism is to be used, unless the parties otherwise agree. On the other hand, when they have accepted different procedures or one party has not accepted any procedure at all, the dispute may be referred to arbitration. These provisions are considered a neat solution to the problem of choice of forum and, subject to some aspects on interpretation and application of the UNCLOS, can be said to establish a useful and flexible system of compulsory jurisdiction (Merrills, 2005, p. 186).

The issue of the jurisdiction of the UNCLOS dispute settlement mechanism is indicated in its article 288, which express the following (emphasis added):

1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention

which is submitted to it in accordance with this Part.

2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.
3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.
4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Moreover, the UNCLOS dispute settlement contains several exceptions and limitations on the application of its compulsory jurisdiction, but they are primarily related to the exercise of the traditional freedoms of the high seas in the Exclusive Economic Zone and on the continental shelf (Klein, 2004, p. 121). In this sense, nor freedom of transit nor duties and obligations of transit States and LLS are contemplated within the exceptions and limitations provided by such instrument.

Therefore, taking into account that the freedom of transit is contemplated and regulated in Part X of the UNCLOS along with the right of access of land-locked States to and from the sea, any dispute concerning the interpretation or application of the freedom of transit as provided in such Part X may be referred to the International Tribunal for the Law of the Sea, the Interna-

tional Court of Justice, an arbitral tribunal, or a special arbitral tribunal.

Nonetheless, with regard to the special arbitral tribunal, the disputes under such mechanism must be related to fisheries, protection, and preservation of the marine environment, marine scientific research, or navigation, including pollution from vessels and by dumping.⁹⁹ As result, for a dispute on freedom of transit of goods to be resolved under the special arbitration mechanism of the UNCLOS, such dispute must be linked with any of the mentioned situations.

3. WTO

The rules governing dispute settlement within the World Trade Organization are, in large part, established in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This instrument is found as Annex 2 of the WTO Agreement of 1994 and it builds on rules, procedures, and practices developed over almost half a century under the GATT of 1947 (World Trade Organization, 2017, p. 4).

99 UNCLOS – Annex VIII. Special Arbitration - Article 1. “Institution of proceedings – Subject to Part XV, any party to a dispute concerning the interpretation or application of the articles of this Convention relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping, may submit the dispute to the special arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based”.

For the scope and application of the DSU, the first paragraph of its Article 1 states as follows:

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the “covered agreements”). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the “WTO Agreement”) and of this Understanding taken in isolation or in combination with any other covered agreement.

In *Guatemala – Cement I*, the Appellate Body interpreted the mentioned provision, arguing that the DSU is a coherent system of rules and procedures for dispute settlement which applies to “disputes brought pursuant to the consultation and dispute settlement provisions of” the covered agreements (Guatemala - Anti-dumping Investigation regarding Portland cement from Mexico, 1998, para. 64).

Among the mentioned “covered agreements” provided by Appendix 1 of the DSU are the “Multilateral Agreements on Trade in Goods”, in which the General Agreement on Tariffs and Trade (GATT) is comprehended. Indeed, the Appellate Body expressed in *India – Quantitative Restrictions* that “*We note that Appendix 1 to the DSU lists ‘Multilateral Agreements on Trade in Goods’, to which*

the GATT 1994 belongs, among the agreements covered by the DSU” (India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, 1999, para. 85).

Moreover, Article 1.2 of the DSU provides for the subjection of the application of rules and procedures of the mentioned instrument to special or additional rules and procedures contained in the “covered agreements”.¹⁰⁰ On the other hand, Art. 2.1 establishes the Dispute Settlement Body to administer the rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the co-

100 DSU – Article 12. “The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the “DSB”), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict”.

vered agreements, with the authority to establish panels and adopt panel and Appellate Body reports.

Taking into account that freedom of transit is enshrined and ruled by Article V of the GATT, which is a covered agreement by the DSU, the latter instrument applies to any dispute concerning freedom of transit under Article V of the GATT.

4. ALADI

The 1980 Montevideo Treaty, which establishes the ALADI, does not contemplate a specific procedure regarding the settlement of disputes at a regional level.¹⁰¹ It provides, as mentioned by some authors, “a sort of mechanism of monitoring and control on legality” through a conferred attribution of the Representatives Committee, the political organ of the ALADI,¹⁰² which is very limited but sets the specific competence of the Commit-

101 Original text: *El Tratado de Montevideo de 1980 (TM80), que instituye la Asociación Latinoamericana de Integración (ALADI), no contiene un procedimiento específico destinado a la solución de las controversias a nivel regional* (Rojas Penso, 2004). (Translation by the author)

102 1980 Montevideo Treaty. Article 35. “The Committee is the permanent body of the Association and will have the following attributions and duties: (...) m) Propose formulas to resolve the issues raised by country members, whenever the non-observance of any of the rules or principles of the present Treaty had been claimed”. Original text; *El Comité es el órgano permanente de la Asociación y tendrá las siguientes atribuciones y obligaciones: (...) m) Proponer fórmulas para resolver las cuestiones planteadas por los países miembros, cuando fuera alegada la inobservancia de algunas de las normas o principios del presente Tratado* (Translation by the author).

tee on the subject. This article was regulated through the Resolution CR/114, which created a procedure relating to the establishment of preview consultations between the parties in a dispute, and its referral to the own Committee in case of persistence of the issue. The mentioned body, as provided by Article 35, has the competences to propose formulas of arrangement between the parties but not to decide the dispute. Moreover, another general provision on dispute settlement established by the mentioned instrument refers to the attribution of the General Secretary of the ALADI to analyze the fulfillment of the agreed commitments and to evaluate the legal provisions of the member countries that directly or indirectly alter the agreed concessions.¹⁰³ Nonetheless, they do not imply a specific commitment to dispute settlement nor a particular form of implementation (Pastori, 2003).

Nonetheless, this absence had been resolved through the adoption of specific regimes within the “Partial Scope Agreements” (*Acuerdos de Alcance Parcial*) signed between its State Members, under the 1980 Montevideo Treaty frame, which constitute nowadays the most important documents of the ALADI on the matter. Indeed,

103 1980 Montevideo Treaty. Article 38. “The Secretariat will have the following functions and powers: (...) i) Analyze, on its own initiative, for all the countries, or at the request of the Committee, the compliance with the agreed commitments and evaluate the legal provisions of the member countries that directly or indirectly alter the agreed concessions”. Original text; (...) *La Secretaría tendrá las siguientes funciones y atribuciones: (...) i) Analizar por iniciativa propia, para todos los países, o a pedido del Comité, el cumplimiento de los compromisos convenidos y evaluar las disposiciones legales de los países miembros que alteren directa o indirectamente las concesiones pactadas.*

such specific regimes had developed, according to authors like Rojas Penso, to the point of creating arbitral mechanisms with binding decisions to the State members.¹⁰⁴

Among the mentioned “Partial Scope Agreements” are the instruments that deal with the issue of the freedom of transit: the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway¹⁰⁵ and the Agreement on International Land Transport.¹⁰⁶

i. Agreement of the Paraguay-Paraná Waterway

The Treaty of Santa Cruz de la Sierra provides that, pursuant the accomplishment of such instrument, the signatories States agree, inter alia, to celebrate an Additional Protocol on Dispute Settlement.¹⁰⁷ Such instrument was signed as the Fifth Additional Protocol of the mentioned treaty on June 26, 1992, and is in force since February 13, 1995 (ALADI, n.d.-c).

104 Original text: *La falta de un sistema regional de solución de controversias en la ALADI fue resolviéndose, en definitiva, a través de la adopción de regímenes específicos en los Acuerdos de alcance parcial suscritos entre sus países miembros al amparo del TM 80, los que constituyen el acervo más importante de la Asociación en la materia. Estos regímenes específicos se han ido perfeccionando hasta llegar, en muchos casos, a contar con mecanismos de arbitraje cuyos laudos tienen fuerza obligatoria para las Partes...* (Rojas Penso, 2004, p. 133). (Translation by the author)

105 Registered at the ALADI as “Acuerdo de Alcance Parcial N° 5” (Partial Scope Agreement N° 5) (ALADI, n.d.).

106 Registered at the ALADI as “Acuerdo de Alcance Parcial N° 3” (Partial Scope Agreement N° 3) (ALADI, n.d.)

107 Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway. Article 17 (translation by the author).

The Fifth Additional Protocol of the Agreement of the Paraguay-Paraná Waterway provides for proceedings under which the disputes raised between the parties of the mentioned agreement on the interpretation, application, or the non-compliance of the rules of such instruments or its Protocols, as well as the decisions of the Waterway Committee and the Agreement Commission.¹⁰⁸

In this sense, the instrument states the duty of the parties on a dispute to seek to solve it, firstly, through consultations and direct negotiations.¹⁰⁹ In case that by such negotiations the dispute is not solved, the Additional Protocol contemplated that any of the involved parties may submit it to consideration of the Agreement Commission. This body shall make recommendations after an evaluation of the situation and hearing the positions of the parties, requiring, if it considers it necessary, the advice of experts.¹¹⁰¹¹¹ In the above-mentioned mechanisms fail to solve the dispute, the Additional Protocol

108 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 1 (Translation by the author)

109 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 2 (translation by the author).

110 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 3 (translation by the author).

111 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 4 (translation by the author).

provides for parties the right to submit it to consideration of the Committee of the Waterway.¹¹²

Furthermore, if the proceeding before the Committee of the Waterway cannot solve the issue, the instrument contemplates the possibility of any of the involved States to submit the dispute to the decision of an Arbitral Tribunal. Moreover, the Additional Protocol provides general rules on the designation and composition of such tribunal,^{113 114} and regarding the unification of representation in case of shared positions between two or more States.¹¹⁵

In the same way, the Fifth Additional Protocol states that the Arbitral Tribunal shall resolve the disputes under the provisions of the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway, the Protocols framed in such instrument, the decisions of the Committee of the Waterway and the Agreement Commission, as well as with the general principles of International Law that apply to the subject. Nonetheless, the

112 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 5 (translation by the author).

113 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 6 (translation by the author).

114 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 8 (translation by the author).

115 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 7 (translation by the author).

Arbitral Tribunal is allowed to decide a dispute *ex aequo et bono* if the Parties so agree.¹¹⁶

The Additional Protocol contains other important rules, such as the commitment of its State Parties to recognize the jurisdiction of the Arbitral Tribunal as compulsory, *ipso facto* and without any special compromise, to hear and decide controversies within the scope of the mentioned instrument, as well as to comply with the decisions and awards issued.¹¹⁷ Moreover, the instrument grants the Arbitral Tribunal the possibility to adopt provisional measures, by request of any of the involved parties and based on reasoned presumptions on possible damages due to the continuation of a situation, which may be appropriated to prevent such damages.¹¹⁸

Furthermore, the Additional Protocol states that the Arbitral Tribunal shall issue its decision by written within thirty days, extensible for the same period, since its constitution.¹¹⁹

116 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 9 (translation by the author).

117 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 10 (translation by the author).

118 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay - Paraná Waterway on Dispute Settlement. Article 12 (translation by the author).

119 Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay- Paraná Waterway on Dispute Settlement. Article 13 (translation by the author).

Another relevant provision of the instrument in issue is that, in case of non-compliance of the decision by a State involved in a dispute, it allows the other parties on the dispute to adopt compensatory provisional and proportional toward obtaining its compliance.¹²⁰

ii. ATIT

Curiously, the ATIT does not have an express provision regarding the settlement of a dispute that may arise due to its application or interpretation. According to a press statement, in 2019 negotiations were conducted towards an agreement on dispute settlement within that structure (ALADI, 2019). Nevertheless, because the ATIT is part of the 1980 Montevideo Treaty framework, the dispute settlements system of the ALADI applies to such disputes.

5. MERCOSUR

The dispute settlement system within MERCOSUR is governed by the Protocol of Olivos of 2002, which according to its Article 1 sets out the procedures for the disputes arising between States Parties on the interpretation, application, or non-compliance with the Treaty of Asuncion, the Protocol of Ouro Preto, of protocols and agreements signed within the framework of the Treaty of Asuncion, and the rules adopted by the bodies with decision-making capacity of the MERCOSUR. Moreover, the mentioned article provides the choice of forum at the discretion of the complainant in disputes which

¹²⁰ Additional Protocol to the Agreement on the Fluvial Transport through the Paraguay-Paraná Waterway on Dispute Settlement. Article 14 (translation by the author).

fall within the scope of the MERCOSUR dispute settlement system, the mechanisms provided by the WTO, or other preferential trade systems of which member States are members on an individual basis.¹²¹

Moreover, the Protocol of Olivos contemplates a dispute settlement system that includes direct negotiations between the Parties on a dispute,¹²² the intervention of one of the bodies with decision-making capacity in the structure of MERCOSUR: the Common Market Group (GMC, by its acronym in Spanish),¹²³ an Ad Hoc Arbitration procedure,¹²⁴ and a review proceeding in the MERCOSUR Permanent Review Tribunal (TPR, by its acronym in Spanish).¹²⁵ The instrument also provides the possibility of direct access of the State Parties on the dispute to the TPR, as long as the direct negotiations and the intervention of the GMC are fulfilled and such States agree on it so.¹²⁶

Furthermore, the system grants the Council of the Common Market the possibility to establish a special proceeding to meet exceptional cases of urgency that may cause irreparable damage to the Parties.¹²⁷ Such proceeding was adopted by the CMC through the Decision N°

121 Protocol of Olivos. Article 1 (translation by the author).

122 Protocol of Olivos. Chapter IV (translation by the author).

123 Protocol of Olivos. Chapter V (translation by the author).

124 Protocol of Olivos. Chapter VI (translation by the author).

125 Protocol of Olivos. Chapter VII (translation by the author).

126 Protocol of Olivos. Article 23 (translation by the author).

127 Protocol of Olivos. Article 24 (translation by the author).

23/04, which provides the TPR the competence to resolve such cases.¹²⁸

In the same way, the Protocol of Olivos contemplates the possibility to apply compensatory measures in cases where a State party to the dispute fails to comply fully or partially with the decision of the Arbitration Court.¹²⁹ The figure of the compensatory measures in the mentioned instrument is governed by principles of temporality and proportionality, as in other dispute settlement mechanisms.

Finally, it is worth mentioning that the Protocol of Olivos entered into force on 1 January 2004. Before that date, the applicable instruments were Annex III of the Treaty of Asuncion and the Protocol of Brasilia (Economic Commission for Latin America and the Caribbean, n.d.).

¹²⁸ Decision CMC N° 23/04. Article 2 (translation by the author).

¹²⁹ Protocol of Olivos. Article 31 (translation by the author).

C. Freedom of transit in the resolution of disputes in International Law and the international legal framework regarding Freedom of Transit

1. GENERAL INTERNATIONAL LAW

a. Permanent Court of Justice

i. The Lithuania – Poland railway traffic

One of the first disputes regarding freedom of transit submitted to the consideration of permanent adjudicatory bodies within International Law was the *Railway Traffic between Lithuania and Poland* case. In this issue, the Permanent Court of International Justice was requested by the Council of the League of Nations in 1931 to determine if international engagements in force obligated Lithuania to take the necessary measures to open for traffic or certain categories of traffic the Landwarów-Kaisiadorys railway sector (*Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)*, 1931).

In particular, the PCIJ provided an interpretation of Article 23(e) of the Covenant of the League of Nations¹³⁰ and considered that specific obligations can only arise from “international conventions existing or hereaf-

130 Covenant of the League of Nations. Art. 23: “Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: (...) (e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In

ter to be agreed upon”, exemplifying it with the “general conventions to which other Powers may accede at a later date”, as stated in the Preamble of the 1921 Barcelona Convention on freedom of transit. From this basis, the PCIJ held that the general rule contained in the article at issue did not contain an obligation for Lithuania to open the Landwarów-Kaisiadorys railway sector for international traffic or for part of such traffic, and that such obligation could only result from a special agreement (*Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)*, 1931).

Regarding this case, Pogoretsky and Huarte highlight that the correct formulation of the claim is a key element to success in a dispute concerning the enforcement of freedom of transit. Furthermore, the latter considers that the development of International Law shows that the exercise of such transit must respect the principle of sovereignty of the transit State (Huarte Melgar, 2015) and the first that the freedom of transit is a basic principle, “which as such does not establish an obligation to provide access to any particular ‘route’” (Pogoretsky, 2017).

For its part, Uprety states that from the interpretation of the PCIJ in the *Railway Traffic between Lithuania and Poland* case it may be concluded that transit “is only a freedom to be enjoyed upon the benevolence of the transit State”, which needs to be ensured through specific bilateral agreements, rather than a right inherent to the geographic position of a land-locked State (Uprety, 2006).

this connection, the special necessities of the regions devastated during the war of 1914–1918 shall be borne in mind”.

b. The International Court of Justice

Curiously, none of the 179 cases entered before the ICJ until the date is expressly focused on the issue of freedom of transit. However, the figure was considered by the Court and the Parties in several cases and, according to the literature, the qualification of concepts such as “freedom of navigation” and “right of innocent passage” as customary international law by the ICJ results in the conclusion that transit is customary international law (Huarte, 2015, p. 309).

The most relevant cases which refer to the issue of freedom of transit or similar figures are the following:

i. The Corfu Channel case

The International Court of Justice considered a fact of particular importance the special importance of the Strait of the North Corfu Channel “to Greece by reason of the traffic to and from the port of Corfu”, which among others, lead the ICJ to conclude that such channel “should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace” (*Corfu Channel [United Kingdom of Great Britain and Northern Ireland v. Albania]*, 1949, P. 29).

ii. The right of passage case

In 1955, Portugal presented a claim against India in the ICJ, regarding the two Portuguese enclaves in India, Dadra and Nagar-Aveliwhich. In that respect, Portugal claimed that it had a right of passage to those possessions and between one enclave and the other to the extent necessary for the exercise of its sovereignty and subject to the regulation and control of India. Moreover,

Portugal also claimed that in 1954 India had prevented it from exercising that right, despite the practice observed in the previous years, and that that situation should be redressed (Singh, 1989, p. 407).

In the case at issue, Portugal claimed that it was the holder or beneficiary of a right of passage between its territory of Damão and its enclaves of Dadra and Nagar-Aveli, and between each of the latter and that this right comprises the unrestricted “faculty of transit for persons and goods, including armed forces or other upholders of law and order” to the extent required by the effective exercise of Portuguese sovereignty in the said territories. Nonetheless, Portugal noted that transit forming the subject-matter of its claim remained subject to the regulation and control of India, “which must exercise these by taking, in good faith and on its own responsibility, the necessary decisions” (*Case Concerning Right of Passage over Indian Territory [Portugal v. India]*, 1960, pp. 7 and 12). Moreover, Portugal relied on Treaties of the XVIII century, which conferred sovereignty over the enclaves with the right of passage to them, in support of its claim (*Case Concerning Right of Passage over Indian Territory [Portugal v. India]*, 1960, p. 11).

After examining the practice for long periods, the ICJ held that Portugal had in 1954 *a right of passage over intervening Indian territory between coastal Daman and the enclaves and between the enclaves, in respect of private persons, civil officials and goods in general, to the extent necessary, as claimed by Portugal, for the exercise of its sovereignty over the enclaves, and subject to the regulation and control of India* (*Case Concerning Right of Passage over Indian Territory [Portugal v. India]*, 1960, p. 40).

A different position was adopted by the ICJ about the passage of armed forces, armed police, and ammunition. Indeed, the ICJ stated that “no right of passage in favor of Portugal involving a correlative obligation on India has been established” in respect of such situations (*Case Concerning Right of Passage over Indian Territory* [*Portugal v. India*], 1960, p. 43).

Furthermore, regarding the refusal of India to allow passage of a delegation and to provide visas to Portuguese national, the ICJ also stated that Portugal’s claim of a right of passage was subject “to full recognition and exercise of Indian sovereignty over the intervening territory and without any immunity in favour of Portugal” (*Case Concerning Right of Passage over Indian Territory* [*Portugal v. India*], 1960, p. 45).

Moreover, important thoughts are found in separate and dissenting opinions. For instance, in the one belonging to Judge Koo, he considers that despite the particularity of the situation of enclaves, “it is inconceivable in international law that one sovereignty exists only by the will or caprice of another sovereignty”. On the other side, he also argues that although the right of passage imposes a correlative obligation binding on the State through whose territory it has to be effected, it is not an absolute, unrestricted right, as its exercise “must be subject to control and regulation by the sovereign of the intervening territory”. However, he recognizes that the existence of two conflicting rights is not an uncommon phenomenon in international law and that “its solution only calls for mutual adaptation and adjustment” (*Case Concerning Right of Passage over Indian Territory* [*Portugal v. India*], 1960b, p. 66).

In the same way, in its dissenting opinion on the judgment of the case, Judge Armand-Ugon made a relevant remark on the figure of freedom of transit, stating: “*If the principle of international freedom of transit scarcely encounters any longer any prohibition of passage on the basis of territorial sovereignty, still less can that sovereignty be adduced as a reason for withdrawing a long-practiced right of transit to an enclave*” (*Case Concerning Right of Passage over Indian Territory* [*Portugal v. India*], 1960c, p. 84). This reflection of Judge Armand-Ugon provides two important thoughts, which are the consideration of international freedom of transit as a principle and the fact that the passage of such a figure barely is restricted based on territorial sovereignty.

Nonetheless, an antagonist perspective is adopted by Judge Chagla, who was a national of one of the Parties. In its dissenting opinion, he argues that sovereign State must have a complete, absolute, and unrestricted right to regulate the passage of goods, men, and traffic via its territory, including implementing a complete prohibition (*Case Concerning Right of Passage over Indian Territory* [*Portugal v. India*], 1960d, p. 119).

Despite addressing mainly the figure of the particular right of the passage to territorial enclaves framed in a specific treaty and practice rather than the figure of the freedom of transit in general, the *Right of passage case over Indian Territory* is relevant to the latter because, as Pogoretsky considers, the right of passage is deemed analogous to freedom of transit for land-locked countries (Pogoretsky, 2017, p. 112). In this sense, the reasonings found in the opinion of Judges Koo and Armand-Ugon are relevant to value the justification and status of

freedom of transit in International Law and the case law of the ICJ.

iii. Military and Paramilitary Activities in and against Nicaragua

In 1984, Nicaragua instituted a proceeding against the United States of America in the ICJ concerning a dispute relating to responsibility for military and paramilitary activities in and against Nicaragua (Singh, 1989, p. 419).

In its Memorial of 30 June 1984, Nicaragua claimed that military and paramilitary operations directed and maintained by the United States in and against Nicaragua, including the mining of Nicaraguan ports and territorial waters and attacks to airports of that country and military operations that endanger and limit trade and traffic on land, were designed to paralyze freedom of commerce and navigation provided in the Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States. Moreover, Nicaragua argued that those activities also contravened several articles of the mentioned that treaty including Article XX, which granted freedom of transit “through the territories of each Party by the routes most convenient for international transit” for nationals of the other Party, for other persons en route to or from the territories of such other Party; and for products of any origin en route to or from the territories of such other Party (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1984, para. 82).

Moreover, in its Memorial of 30 April 1985, Nicaragua held: “These principles still hold” and that “There is no doubt that the mining of Nicaragua’s ports by the United States violated the freedom of navigation and, in

consequence, the freedom of commerce, as well as the freedom of transit” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1985, p. 111).

Nevertheless, in its Judgment of 26 November 1984, the ICJ did not deepen in the figure of freedom on transit, and Article XX of the Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States was just quoted at the considerations regarding the jurisdiction of the Court under the mentioned instrument to entertain the claims in the Application of Nicaragua to the extent such claims constitute a dispute as to the interpretation or application of some articles of the treaty, including Article XX (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1984, para. 428). Moreover, in its dissenting opinion, Judge Schwebel expressed that such provisions “have no relationship to the claims of direct and indirect aggression made out in Nicaragua’s Application” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1984b, para. 126).

Furthermore, the ICJ, in its Judgment of 27 June 1986, did not refer to the freedom of transit. Even more, among its conclusions, Article XX was not indicated as one of which the United States had breached by its acts (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986, para. 292).

However, the importance of the *Military and Paramilitary Activities in and against Nicaragua* case to the present study lies in the qualification provided by the ICJ to the principle of freedom of navigation as part of customary law. Indeed, the Court held: “Principles such as those of the

non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law in which they have been incorporated” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1984, para. 73). In that regard, Huarte considers the mentioned qualification as one of the elements to conclude “*that transit is customary international law*” (Huarte, 2015, p. 309).

iv. Navigation and related rights

In 2005, Costa Rica put in a claim in the ICJ against Nicaragua in a dispute related to its navigational and related rights on a section of the San Juan River, the southern bank of which forms the boundary between the two States provided for by an 1858 bilateral treaty (Sainz-Borgo, 2019, p. 98).

In this case, the ICJ had to determine, among other things, the scope of the right of free navigation of Costa Rica on the Nicaragua section of the San Juan River, particularly if such right includes the obligation of Nicaragua to notify Costa Rica of the regulations it adopts regarding the mentioned navigational regime, taking into account that the 1858 bilateral treaty does not contain any explicit notification requirement (Pogoretsky, 2017, p. 195). In this sense, the ICJ recognized the mentioned obligation of Nicaragua after considering that “if the various purposes of navigation are to be achieved, it must be subject to some discipline, a discipline which depends on proper notification of the relevant regulations”. However, the Court also concluded that such obligation did not extend to “to notice or consultation prior to the adoption by Nicaragua of such regulations” (*Dispute re-*

garding Navigational and Related Rights (Costa Rica v. Nicaragua), 2009, para. 97).

Furthermore, the ICJ concluded that Nicaragua had the power to regulate the exercise by Costa Rica of its freedom of navigation under the 1858 bilateral treaty, although such power was not unlimited, being tempered by the rights and obligations of the Parties. Indeed, the Court provided the characteristics that regulation in such case must contemplate, such as a legitimate purpose and that it must not be unreasonable nor discriminatory (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 2009, para. 87).

As Pogoretsky outlines from the basis of the mentioned characteristics, a “reasonable” regulation must compatible with the right established as well as other treaty obligations, must have a legitimate objective, must strike an appropriate balance between the established right and the right to regulate for the protection of legitimate objectives, and must not be discriminatory (Pogoretsky, 2017, p. 221). The author exemplifies the right established with “freedom of navigation”, but there is no reason that prevents the consideration of the right to transit as applicable to the present case too.

2. UNCLOS

Despite the relevant provisions in the UNCLOS regarding the right of access of land-locked States to and from the sea, there has not been a dispute on such figures within the system established by the mentioned instrument.¹³¹

¹³¹ Conclusion arrived after searching in the databases of the ITLOS (International Tribunal for the Law of the Seas, 2021) and

Indeed, in December 2019, Nigeria and Switzerland agreed to transfer to the International Tribunal of the Law of the Sea (ITLOS) their dispute concerning the arrest and detention of the M/T San Padre Pio, a Swiss motor tanker by Nigerian authorities while it was allegedly engaged in ship-to-ship transfers of gasoil in Nigeria's exclusive economic zone (International Tribunal for the Law of the Sea, 2019), becoming the first time a land-locked State is involved in a dispute in the system of the UNCLOS.

In this sense, since the existence of the UNCLOS, landlocked States seemed unenthusiastic to recur to the system established by that instrument. According to the literature, this was the case of Nepal concerning several actions of India which were not consistent with Nepal's right of access to and from the sea and freedom of transit under UNCLOS. Nepal could have considered the option available under such instrument, consistent in one of the mechanisms stipulated in it, about the measures adopted by India, since both countries are part of the instrument, but it seemed reluctant to do so (Upreti & Subedi, 2019, p. 651).

On the other side, while the matter is not directly connected with the right of access to and from the sea and freedom of transit, several authors highlight the difficulties that landlocked States may find if claiming at the UNCLOS dispute settlement system within the context of their right to participate on an equitable basis in the exploitation of the living resources of an Exclusive Economic Zone of a coastal State in the same

the Permanent Court of Arbitration (Permanent Court of Arbitration, 2021).

region or subregion, which is also a right stipulated by the Convention (Powell, 2018, p. 588) (Uprety, 2006, p. 88). Taken this situation to the scope of the freedom of transit, these considerations may explain the reluctance of land-locked States with regard to the UNCLOS dispute settlement.

3. WTO

i. Colombia – ports of entry

In July 2007, Panama requested consultations with Colombia on indicative prices applicable to specific goods and restrictions on ports of entry for certain goods. The request on indicative prices relates to a series of resolutions promulgated in June 2007 which establish a system of payment of customs duties or other charges for importers of specific goods based on the indicative prices, rather than on the valuation methods set out in Article VII of the GATT 1994 and the Agreement on Customs Valuation. Regarding the restrictions on ports of entry, which is more related to the figure of the freedom of transit, Panama's request is directed at a resolution of June 2007 which provides that all goods classifiable in Chapters 50-64 of the Customs Tariff coming from the Free Zone of Colon in Panama shall be entered and imported exclusively through the jurisdictions of the Special Customs Administration of Bogota and the Barranquilla Customs Office, although this requirement does not apply to goods arriving directly from third countries. Moreover, the import declaration applicable to these imports shall be presented before they arrive in the national customs territory not more than 15 days in advance and, in case an importer does not comply with these requirements, it is subject to special procedures

under Colombia's Customs Code, including the detention of goods. In this sense, Panama considers that these restrictions are inconsistent with Colombia's obligations under several articles of GATT 1994, including Art. V:2 and V:6 (World Trade Organization, 2021).

As the Panel noted in its report, Article V of the GATT, which deals with the freedom of transit, has never before been interpreted by the Appellate Body or a GATT/WTO panel (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.388). Therefore, the Panel considered Article V:2 and V:6 in accordance with its ordinary meaning in its context and in light of its object and purpose where necessary, as well as employing supplementary means of interpretation, including the travaux préparatoires, to inform its interpretation in unclear meanings (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.389, 7.444).

In this sense, the Panel examined the scope of the term "traffic in transit" in Article V:2. Indeed, based on the sufficient clarity of such definition of "traffic in transit" provided in Article V:1, the Panel held that when applied to Article V:2, freedom of transit "must thus be extended to all traffic in transit when the goods' passage across the territory of a Member is only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes. Freedom of transit must additionally be guaranteed with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport". Moreover, due to the absence of the mention of "traffic in transit" in the second sentence of article V:2, the Panel held that such sentence complements and expands upon the obligation to extend freedom of transit, stating additionally that distinctions must not be made based on the

nationality, or place of origin, departure, entry, exit or destination of the vessel transporting goods (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.396, 7.397).

Furthermore, the Panel examined the substantives obligations in the first and second sentences of Art. V:2. Regarding the first sentence, the Panel noted that the opening text introduces the obligation – the provision of “freedom of transit” by Members within their territory, the intermediate clause imposes a limiting condition on the obligation– that freedom of transit should be provided on the most convenient routes, and the remainder explains that “freedom of transit” must be provided for “traffic in transit” entering and then subsequently departing from the Member’s territory (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.400). In relation to the second sentence, the Panel concluded that it requires that goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international transit (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.402).

Moreover, the Panel explained that while the provision of freedom of transit requires extending “unrestricted access” via most of the most convenient routes for the passage of goods in international transit, a Member is not required to guarantee transport on necessarily any or all routes in its territory, as transit must be provided on those routes “most convenient” for transport through its territory (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.401).

Regarding Article V:6, the Panel analyzed if it extends MFN obligations to Members whose territory is the ul-

timate destination of the good in transit, or whether the obligation only extends to Members whose territory a good passes through intermediately in route to a final destination elsewhere (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.445). On this subject, the Panel concluded that the obligations in Article V:6, first and second sentences “apply to Members whose territory is the final destination for goods in international transit” (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.475). Concerning the substantive obligation in Art. V:6, the Panel held that “products that are transported from their place of origin which pass through any other Member country on the route to their final destination must be treated no less favourably than had those same products been transported from their place of origin to their final destination without ever passing through that other Member’s territory” (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.478).

As said before, the *Colombia – Ports of entry* case was the first case within the WTO dispute settlement system that dealt with the figure of freedom of transit. The Panel considerations helped to provide relevant precisions on the terminology and scope of the figure. Furthermore, according to Marceau, the Panel findings that goods in international transit from any Member must be allowed entry whenever destined for the territory of a third country, that a Member is not required to guarantee transport on necessarily any or all routes in its territory, but only on the ones “most convenient” for transport through its territory, and that the MFN obligation in GATT Article V is applied not only when a WTO Member was a transit state but also when it was the final destination of the goods, *the Panel wanted to accord the*

GATT transit obligation its full potential in a clear manner (Marceau, 2010, p. 89).

ii. Russia – Transit if traffic

In September 2016, Ukraine requested consultations with the Russian Federation regarding alleged multiple restrictions on traffic in transit from Ukraine through the Russian Federation to third countries. In this sense, Ukraine claimed that the Russian measures appear to be inconsistent with several provisions of the GATT 1994, including articles V:2, V:3, V:4, and V:5, all of which are related to freedom of transit (*WTO | Dispute Settlement - DS512*, 2021) Ukraine requested consultations with the Russian Federation regarding alleged multiple restrictions on traffic in transit from Ukraine through the Russian Federation to third countries.”,”language”:”en”,”title”:”WTO | dispute settlement - DS512: Russia — Measures Concerning Traffic in Transit”,”title-short”:”WTO | dispute settlement - DS512”,”URL”:”https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm”,”accessed”:{“date-parts”:[[“2021”,1,14]]}}},”schema”:”https://github.com/citation-style-language/schema/raw/master/csl-citation.json”} .

In particular, Ukraine argued that the measures of Russia imply transit restrictions and the transit bans applied to traffic in transit by road or rail from Ukraine which is destined for Kazakhstan, Kyrgyz Republic, Mongolia, Tajikistan, Turkmenistan, and Uzbekistan (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.1).

On the other side, Russia did not specifically address the factual evidence or legal arguments presented by Ukraine in support of its substantive claims, mainly because it asserts that the measures are among those that

it considered necessary for the protection of its essential security interests, which it took, as a response “to the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation’s essential security interests”. In this sense, Russia invoked the provisions of Article XXI(b)(iii)¹³² of the GATT 1994, stating that, as a result, “the Panel lacks jurisdiction to further address the matter” and thus requested that the Panel should limit its findings in this dispute to a statement of the fact that Russia has invoked Article XXI(b)(iii), without further engaging on the substance of Ukraine’s claims (*Russia-Measures Concerning Traffic in Transit*, 2019a). As noted by the Panel, in Russia’s view “the explicit wording of Article XXI confers sole discretion on the Member invoking this Article to determine the necessity, form, design and structure of the measures taken pursuant to Article XXI” (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.3, 7.4).

Although the case at issue was related to freedom of transit, it was also relevant because it was the first time a WTO dispute settlement panel was asked to interpret article XXI of the GATT 1994 and its equivalent provisions in other instruments (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.20).

132 GATT 1994 - Article XXI. Security Exceptions *Nothing in this Agreement shall be construed (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.*

The Panel, regarding the Russia argument against its jurisdiction, recalled that international adjudicative tribunals, including WTO dispute settlement bodies, are entitled to determine all matters arising in relation to the exercise of their own substantive jurisdiction, a principle which is known as *Kompetenz-Kompetenz* (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.53). Furthermore, the Panel concluded that its evaluation of Russia's jurisdictional plea requires it to interpret Article XXI(b)(iii) of the GATT 1994 to determine whether, by the language of this provision, the power to decide "whether the requirements for the application of the provision are met is vested exclusively in the Member invoking the provision, or whether the Panel retains the power to review such a decision concerning any of these requirements" (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.58).

After such interpretation of Article XXI(b), the Panel concluded that "for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision" (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.82). As a result, the Panel vested itself with the power to review such requirements, rather than leaving it to the unfettered discretion of the invoking Member, making Article XXI(b)(iii) of the GATT 1994 not totally "self-judging" (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.102).

However, after proceeding to the analysis of the existence of the mentioned requirements, the Panel held that the situation between Ukraine and Russia since 2014 constituted an emergency in international relations, within the meaning of Article XXI(b)(iii) of the GATT

1994 and that each of the questioned measures was “taken in time of” such situation (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.126). Likewise, the Panel considered that was left, in general, “to every Member to define what it considers to be its essential security interests”, although this discretion is limited by its obligation to interpret and apply Article XX(b) (iii) of the GATT 1994 in good faith, as this is a general principle of law and of general international law which underlies all treaties (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.131, 7.132). After asserting the close connection between the measures and the situation of emergency in international relations, the Panel found that Russia had met the requirements for invoking Article XXI(b)(iii) of the GATT 1994 in relation to the measures at issue and thus they were covered by such article (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.149).

Despite arriving at that conclusion, the Panel still analyzed the claims of Ukraine of WTO-inconsistency of the measures, which led to interesting references to the alleged breached provisions of Article V:2 of the GATT. Indeed, regarding the first sentence of Art. V:2, the Panel stated that to establish inconsistency with the first sentence of Article V:2 “it will consequently be sufficient to demonstrate either that a Member has precluded transit through its territory for traffic in transit entering its territory from any other Member, or exiting its territory to any other Member, via the routes most convenient for international transit”. Consequently, a measure prohibiting traffic in transit from another Member from entering at all points along a shared land border “will necessarily be inconsistent with the first sentence of Article V:2” (*Russia-Measures Concerning Traffic in*

Transit, 2019a, para. 7.173, 7.174). Therefore, and also after analyzing the inconsistency of the measures with the second sentence of the article at issue, the Panel concluded that *had the measures been taken in normal times, i.e. had they not been taken in time of an “emergency in international relations” (and met the other conditions of Article XXI(b)), Ukraine would have made a prima facie case that the following measures were inconsistent with the two sentences of Article V:2 (Russia-Measures Concerning Traffic in Transit, 2019a, para. 7.183, 7.196)*. Nevertheless, the Panel did not study the claims of Ukraine under Articles V:3, V:4, and V:5 as they challenge the same aspects of the measures, and it considered that addressing such claims would not add anything to the conclusion of the analysis by an Appellate Body (*Russia-Measures Concerning Traffic in Transit*, 2019a, para. 7.199).

Although the *Russia – Traffic in transit* is very recent, there is already literature that considers the decision of the Panel on major importance due to the establishment that the application of the national security exception is subject to the examination of the adjudicating bodies of the WTO (Mantilla Blanco & Pehl, 2020, p. 14).

4. ALADI

As said in previous paragraphs, the ALADI has what is considered a sort of mechanism of monitoring and control on legality through a conferred attribution of its political organ, the Representatives Committee, which is very limited but sets the specific competence of that body. However, according to some authors, during the existence of the ALADI, the State Parties of the process have been reluctant to employ the existing regional mechanisms to settle their disputes. Indeed, although this

is not a real adjudicatory dispute settlement, the diplomatic and friendly instance neither was used, leading to the consideration that the Parties had been searching for alternative methods to resolve the conflicts or, at least, they had demonstrated the will to allow the Representatives Committee to become in the natural forum to settle the disputes (Pereira Vecino, 2010, p. 123).

Curiously, one of the few occasions in which the dispute settlement mechanism of the ALADI was activated was related to freedom of transit. Indeed, in 2014 Bolivia claimed that Chile had breached article 15 of the ATIT by applying on the Bolivian carriers the rules of such agreements rather than the bilateral treaty of 1904 in which Chile grants full freedom of transport and transit to Bolivia (ALADI - Representatives Committee, 2014, p. 5). After the consultations and arguments exchange, the Representatives Committee encouraged the dispute parties to retake the dialogue in the ALADI seat with the participation of the pertinent national authorities (ALADI, 2014). Some months later, Chile and Bolivia held meetings within the framework of the mentioned suggestion (MundoMarítimo, 2015).

5. MERCOSUR

As mentioned in previous sections, the common market established by MERCOSUR implies “the free movement of goods, services and productive factors between countries”, through the elimination of customs duties and non-tariff restrictions on the movement of goods and any other measure to the same effect. On the other hand, freedom of transit is not expressly mentioned in the main treaties of the organization, and the only instrument that refers to it, the Decision CMC N° 19/11

approved by one of the organs with decision-making capacity in MERCOSUR structure, is not in force. This results in a lack of solid consideration of the figure of freedom of transit within MERCOSUR legal system, at least at such figure is referred to in other frameworks and organizations.

Nevertheless, as evidence of the coincidence of some factual aspects between the figures of freedom of transit of goods and free movements of goods, there have been references to the first in the only case regarding free movement of goods within MERCOSUR dispute settlement case law, which is the dispute between Argentina and Uruguay on free movement in 2006.

i. Uruguay v. Argentina – Free circulation

In July 2006, Uruguay started a proceeding against Argentina within the MERCOSUR dispute settlement system, claiming against the blockades in Argentinian territory of roads of access to the international bridges that communicate it with Uruguay, by environmentalists as a protest for the construction of two pulp mills on the River Uruguay (*Uruguay v. Argentina-Free movement*, 2006, para. 17). On that point, Uruguay argued that Argentinian authorities omitted to adopt the appropriate measures to cease the road blockades and to promote the criminal proceeding on the acts (*Uruguay v. Argentina-Free movement*, 2006, para. 19).

Regarding “freedom of transit”, references to such figure are found in different parts of the case. Indeed, Uruguay claimed that the obstruction to the free movement of passengers and goods affected the operations of transport under the ATIT, “not just between the State Parties but also concerning the transit movements from

and to third State Parties” of the mentioned agreement. Moreover, Uruguay mentioned in its arguments the rules of the WTO that binds the Parties, such as, inter alia, the ones related to the Most Favoured Nation (MFN) clause, freedom of transit, and access to the markets, which had been affected by the denounced measures (*Uruguay v. Argentina-Free movement*, 2006, para. 29). For its side, Argentina stated that the free movement of people was not yet operative within MERCOSUR and neither is in force the “right of free transit” as it can affect the transport of goods from or to third countries (*Uruguay v. Argentina-Free movement*, 2006, para. 49).

However, the *Ad Hoc* Tribunal did not consider or develop the concept of transit as it was framed in other multilateral treaties. The arbitrators interpreted the provision of the Treaty of Asuncion related to the free movement of goods. In that sense, the Tribunal considered the free movement as an “essential objective” of such agreement and that the mention of “duties and non-tariff restrictions on the movement of goods and any other measure to the same effect” is just exemplary, focusing on the objective character of a restriction to the free movement. Moreover, the Tribunal held that the circulation of goods referred to there as “economic” and explained it as follows:

(T)his is that the merchandise remains or is consumed, used or industrialized in the economic space to which it is introduced and, although it is a concept that exceeds that of mere transit or border transfer since the latter has a spatial sense (geographical or physical) alluding to the possibility of crossing a certain economic space without suffering direct or indirect restrictions due to that

mere fact, barriers to transit imply barriers to trade and, therefore, to free movement economic(*Uruguay v. Argentina-Free movement*, 2006, para. 110) (emphasis added).

Furthermore, the Tribunal held that as the restriction of transit leads to the restriction of the free economic movement within integrated spaces, such restriction could be tolerated whereas the necessary measures are adopted to mitigate the inconvenient that it may cause and that it last short periods as not to hinder or cause grave or continued damage.(*Uruguay v. Argentina-Free movement*, 2006, para. 134).

Moreover, the Tribunal defined the dispute which was submitted before it as “referred to the interruption of transit” in the bridges over the River Uruguay with the resulting factual barrier to the free economic movement that compromises the achievement of the objectives of the Treaty of Asuncion and generate distortions in the trade of Uruguay with Argentina and other countries through which Uruguay trade by land transit over custom territory of Argentina (*Uruguay v. Argentina-Free movement*, 2006, para. 161)

D. Positive Aspects of Dispute Settlement Mechanisms on Freedom of Transit of Goods in International Law

As seen from the previous sections, freedom of transit does not have the same consideration in the different legal and political frameworks in International Law. For instance, while in instruments like the 1921 Barcelona Convention, the GATT, and the TFA the mentioned figure has a clear and delimited scope, in other frameworks

such as ALADI and MERCOSUR the situation is different, and thus the concept of freedom of transit is undermined and overlapped by others figures, like freedom of navigation or free movement.

In this sense, within the framework where freedom of transit is well established and considered, the dispute settlement mechanisms, especially those consisting of adjudicatory bodies, are relevant tools to develop and strengthen that own concept.

On the other side, the adjudicatory dispute settlement mechanisms on freedom of transit permit an objective perspective on an issue that generally implies the existence of two opposed interests: the one belonging of the State where the goods are originated or destined and the one of the transit State. In this sense, the presence of a third impartial in a relationship in which one of the parties claims a right in a condition of disadvantage can contribute to a fair resolution of the dispute.

CHAPTER IV: POSSIBLE SOLUTIONS AND CONVENIENCE

A. Possible solutions to hypothetical problematic situations regarding the freedom of transit of paraguayan goods through neighboring states

after analyzing the conceptual scope of the figure of freedom of transit of goods, as well as its considerations in the international legal framework and the dispute settlement mechanisms of such frameworks, it is convenient to continue the research by drawing the possible situations regarding freedom of transit of goods originated from and destined to Paraguay and the solutions that may apply to such situations.

1. GENERAL CONSIDERATIONS

The problematic situations that are to be asserted in the present Chapter are not based on a unique objective, since some of them are overlapped. For instance, the application of domestic law and procedures in neighboring countries can be given due to specific sanitary emergen-

cies, while in the enunciation they will be considered separately.

In this sense, the following problematic situations have been determined and differenced on a factual basis according to common elements and contexts of the situations at issue, taking into account different disputes on freedom of transit, whether Paraguay has been involved in them or not.

With relation to the legal framework on freedom of transit that may apply to the situations at issue, special emphasis will be given to the instruments where the concept and scope of freedom of transit of goods are more detailed, as in the cases of the 1921 Barcelona Convention, the New York Convention, the GATT, and the TFA. However, taking into account the status of the application of the international legal framework regarding freedom of transit in Paraguay and neighboring countries, as portrayed in Annex 2, major attention will be given to this last two mentioned instruments which are part of the WTO legal order, because they both have been ratified and are currently in force in the mentioned States, and because the jurisprudence within that legal order dealt with the figure at issue in two cases allowing a better understanding on its interpretation and application.

Indeed, from the articles regarded freedom of transit in the framework of the WTO, the limits to such figure are the following:

- The passage must be made through the most convenient routes for international transit (Article V:2 of GATT).

- Traffic in transit must be required to be entered at the proper custom house (Article V:3 of GATT).
- Compliance with applicable customs and regulations (Article V:3 of GATT).
- Necessary delays or restrictions due to failure to comply customs with laws or regulations (Article V:3 of GATT).
- Necessary delays or restriction once goods have been put under a transit procedure and have been authorized to proceed from the point of origination in a Member's territory until they conclude their transit at the point of destination within the Member's territory (Article 11:7 of TFA).
- Charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered (Article V:3 of GATT and 11:2 of TFA).
- Reasonable charges and regulations, considering the conditions of the traffic (Article V:4 of GATT).
- Requirements of direct consignment existing on the date of the GATT on goods to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes (Article V: 6 of GATT).
- Voluntary restraints or any other similar measures in existing or future national regulations, bilateral or multilateral arrangements related to regulating transport and consistent with WTO rules (Article 11:3 of TFA).

- Formalities, documentation requirements, and customs controls necessary to identify the goods and ensure fulfillment of transit requirements (Article 11:6 of TFA).
- Guarantee limited to ensure the requirements arising a traffic in transit is fulfilled (Article 11:11 of the TFA).
- Requirement of use of convoys or customs escorts for traffic in transit in circumstances presenting high risks or when compliance with customs laws and regulations cannot be ensured through the use of guarantees (Article 11:15 of the TFA).

Regarding the mechanisms applicable to provide solutions to the hypothetical situations, it is relevant to stress the wide threshold of such mechanisms that, in theory, are available to resolve any problematic situation of International Law. In that sense, negotiations play an important role in the mentioned threshold, because it is considered, as mentioned in previous chapters, the principal methods of resolving all international disputes and is employed more frequently than all other methods put together. Indeed, according to academics like Merrills, States usually consider negotiations as the first means to resolve international disputes to be tried and are often successful. This is evident in the presence of the negotiations or consultations as the first dispute settlement mechanism to be required in several international treaties, such as the DSU and the Protocol of Olivos. Among the reasons for this consideration are low cost, flexibility, speediness, and the less negative impact to the relations after its use.

For that reason, regarding most of the problematic situations on freedom of transit that will be enounced,

direct negotiations would be deemed as an available and convenient mechanism to resolve the disputes. Until now, it has demonstrated a means that was applied in many of the incidents where freedom of transit of Paraguayan goods was involved.

2. TYPES OF PROBLEMATIC SITUATIONS

I. Application of domestic law and procedures in neighboring countries

The majority of incidents regarding the freedom of transit of Paraguayan goods through neighboring countries are caused by the application of domestic regulations and proceedings in such countries. In these situations, perhaps more than in others, arises the issue of the right of the transit State to protect its legitimate concerns and state territoriality, as an interest opposed to the right of transiting goods of the transit-dependent State. That right is provided in the international legal framework that deals with freedom of transit.

Indeed, neither the freedom of transit of goods nor the principle of state territoriality—as are contemplated in current International Law—have the character of absolutes, that is, they are subject to certain conditions. Huarte understands that the “rule of exclusive territorial sovereignty is not absolute, but subject to exceptions; and, similarly, the right of transit exists subject to particular conditions that should be defined” (Huarte, 2015, p. 13).

For instance, the GATT provides several conditions that are required regarding freedom of transit. One of them is the requirement that the passage must be performed “via the routes most convenient for international transit” (Article V:2), which has been considered by the

Panel in the *Colombia – Ports of entry* case as “a limiting condition on the obligation” of the provision of “freedom of transit” by Members within their territory (*Colombia-Indicative Prices and Restrictions on Ports of Entry*, 2009, para. 7.400).

More relevant conditions are found in Article V:3 and V:4 of GATT, as there are some conditions like the possibility that the transit State requires that the passage through its territory “Must be made at the proper custom house” and “applicable customs laws and regulations”. Furthermore, because unnecessary delays and restrictions are prohibited, and as Azaria states, “necessary delays or restrictions, as well as non-discriminatory and reasonable charges are permitted for services rendered or those commensurate with administrative expenses relating to transit”(Azaria, 2015, p. 64). Therefore, transit States of good originated from or destined to Paraguay are entitled to apply “necessary delays or restrictions” and “non-discriminatory and reasonable charges for services rendered or administrative expenses relating to transit.

Clearly, as Pogoretsky states, the determination on the necessity of a delay or restriction as well as the reasonability of a charge or regulation “has to be assessed on a case-by-case basis” (Pogoretsky, 2017, p. 178). In the situations of freedom of transit of Paraguayan goods, this is relevant considering also the different modalities in which the transit can be performed, the plurality of transit States that can be involved, and the diverse legal framework applicable to the situations.

Nonetheless, as the mentioned author also explains, “the assessment cannot be an arbitrary exercise”. He thus refers to the WTO system, where there is extensive jurisprudence on the “necessity” test applied in the context

of Article XX of the GATT (General Exceptions) and the Technical Barriers to Trade Agreement (TBT) and panels have also interpreted the meaning of “reasonable” in several WTO cases (Pogoretsky, 2017, pp. 178-179).

Unfortunately, the Panel in the Russia-Traffic in Transit case did not analyze the claim of Ukraine that Russian measures implied “unnecessary delays or restrictions” on traffic in transit (*Russia-Measures Concerning Traffic in Transit*, 2019, para. 7.201). Although interesting considerations are given by third parties to that dispute. For instance, Canada considered that *The reference to “applicable customs laws and regulations” in Article V:3 should not be read to indicate that only measures that fall within the scope of this phrase can constitute legitimate constraints on traffic in transit in the sense of giving rise to “necessary” delays or restrictions. A purposive reading suggests that Article V:3 provides a right for WTO Members to require that traffic in transit be registered with their customs authorities but that the exercise of that right must not result in any unnecessary delays or restrictions* (*Russia-Measures Concerning Traffic in Transit*, 2019, Annex D-3, para. 15). On the other side, the European Union deemed that the requirement in Article V:3 that the traffic in transit shall not be subject to any unnecessary delays or restrictions *applies specifically with regard to delays or restrictions resulting from customs laws or regulations* (*Russia-Measures Concerning Traffic in Transit*, 2019, Annex D-5, para. 33). Perhaps, one of the most remarkable inputs in this sense was provided by Brazil, which proposed that whether delays or restrictions are “necessary” under Article V:3 must be examined on a case-by-case basis, including assessing “the trade restrictiveness of the procedures, its degree of contribution to the public interest at stake and the risk of non-fulfilment”. Moreover, Brazil also con-

sidered that restrictions or delays can be “necessary” to achieve legitimate objectives that are not exclusively related to transit regulation, such as in “force majeure” circumstances (*Russia-Measures Concerning Traffic in Transit*, 2019b, para. 7.206).

In the particular cases of the transit of goods through the Paraguay-Paraná Waterway, which is the main way of product import and export of Paraguayan foreign trade, the Santa Cruz de la Sierra Treaty and its additional protocols set the general legal framework of navigation and transit through the waterway from Puerto Cáceres to Nueva Palmira. Binding international obligations of the State parties stem from that framework, including the transit States, so its domestic regulations must be coherent with such framework. A similar situation occurs with the transit through land transport, where all States in the region are parties of the ATIT and thus all national regulations on international land transport must be in accordance with the mentioned agreement and its additional protocols.

In consequence, the mechanisms that may be applied to resolve disputes on freedom of transit of goods originated from or destined to Paraguay due to the application of domestic law and procedures between Paraguay and its neighboring countries must be addressed on a case-by-case basis. In this evaluation, some factors must be taken into consideration, such as the object, purpose, and modalities of application of the mentioned law, regulations, and procedures; the determination on the necessity of a delay or restriction as well as the reasonability of a charge or regulation, taking into account the test and standards performed in the WTO jurisprudence; and the level of compliance of the necessary regula-

tions and reasonable charges by the Paraguayan agents and companies who perform the transit.

ii. Internal protests, tension, or convulsion in neighboring countries

In recent history, internal protests within the territory of a transit State paralyzed for some periods the transshipment operations of vessels with the flag of Paraguay, which affected transit of goods originated from and destined to that country and caused economic losses as well as friction in media and diplomacy between Paraguay and the transit State. While negotiations are the first and main to resolve these kinds of controversies, there are occasions where the internal political affairs can hinder such mechanism, especially in situations where the own Government of the transit State may be encouraging the protests actions or, at least, is not keen to make them cease. In the mentioned occasions, resorting to an adjudicatory organ can be useful to resolve the dispute and to obtain compensations for damages.

In the MERCOSUR dispute settlement jurisprudence, the *Uruguay v. Argentina—Free circulation* case is an important precedent that demonstrates that, despite the right of protest of the citizens of a State, the necessary measures must be adopted to mitigate the inconvenient that the protests may cause as well as not to result in a factual barrier to the free economic movement that compromise the achievement of the objectives of the Treaty of Asuncion. Nonetheless, as said in previous sections, freedom of transit, as it is addressed in general International Law, is not contemplated in the mentioned treaty nor is contemplated in the current MERCOSUR legislation, as the free economic movement is. Thus, the ju-

risprudence will hardly consider freedom of transit as it is considered the latter.

On the other side, the WTO dispute settlement offers better perspectives. The GATT and the TFA provide several provisions to ensure freedom of transit of goods in practical cases where internal protests, tension, or convulsion arise in neighboring countries.

Therefore, the limits to freedom of transit in the instruments of the WTO are regarded to the operability of the traffic in transit, that is, to *how* the traffic in transit must be made. These provisions are in line with the existence of freedom of transit as a right that is subject to particular conditions. In this sense, none of the GATT and TFA provisions allow transit States to arbitrarily prevent traffic in transit through their territory.

It is important to mention that a State may prevent transit in traffic across its territory under the general exceptions and the security exceptions provided in Articles XX and XXI of the GATT, respectively. Nonetheless, there is not a situation within such exceptions that entirely justify the prevention of transit in traffic by internal protests, tension, or convulsion in transit States. For that to happen, unusual particular circumstances must occur, such as the traffic of fissionable materials or the materials from which they are derived and the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly to supply a military establishment.¹³³

133 Article XXI of the GATT. Security Exceptions. *Nothing in this Agreement shall be construed: (...) (b) to prevent any contracting party from taking any action which it considers necessary for the protection*

iii. Sanitary emergencies

The ongoing crisis of the coronavirus is evidence of the importance to analyze the coexistence of trade and sanitary issues, especially, the scope of the area covered by both figures, especially in situations where they seem to collide. About the present research, it is relevant to analyze the delimitation of the freedom of transit of goods in circumstances of emergencies related to public health.

Within the WTO, the GATT contemplates that States may adopt or enforce measures necessary to “protect human, animal or plant life or health”. Nonetheless, these measures must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade”.¹³⁴ From such reading, it can be argued that nothing in the GATT, including the provisions on freedom of transit, can prevent a State, including a transit State, to apply measures necessary to protect human health whenever such measures are not applied in the mentioned manner.

of its essential security Interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment.

134 Article XX of the GATT. General Exceptions. *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (...) (b) necessary to protect human, animal or plant life or health.*

The special relation between trade and public health generated by the existence of Article XX(b) of GATT had been addressed in several cases within the jurisprudence of the WTO and by the literature on that subject. These analyses by the dispute settlement bodies and scholars are interesting in order to identify the boundaries between trade and public health.

For instance, the Panel in the *United States-Standards for Reformulated and Conventional Gasoline* case held that the party invoking an exception “bore the burden of proof in demonstrating that the inconsistent measures came within its scope”, by establishing the following elements: (1) *that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health*; (2) *that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective*; and (3) *that the measures were applied in conformity with the requirements of the introductory clause of Article XX*. To justify the application of Article XX(b), all the above elements had to be satisfied (*United States-Standards for Reformulated and Conventional Gasoline*, 1996, para 6.20).

Moreover, the *European Communities-Measures Affecting Asbestos and Products Containing Asbestos* case establishes an important precedent regarding the assessment of the “necessity” of a measure. In this case, the Panel considered the “extent of the health problem in assessing the necessity of the measure”, as well as a “pragmatic assessment of the scientific situation and the measures available” (*European Communities-Measures Affecting Asbestos and Products Containing Asbestos*, 2001, para. 8.176 and 8.183).

Furthermore, the Appellate Body in the *Korea–Various measures on beef* case considered that “determination of whether a measure, which is not “indispensable”, may nevertheless be “necessary” within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports” (*Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, 2001). The mentioned weighing and balancing was considered by the Appellate Body of the *Brazil–Measures Affecting Imports of Retreaded Tyres* case as a “holistic operation that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement” (*Brazil–Measures Affecting Imports of Retreaded Tyres*, 2007, para. 182).

The jurisprudence of the cases mentioned above is important to understand that the application of the general exceptions provided in the GATT, including the measures considered necessary to protect human, animal or plant life or health, which are sanitary emergencies, are subject to the dispute settlement mechanisms of the WTO, where the necessity of such measures must be analyzed case-by-case in a holistic operation considering all variables addressed individually and with each other.

Regarding other instruments on the subject, they explicitly contemplate provisions that limit the application of freedom of transit in cases of public health policies of the transit State. These are the cases of the 1921

Barcelona Convention¹³⁵ and the Convention on Transit Trade of Land-locked States.¹³⁶ In the same way, the 1980 Montevideo Treaty contemplates measures aimed at the protection of human life and health as a general exception to the application of that instrument.¹³⁷ It is worth highlighting that the mentioned provision lacks the consideration of necessity by the State applying the measure as the GATT does contemplate.

iv. International war or tension

The relatively recent case of *Russia–Transit in Traffic* is relevant to evaluate the situation of the application of the freedom of transit in circumstances of international war or tension in the context of the WTO legal framework. In this case, as mentioned in the previous section, while Ukraine claimed that Russian measures appeared to be inconsistent with provisions of the GATT 1994 related to freedom of transit, Russia invoked the provisions of Article xxi(b)(iii) of the GATT, arguing that such measures are among those that it considered necessary for the protection of its essential security interests and

135 See cit. 21.

136 Convention on Transit Trade of Land-locked States. Article 11.1: “No Contracting State shall be bound by this Convention to afford transit to persons whose admission into its territory is forbidden, or for goods of a kind of which the importation is prohibited, either on grounds of public morals, public health or security, or as a precaution against diseases of animals or plants or against pests”.

137 1980 Montevideo Treaty. Article 50. “No provision of this Treaty shall be construed as an impediment to the adoption and compliance of measures aimed at: d) Protection of life and health of people, animals and plants”.

adopted as a response “to the emergency in international relations” and thus that the Panel lacked jurisdiction to further address the matter.

In this sense, the report of the Panel contains two important considerations. First, that the invocation of the security exception is not a totally “self-judging” attribution of the States (in the case of the freedom of transit, the transit State) because it can be, and it have been in that case, subject to an objective evaluation by the WTO dispute settlement bodies. And second, that in case that the evaluation finds that the mentioned requirements are met, GATT provisions, such as freedom of transit, can be suspended or ignored under such frame. From a general and practical perspective, this last conclusion can be seen as a prevalence of the right of the transit State to its “essential security interests” over the right of transit of the States that practices or needs the transit, in situations of war or other emergencies in international relations.

The result of the case proves the legal and practical difficulty to reverse the mentioned prevalence, which implies an advantageous position for transit States in circumstances of war or other emergencies in international relations. Indeed, according to Bogdanova, although the panel’s ruling is an attempt to balance the ambiguous national security exception with some sort of judicial review exercised by the WTO dispute settlement bodies, in its view, it has extremely restricted discretion to review the security clause invocation. The author concluded that is evident “the possibility of more powerful states to flex their economic muscle against less powerful states amidst political turmoil and be exempted by the national security exception” (Bogdanova, 2019).

v. International sanctions

Although there are different definitions of international sanctions, Doxey provides an interesting one that states that they are “penalties threatened or imposed as a declared consequence of the target’s failure to observe international standards or international obligations”. The author also mentions that because standardized penalties for designated offenses do not exist at the international level, in conventional parlance sanctions usually mean non-violent measures, particularly economic measures, and this reflects state practice. Moreover, governments have a very wide range of options on these non-violent sanctions, which include diplomatic, political, cultural, and communications measures, as well as a very broad range of economic measures of a commercial, financial and technological nature (Doxey, 1996, p. 9 and 11).

In this sense, on several occasions, freedom of transit has been a figure affected by international sanctions during history. For instance, as a unilateral sanction, in 1995 Russia sealed off its border with Azerbaijan, including railway traffic, through which 70 percent of Azeri foreign trade passed, causing losses of \$250 million to Azerbaijan. In the same way, years before, as a response to the reduction of oil deliveries by Russia, Latvia seized control of the oil pipeline running from the Russian border to the port of Ventspils and shut down deliveries, demanded an increased transit fee for the pipeline (Drezner, 1999, 211 and 220).

Despite the political background that influences international sanctions, it has to be pointed out that there are, as Joyner indicates, several positive sources of international law which “circumscribe the ability of States to lawfully apply coercive economic/financial sanc-

tions against other States". Indeed, as he indicates, the totality of the obligations of International Law limiting the lawfulness of both unilaterally and multilaterally applied coercive economic/financial sanctions leaves a vanishingly small space of lawfulness for such sanctions, applied for counter-proliferation purposes (Joyner, 2015, 93) and Consequences." , "event-place": "The Hague", "language": "English", "publisher": "Asser Press", "publisher-place": "The Hague", "title": "International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions", "author": [{"family": "Joyner", "given": "Daniel H."}], "editor": [{"family": "Marossi", "given": "Ali Z."}, {"family": "Bassett", "given": "Marsa R."}], "issued": {"date-parts": [{"2015"}]}, "schema": "https://github.com/citation-style-language/schema/raw/master/csl-citation.json" .

Therefore, in order to analyze the compatibility of the application of international sanctions and the freedom of transit within International Law, and thus the available legal mechanisms, different variables must be considered in a case-by-case evaluation. For instance, on the basis that a very wide range of options on non-violent sanctions is at disposal for States in their relations with others, it must be determined that the sanction affects traffic in transit. In the same way, it must be addressed if such sanction is within the space of lawfulness provided for International Law for these kinds of actions. In case they fall outside of the mentioned space, in principle, the legal mechanisms of dispute settlement existing in the pertinent framework may apply to the situation.

B. Convenience for Paraguay of the available mechanisms to resolve disputes regarding the freedom of transit of its goods

From the legal framework and jurisprudence revised regarding the hypothetical situations examined involving disputes on freedom of transit, addressing the convenience for Paraguay to recur to such mechanisms in order to resolve disputes of that matter requires taking into account multiple elements, and it implies a discussion that must be addressed on a case-by-case basis. In other words, is not the same to evaluate such convenience in a case concerning the application of regulations by a transit State than in a case of union strikes or civil demonstrations that paralyzes traffic in traffic or circumstances of international war.

Among the elements that must be considered are the type of the action or measure affecting the freedom of transit of goods, its legitimacy, its cause, its duration, the direct and indirect economic costs it generates to Paraguay actors, the bilateral relation between Paraguay and the involved neighboring transit State, the impact of the measure in society and media, as well as the mechanisms in International Law that are available to resolve the specific dispute, possible counter-claims in such mechanisms, its extent and economic costs, and its consequences on bilateral relation. Therefore, due to the space of variability elements is very wide, conclusions shall be made on a case-by-case assessment.

Nonetheless, some conclusions can be drawn regarding the element of the legitimacy of the actions or measures that result in a dispute of freedom of transit of goods originated from or destined to Paraguay with

its neighboring countries. In this sense, the considerations in previous chapters allow us to determine the definition and scope of the figure of freedom of transit (of goods) within International Law, and the different ways that such figure is protected by the diverse legal framework and the jurisprudence of the legal mechanisms provided by them.

Disputes arising from the application of domestic law and procedures in neighboring countries are generally circumscribed in legal powers of the transit States, derived from their right to territorial sovereignty, which, as seen before, is the other weigh in the balance when pondering freedom of transit. Therefore, because of its flexibility, direct negotiations are often an appropriate mechanism to resolve that kind of incident. When, on the contrary, the domestic law or procedures of the transit State move away from such legal powers, depending on the situation, arbitration mechanisms are an alternative way to solve the situation. In this point, the dispute settlement of the WTO may be a suitable forum because of some reasons, such as the possibility to make consultations regarding existing specific measures of the State members and to request for the establishment of a panel, the fact that its framework limits to necessary delays or restrictions, as well as to non-discriminatory and reasonable charges that are permitted for services rendered or those commensurate with administrative expenses relating to transit requires, and that its jurisprudence has developed tests and standards as to determine the necessity of a delay or restriction as well as the reasonability of a charge or regulation.

On the other side, disputes originated from internal protests, tension, or convulsion in neighboring transit

countries, have less legitimacy because they are not covered by the legal powers of the transit States, derived from their right to territorial sovereignty. As previously mentioned, negotiations are the first and main international dispute settlement mechanism. But when in such circumstances the negotiations fail, which may happen due to the support of the Government of the transit States to the protests, adjudicatory mechanisms, such as the WTO dispute settlement system or a proceeding before the ICJ, are interesting in order to enforce the freedom of transit, as they allow the settlement of the dispute by an impartial third actor and they permit smaller parties to argue in a more equitable basis with a stronger counterpart.

Concerning the sanitary emergencies, this is, measures adopted to protect public health, legitimacy of such measures is generally provided by different international instruments on freedom of transit. Consequently, and as it happens with the rest of domestic law and procedures of the transit States, direct negotiations are an appropriate method to resolve that kind of incidents and international arbitration is an alternative mechanism when, according to the situation, the measures are not deemed necessary to the purpose to protect public health. The mentioned tests and standards developed by the WTO jurisprudence to determine the necessity of a measure make the dispute settlement mechanisms of the WTO a suitable forum to resolve those kinds of disputes.

Regarding the measures adopted by transit States against freedom of transit in circumstances of war or emergencies in international relations, negotiation capacities would be limited due to the own nature of that type of dispute. Moreover, the instruments on freedom

of transit also restrain the application of the figure in such circumstances, based on the security of the transit State. On this point, the recent *Russi-Traffic in Transit* case within the WTO is evidence of the application of the prevalence of the right of the transit State to its “essential security interests” over the right of transit of the States that practices or needs the transit, and that the adjudicatory body only can address the objective existence of such situation, leaving the evaluation on the necessity of the measure to the own transit State.

Lastly, concerning the situations of international sanctions which affect the transit of a State, it must be analyzed, case-by-case, if the sanctions are allowed in International Law. If the State that needs the transit deems they are not, mechanisms of international dispute settlement provided on legal instruments on freedom of transit, such as negotiations and arbitration, could be used against the sanctions.

CONCLUSIONS

Freedom of transit of goods is a well-established principle in International Law. It appears in several important legal instruments, where it is protected as a right subject to certain conditions and exceptions, in a system of balance with the opposed interests, which are the legitimate concerns and state territoriality of the transit State.

Among the mentioned legal instruments are the 1921 Barcelona Convention and Statute on Freedom of Transit, the Convention on Transit Trade of Land-Locked States, the United Nations Convention on the Law of the Seas, and the General Agreement on Tariffs and Trade and the Trade Facilitation Agreement within the World Trade Organization. Furthermore, the concept is also contemplated in regional agreements, such as the International Land Transport Agreement and the Paraguay – Paraná Waterway Agreement within the Latin American Integration Association. Nonetheless, it has to be pointed out that the provisions on freedom of transit differ according to the nature and purpose of each instrument.

In the same way that the mentioned instruments expressly contemplate and protect freedom of transit of goods, subject to certain conditions and exceptions, they

also contain dispute settlement mechanisms to enforce such concept in the trade of goods between States.

With regard to the kind of dispute settlement mechanisms, all the instruments analyzed contemplate direct negotiations, exchange of views or consultations between the involved States as the first one to be conducted and, in case of its failure, they provide for other methods to resolve the dispute, which varies greatly between each other. Indeed, the United Nations Convention on the Law of the Seas provides procedures before the International Tribunal for the Law of the Sea, the International Court of Justice or arbitral tribunals, and the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization, which implies the jurisdiction of a Panel and an Appellate Body, applies to the General Agreement on Tariffs and Trade and the Trade Facilitation Agreement. Moreover, disputes within the International Land Transport Agreement may resort to the Representatives Committee, whose intervention and recommendations are non-binding, while within the Paraguay-Paraná Waterway Agreement they can be resolved through an arbitral proceeding.

Nonetheless, in international practice, the application of those dispute settlement mechanisms developed very different among them, mostly depending on the pertinent framework. For instance, there is no knowledge regarding the application of the arbitration proceedings provided by the Convention on Transit Trade of Land-Locked States and the United Nations Convention on the Law of the Seas on a dispute concerning freedom of transit, while the World Trade Organization dispute settlement system ruled in two important cases on that subject.

Moreover, as Paraguay and those States are all parties in some of the instruments contemplating and protecting freedom of transit, the different mechanisms provided by such instruments may be applied in the incidents between them, considering also the limitations and exceptions contemplated in each framework.

Therefore, regarding the established general objective regarding the existence of mechanisms within International Law that are available to Paraguay to resolve the disputes on freedom of transit of its goods with neighboring countries, the conclusion is that they do exist, that they comprise a wide range of mechanisms, including negotiations, conciliation, arbitration and adjudication before *ad hoc* and permanent tribunals, and that they are available within the scope provided by the instruments that contemplate such mechanisms.

With reference to the convenience to recur to such mechanisms in disputes where freedom of transit of goods originated in and destined to Paraguay is affected in neighboring countries, some advantages and disadvantages have been pointed out. For instance, the problematic situations of the last decade were resolved by different means which did not imply arbitration and adjudication proceedings, mostly negotiations and domestic procedures within such neighboring countries. Although the mentioned means were, in the end, effective to resolve the disputes, they did not prevent economic losses and delays to Paraguayan trade. Moreover, they also highlighted the scarce capacity of Paraguayan representatives and companies to resolve the disputes by themselves and their obligation to recur entirely to the goodwill of actors of the neighboring countries. In this sense, the arbitration and adjudicatory dispute settlement

mechanisms on freedom of transit allow an objective perspective on an issue that implies the existence of two opposed State interests: the one belonging of the State needing of the transit and the one of the transit State.

Even so, the convenience to recur to legal mechanisms to resolve disputes on freedom of transit of goods by Paraguay requires a holistic analysis of multiple and diverse elements. Among these are the type of the action or measure affecting the freedom of transit of goods, its legitimacy, its cause, its duration, the direct and indirect economic costs it generates to Paraguayan actors, the bilateral relation between Paraguay and the involved neighboring transit State, the impact of the measure in society and in media, the mechanisms in International Law that are available to resolve the specific dispute, possible counter-claims in such mechanisms, its extent and economic costs, and its consequences on bilateral relation.

As a result, regarding the determination on the convenience for Paraguay to recur to legal mechanisms to resolve disputes on freedom of transit of its goods in neighboring countries, due to the wide range of variable elements, such determination shall be made on a case-by-case assessment.

However, the analysis made on the international legal order and jurisprudence in the present thesis permits some conclusions concerning the convenience to recur to legal mechanisms to resolve disputes on freedom of transit of goods from the point of view of the legitimacy and the kind of situation where freedom of transit is affected. About these thoughts, the development and consideration of the concept of freedom of transit by the case law of particular dispute settlement systems

result very important. For instance, direct negotiations, due to their flexibility, can be useful to solve many of these situations, including the application of domestic law and procedures in neighboring countries based on the legal faculties of such countries. On the other side, arbitration or adjudicatory mechanisms, as they allow an impartial third actor to settle a dispute that cannot be solved between them and they also permit smaller parties to argue in a more equitable basis with a stronger counterpart, can be convenient in cases where the domestic law or procedures are far from being lawful, as well as in disputes originates from internal protests, tension, or convulsion in neighboring transit countries.

BIBLIOGRAPHY

CASE LAW

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), No. c140 (April 1, 2011).

<https://www.icj-cij.org/public/files/case-related/140/140-20110401-JUD-01-00-EN.pdf>

Brazil—Measures Affecting Imports of Retreaded Tyres, No. DS332 (WTO-DS Appellate Body December 17, 2007). <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/332ABR.pdf&Open=True>

Case Concerning Right of Passage over Indian Territory (Portugal v. India), 1960d, Dissenting Opinion of Judge Chagla _ (International Court of Justice 1960). <https://www.icj-cij.org/public/files/case-related/32/032-19600412-JUD-01-11-EN.pdf>

Case Concerning Right of Passage over Indian Territory (Portugal v. India), 1960c, Dissenting Opinion of Judge Armand-Ugon _ (International Court of Justice 1960). <https://www.icj-cij.org/public/files/case-related/32/032-19600412-JUD-01-08-EN.pdf>

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), (International Court of Justice April 9, 1949). <https://www.icj-cij.org/public/files/case-related/1/001-19490409-JUD-01-00-EN.pdf>

Case Concerning Right of Passage over Indian Territory (Portugal v. India), Judgment _ (International

Court of Justice 1960). <https://www.icj-cij.org/public/files/case-related/32/032-19600412-JUD-01-00-EN.pdf>

Case Concerning Right of Passage over Indian Territory (Portugal v. India), 1960 b, Separate Opinion of Judge V. K. Wellington Koo _ (International Court of Justice 1960). <https://www.icj-cij.org/public/files/case-related/32/032-19600412-JUD-01-06-EN.pdf>

Colombia—Indicative Prices and Restrictions on Ports of Entry, No. DS366 (World Trade Organization - Dispute Settlement Body - Panel May 20, 2009). <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/366R.pdf&Open=True>

Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment _ (International Court of Justice 2009). <https://www.icj-cij.org/public/files/case-related/133/133-20090713-JUD-01-00-EN.pdf>

European Communities-Measures Affecting Asbestos and Products Containing Asbestos, (WTO-DS Panel April 5, 2001). <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/135R-00.pdf&Open=True>

Guatemala- Anti-dumping Investigation regarding Portland cement from Mexico, No. DS60 (WTO-DS Appellate Body November 25, 1998). <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/60ABR.pdf&Open=True>

India- Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, No. DS90 (WTO-DS Appellate Body September 22, 1999). <https://docs.wto.org/dol2fe/Pages/SS/>

directdoc.aspx?filename=Q:/WT/DS/90ABR.pdf&Open=True

International Tribunal for the Law of the Sea. (2019). *The Swiss Confederation and the Federal Republic of Nigeria transfer their dispute concerning the M/T “San Padre Pio” to the Tribunal*. https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_298_en_20edit_20PTG_2017-12-19_br_2017.12.19.pdf

Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, No. DS161 (WTO-DS Appellate Body January 10, 2001). <https://docs.wto.org/dol-2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/169ABR.pdf&Open=True>

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment _ (International Court of Justice 1984). <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-BI.pdf>

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment _ (International Court of Justice 1986). <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-BI.pdf>

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), No. 70 (International Court of Justice June 30, 1984). <https://www.icj-cij.org/public/files/case-related/70/9617.pdf>

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), No. 70 (International Court of Justice April 30,

1985). <https://www.icj-cij.org/public/files/case-related/70/9619.pdf>

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Dissenting opinion of Judge Schwebel _ (International Court of Justice 1984). <https://www.icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-07-EN.pdf>

Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys), Series A/B, No. 42 (Permanent Court of International Justice October 15, 1931). https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_AB/AB_42/Trafic_ferroviaire_Avis_consultatif.pdf

Russia-Measures Concerning Traffic in Transit, WT/DS512/R/Add.1 Report of the Panel-Addendum _ (World Trade Organization - Dispute Settlement Body - Panel 2019). <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/512R.pdf&Open=True>

Russia-Measures Concerning Traffic in Transit, No. DS512 (World Trade Organization - Dispute Settlement Body - Panel April 5, 2019). <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/512R.pdf&Open=True>

United States-Standards for Reformulated and Conventional Gasoline, (May 20, 1996). <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/2R.pdf&Open=True>

Uruguay v. Argentina-Free movement, Award _ (“Ad Hoc” Tribunal constituted to understand the dis-

pute 2006). https://www.tprmercosur.org/es/document/laudos/Laudo_arb_omision_estado_arg.pdf

WTO | dispute settlement - DS512: Russia - Measures Concerning Traffic in Transit. (n.d.). Retrieved January 14, 2021, from https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm

ACADEMIC WRITINGS AND DOCTRINE

Areces, N. R. (2010). Capítulo VIII. De la Independencia a la Guerra de la Triple Alianza (1811-1870). In I. Telesca (Ed.), *Historia del Paraguay* (p. XX-XX). Santillana SA.

Areces, N. R., & Bouvet, Nora E. (2002). “La libertad de los tabacos” y las relaciones entre Asunción y Buenos Aires, 1810-1813. *Boletín Americanista*, 52, 57-83.

Aust, A. (2010). *Handbook of International Law*. Cambridge: Cambridge University Press.

Azaria, D. (2015). *Treaties on transit of energy via pipelines and countermeasures* (First). Oxford University Press.

Bertoni, L. (2017). *La Libre Circulación y los Derechos Fundamentales en los procesos de integración regional*. In C. F. Molina del Pozo, *Evolución histórica y jurídica de los procesos de integración de la Unión Europea y el Mercosur* (pp. 99-112). EUDEBA: Buenos Aires.

Bogdanova, I. (2019, April 12). The WTO Panel Ruling on the National Security Exception: Has the Panel ‘Cut’ the Baby in Half? *Blog of the European Journal of International Law*. <https://www.ejiltalk.org/the-wto-panel-ruling-on-the-national-security-exception-has-the-panel-cut-the-baby-in-half/>

- Brezzo, L. M. (2010). Capítulo IX. Reconstrucción, poder político y revoluciones (1870-1920). In I. Telesca (Ed.), *Historia del Paraguay* (p. XX–XX). Santillana SA.
- Cançado Trindade, A. A. (2004). *Peaceful Settlement of International Disputes: Current State and Perspectives*. XXXI Course of International Law organized by the Inter-American Juridical Committee of the OAS, Río de Janeiro. http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXXI_curso_derecho_internacional_2004_Antonio_Augusto_Cançado_Trindade.pdf
- Cardozo, E. (2011). *Paraguay Independiente*. Servilibro.
- Collier, J. G., & Lowe, V. (2000). *The Settlement of Disputes in International Law: Institutions and Provisions*. Oxford University Press.
- Cooney, J. W. (2012). *El Proceso de la Independencia del Paraguay 1807-1814*. Intercontinental Editora S.A.
- Doxey, M. P. (1996). *International Sanctions in Contemporary Perspective* (Second). Macmillan Press Ltd.
- Drezner, D. W. (1999). *The Sanctions Paradox: Economic Statecraft and International Relations* (First). Cambridge University Press.
- Durán Estragó, M. (2010). Capítulo IV. Conquista y Colonización. In I. Telesca (Ed.), *Historia del Paraguay* (pp. 63-86). Santillana SA.
- Huarte Melgar, B. (2015). *The Transit of Goods in Public International Law* (1st ed.). Brill Nijhoff.
- Johnson, R. W. (1964). Freedom of Navigation for International Rivers: What Does It Mean? *Michigan Law Review*, 62(3), 465-484.

- Joyner, D. H. (2015). International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions. In A. Z. Marossi & M. R. Bassett (Eds.), *Economic Sanctions under International Law. Unilateralism, Multilateralism, Legitimacy, and Consequences*. Asser Press.
- Karaman, I. V. (2012). *Dispute Resolution in the Law of the Sea*. Martinus Nijhoff Publishers.
- Kidane, W. L. (2017). *The Culture of International Arbitration*. Oxford University Press.
- Klein, N. (2004). *Dispute Settlement in the UN Convention on the Law of the Sea*. Cambridge University Press.
- Mantilla Blanco, S., & Pehl, A. (2020). *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review*. Springer Nature.
- Marceau, G. (2010). The WTO in the Emerging Energy Governance Debate. *Global Trade and Customs Journal*, 5, 83–94.
- Merrills, J. G. (2005). *International Dispute Settlement* (Fourth Edition). Cambridge University Press.
- Oppenheim, L. (2005). *International Law: A Treatise*, Volumen 1. New Jersey: The Lawbook Exchange.
- Pastore, M. (1997). Taxation, Coercion, Trade and Development in a Frontier Economy: Early and Mid Colonial Paraguay. *Journal of Latin American Studies*, 29, 329–354.
- Pastori, A. (2003, 10 03). ALADI. Retrieved 12 01, 2020, from VIII Seminario Jurídico “La Dimensión Jurídica de la Integración”: <http://www2.aladi.org/nsfaladi/reuniones.nsf/6053654be7953f91032569fa0>

064855b/0b286a2719a2287703256ebb006988bc?
opendocument

- Pereira Vecino, M. (2010). Solución de controversias en la Asociación Latinoamericana de Integración (ALADI). *Revista de Derecho de la Universidad de Montevideo*, N° 18, 123–147.
- Pogoretsky, V. (2017). *Freedom of Transit and Access to Gas Pipeline Networks under WTO Law*. Cambridge University Press.
- Powell, E. J. (2018). Not so Treacherous Waters of International Maritime Law: Islamic Law States and the UN Convention on the Law of the Sea. In A. Roberts, P. B. Stephan, P.-H. Verdier, & M. Versteeg (Eds.), *Comparative International Law*. Oxford University Press.
- Rojas Penso, J. (2004). Nuevas perspectivas para la solución de controversias en la Asociación Latinoamericana de Integración (ALADI). In J. Lacarte, & J. Granados, *Solución de controversias comerciales e inter-gubernamentales: enfoques regionales y multilaterales* (pp. 133 - 138). Buenos Aires: Instituto para la Integración de América Latina y el Caribe - BID - INTAL.
- Sainz-Borgo, J. C. (2019). Latin America and the International Court of Justice. In F. Rojas Aravena (Ed.), *The Difficult Task of Peace: Crisis, Fragility and Conflict in an Uncertain World*. Palgrave Macmillan - Springer Nature.
- Singh, N. (1989). *The Role and Record of the International Court of Justice*. Martinus Nijhoff Publishers.
- Suárez, D. (2018, 03). United Nations - Comisión Económica para América Latina y el Caribe (CEPAL).

Retrieved from Logística y recursos naturales en los países sin litoral: el caso de la soya y la chía en el Estado Plurinacional de Bolivia y Paraguay: https://www.cepal.org/sites/default/files/news/files/lcts2018_bo_py.pdf

Tanaka, Y. (2018). *The Peaceful Settlement of International Disputes* (First). Cambridge University Press.

Telesca, I. (2010). Capítulo V. La Colonia desde 1680 a 1780. In I. Telesca (Ed.), *Historia del Paraguay* (pp. 87-XX). Santillana SA.

Treves, T. (2008). *United Nations Convention on the Law of the Sea*. United Nations Audiovisual Library of International Law. https://legal.un.org/avl/pdf/ha/uncls/uncls_e.pdf

Turner, B. (Ed.). (2010). *The Statesman's Yearbook: The Politics, Cultures and Economies of the World 2011*. Macmillan Publishers Ltd.

Upreti, P. N., & Subedi, S. P. (2019). Nepal. In S. Chesterman, H. Owada, & B. Saul (Eds.), *The Oxford Handbook of International Law in Asia and the Pacific*. Oxford University Press.

Upreti, K. (2006). *The Transit Regime for Land-locked States: International Law and Development Perspective*. The World Bank.

World Trade Organization. (2017). *A Handbook on the WTO Dispute Settlement System*. Cambridge University Press.

PRESS, MEDIA, REPORTS AND WEB PAGES

ABC Color. (2010a, October 30). *Sindicalista de SOMU es director de naviera-Economía-ABC Color*. <https://>

www.abc.com.py/edicion-impres/a/economia/sindicalista-de-somu-es-director-de-naviera-178557.html

ABC Color. (2010b, December 1). *En puertos argentinos siguen trabas a operaciones de naves paraguayas-Economía-ABC Color*. <https://www.abc.com.py/edicion-impres/a/economia/en-puertos-argentinos-siguen-trabas-a-operaciones-de-naves-paraguayas-191647.html>

ABC Color. (2010c, December 13). *Sindicato levanta bloqueo de cargamentos con conexión a Paraguay-Nacionales-ABC Color*. <https://www.abc.com.py/nacionales/sindicato-levanta-bloqueo-de-cargamentos-con-conexion-a-paraguay-196011.html>

ABC Color. (2010d, December 2). *Sindicato paraliza en Argentina los embarques al país-Economía-ABC Color*. <https://www.abc.com.py/edicion-impres/a/economia/sindicato-paraliza-en-argentina-los-embarques-al-pais-191790.html>

ABC Color. (2011a, March 6). *Marítimos argentinos harían otro bloqueo-Artículos-ABC Color*. <https://www.abc.com.py/articulos/maritimos-argentinos-harian-otro-bloqueo-228513.html>

ABC Color. (2011b, April 29). *Navieros denuncian nuevo bloqueo en Argentina al comercio paraguayo-Economía-ABC Color*. <https://www.abc.com.py/edicion-impres/a/economia/navieros-denuncian-nuevo-bloqueo-en-argentina-al-comercio-paraguayo-251154.html>

ABC Color. (2013, November 17). *El SOMU levantó medida de fuerza contra la navegación paraguaya-Economía-ABC Color*. <https://www.abc.com.py/edicion-im>

presa/economia/el-somu-levanto-medida-de-fuerza-contra-la-navegacion-paraguaya-640477.html

ABC Color. (2016, September 19). *Se hizo justicia, al menos en parte, según navieros locales-Economía-ABC Color*. <https://www.abc.com.py/edicion-imprensa/economia/se-hizo-justicia-al-menos-en-parte-segun-navieros-locales-1520329.html>

ABC Color. (2017, December 6). *Superan atasco de cargas paraguayas-Economía-ABC Color*. <https://www.abc.com.py/edicion-imprensa/economia/superan-atasco-de-cargas-paraguayas-1656056.html>

ABC Color. (2018a, November 13). *Bloqueo ilegal a buque paraguayo en Argentina-Economía-ABC Color*. <https://www.abc.com.py/edicion-imprensa/economia/bloqueo-ilegal-a-buque-paraguayo-en-argentina-1758877.html>

ABC Color. (2018b, November 29). *Argentina libera buque paraguayo luego de intensas negociaciones-Economía-ABC Color*. <https://www.abc.com.py/edicion-imprensa/economia/argentina-libera-buque-paraguayo-luego-de-intensas-negociaciones-1763956.html>

ABC Color. (2020, September 25). *Desbloquean rutas en Clorinda y camiones con mercaderías vuelven a circular-Nacionales-ABC Color*. <https://www.abc.com.py/nacionales/2020/09/25/desbloquean-rutas-en-clorinda-y-camiones-con-mercaderias-vuelven-a-circular/>

Agencia Uruguaya de Noticias. (2019, January 27). *Paraguayos dejan puerto de Montevideo por el de Buenos Aires por “inacción” de autoridades*. <https://www.uy-press.net/Actualidad/Paraguayos-dejan-puerto-de-Montevideo-por-el-de-Buenos-Aires-por-inaccion-de-autoridades-uc93404>

- ALADI. (n.d.-a). *AAP.A14TM N° 3-Acuerdo*. Acuerdos de Alcance Parcial. Retrieved February 19, 2021, from <http://www2.aladi.org/nsfaladi/textacos.nsf/9d75d127f40400a483257d800057bc77/a0b442a36c50c2d20325682500602655?OpenDocument>
- ALADI. (n.d.-b). *AAP.A14TM N° 5-Acuerdo*. Acuerdo Acuerdos de Alcance Parcial. Retrieved February 19, 2021, from <https://www2.aladi.org/nsfaladi/textacos.nsf/9d75d127f40400a483257d800057bc77/7a07ccfdceb9623f032582d5005b04f0?OpenDocument>
- ALADI. (n.d.-c). *AAP.A14TM N° 5-Quinto Protocolo Adicional*. Acuerdo Acuerdos de Alcance Parcial. Retrieved December 9, 2020, from <http://www2.aladi.org/nsfaladi/textacos.nsf/d390df5b6d403b69032567f200721398/315aa4fd-21e550d403256825007354e8?OpenDocument>
- ALADI. (n.d.-d). EL ATIT. *ALADI*. Retrieved February 10, 2021, from http://www.aladi.org/sitioaladi/?page_id=6215
- ALADI. (2014). *Bolivia y Chile acogen fórmula de solución propuesta por el Comité de Representantes de la ALADI (Bolivia and Chile accept the solution formula proposed by the ALADI Committee of Representatives)*. Press statement of ALADI. <http://www2.aladi.org/nsfaladi/titulare.nsf/vwtitularwebR/DF4C7EB-6CEF14D0883257DB2006D1647>
- ALADI. (2019, May 14). *Con grandes avances concluye la XXI Reunión del Acuerdo de Transporte Internacional Terrestre (ATIT)*. <http://www2.aladi.org/nsfaladi/sitioaladi.nsf/prensaDatosv2.xsp?databaseName=NSFALADI/prensanueva.nsf>

&documentId=07F727A9C9066BA9032583FA00
54888F&OpenDocument

- ALADI - Representatives Committee. (2014). *Acta de la 1192 Sesión Extraordinaria del Comité de Representantes (Act of the 1192 Extraordinary Session of the Representatives Committee)* (ALADI/CR/Acta 1192). ALADI. http://www2.aladi.org/biblioteca/Publicaciones/ALADI/Comite_de_Representantes/CR_Actas/ES/1192ap.pdf
- ASALE, R.-, & RAE. (n.d.). *Arroba* | *Diccionario de la lengua española*. «Diccionario de la lengua española» - Edición del Tricentenario. Retrieved December 16, 2020, from <https://dle.rae.es/arroba>
- ASALE, R.-, & RAE. (n.d.). *Tránsito* | *Diccionario de la lengua española*. «Diccionario de la lengua española» - Edición del Tricentenario. Retrieved December 14, 2020, from <https://dle.rae.es/tránsito>
- ASAMAR. (2017, November 16). *Cargas de exportación están varadas en Montevideo con fuertes pérdidas-Asamar-Asociación Agentes Marítimos del Paraguay*. <http://www.asamar.org.py/es/cargas-de-exportacion-estan-varadas-en-montevideo-con-fuertes-perdidas-n335>
- BCP. (2020). Banco Central del Paraguay. Retrieved from *Boletín de Comercio Exterior - Trimestral*. <https://www.bcp.gov.py/boletin-de-comercio-exterior-trimestral-i400>
- Cambridge Dictionary, transit. <https://dictionary.cambridge.org/dictionary/english/transit>. Retrieved December 2, 2020.
- Campo Agropecuario. (2020, September 25). *Cierre de ruta argentina paraliza exportación de carne y bana-*

na. <http://www.campoagropecuario.com.py/notas/1872/cierre-de-ruta-argentina-paraliza-exportacion-de-carne-y-banana>

El País. (2019, March 19). *Puerto: Baja carga paraguaya y se desata una polémica*. Diario EL PAIS Uruguay. <https://negocios.elpais.com.uy/noticias/puerto-baja-carga-paraguaya-desata-polemica.html>

European Commission: Directorate-General for Enterprise and Industry. (2010). Free movement of Goods: Guide to the application of Treaty provisions governing the free movement of goods. Luxembourg: Publications Office of the European Union.

Infobae. (2016, February 18). *Intervinieron el Sindicato de Obreros Marítimos Unidos*. Infobae. <https://www.infobae.com/2016/02/19/1791221-intervinieron-el-sindicato-obreros-maritimos-unidos/>

Infobae. (2017, November 21). *Uruguay prometió una solución para los 15 buques paraguayos varados hace 15 días en Montevideo: Tienen 3 mil contenedores*. infobae. /america/america-latina/2017/11/21/uruguay-prometio-una-solucion-para-los-15-buques-paraguayos-varados-hace-15-dias-en-montevideo-tienen-3-mil-contenedores/

International Court of Justice. (2021). *Cases | International Court of Justice*. <https://www.icj-cij.org/en/cases>

International Tribunal for the Law of the Seas. (2021). *ITLOS: List of Cases*. <https://www.itlos.org/cases/list-of-cases/>

La Nación. (2020, June 9). *La Nación / Liberan a camiones paraguayos varados en frontera entre Argentina y Chile*. <https://www.lanacion.com.py/pais/2020/06/09/>

liberan-a-camioneros-paraguayos-varados-en-frontera-de-argentina-y-chile/

Ministry of Foreign Affairs of Paraguay. (2019). *Informe-Nota DM/Nº 1* (Report Nº 1/2019). Ministry of Foreign Affairs of Paraguay.

Ministry of Foreign Affairs of Paraguay. (2020). *Instrumentos Bilaterales suscritos por la República del Paraguay en Materia de Navegación*. Department of Treaties of the Ministry of Foreign Affairs of Paraguay.

MundoMarítimo. (2010a, December 13). *Sindicato argentino libera cargamentos con conexión a Paraguay*. <http://www.mundomaritimo.cl/noticias/sindicato-argentino-libera-cargamentos-con-conexion-a-paraguay>

MundoMarítimo. (2010b, December 27). *Paraguay piensa en puerto de Montevideo como alternativa*. <http://www.mundomaritimo.cl/noticias/paraguay-piensa-en-puerto-de-montevideo-como-alternativa>

MundoMarítimo. (2011, June 17). *Récord en movimiento mensual de contenedores en Montevideo*. <http://www.mundomaritimo.cl/noticias/record-en-movimiento-mensual-de-contenedores-en-montevideo>

MundoMarítimo. (2015, March 30). *Chile y Bolivia concluyen segunda reunión bilateral en el marco del ATIT en Uruguay*. <http://www.mundomaritimo.cl/noticias/chile-y-bolivia-concluyen-segunda-reunion-bilateral-en-el-marco-del-atit-en-uruguay>

Paraguay.com. (2010, December 4). *Las navieras denuncian agravamiento de bloqueo argentino—Paraguay.com*. <https://www.paraguay.com/nacionales/las-navieras-denuncian-agravamiento-de-bloqueo-argentino-56782>

- Permanent Court of Arbitration. (2021). *UNCLOS | PCA-CPA*. <https://pca-cpa.org/en/services/arbitration-services/unclos/>
- Radio Ñanduti. (2018, November 28). Prefectura Argentina liberará buque paraguayo, pero con varias condiciones » Ñanduti. *Ñanduti*. <http://www.nanduti.com.py/2018/11/28/prefectura-argentina-liberara-buque-paraguayo-varias-condiciones/>
- ResearchGate (2021). Retrieved February 17, 2021, from https://www.researchgate.net/figure/Paraguay-Parana-Waterway_fig4_322478352
- Tratado de Navegación (Treaty of Navigation), (1967).
- Tratado de Paz entre la República Argentina y la República del Paraguay (Peace Treaty between the Republic of Argentina and the Republic of Paraguay), Signed on 3 February 1876. https://hum.unne.edu.ar/academica/departamentos/historia/catedras/hist_argen_indep/pactos_trat_acuer/tratado_paz_py_arg.pdf
- Tratado entre la Junta de Gobierno del Paraguay y los representantes de Buenos Aires, PY -ANA- SH-214n8-151-163 (1811). <http://historia.anasnc.se-natics.gov.py/uploads/r/archivo-nacional-de-asuncion/5/5/55206/PY-ANA-SH-214n8-151-163.pdf>
- Última Hora. (2010, December 11). *Sindicalista revela que Cristina instó al boicot contra Paraguay*. <https://www.ultimahora.com/sindicalista-revela-que-cristina-insto-al-boicot-contra-paraguay-n385391.html>
- Última Hora. (2012, February 7). *Navieras esperan que la Cancillería asuma posición*. <https://www.ultimahora.com/navieras-esperan-que-la-cancilleria-asuma-posicion-n501650.html>

- United Nations. (n.d.-a). 3. *Convention on Transit Trade of Land-locked States*. United Nations Treaty Collection. Retrieved February 19, 2021, from https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-3&chapter=10&clang=_en
- United Nations. (n.d.-b). 6. *United Nations Convention on the Law of the Sea*. United Nations Treaty Collection. Retrieved February 19, 2021, from https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en
- United Nations. (n.d.-c). 16. *Convention and Statute on Freedom of Transit*. United Nations Treaty Collection. Retrieved February 19, 2021, from https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=560&chapter=30&clang=_en
- World Trade Organization. (n.d.). *WTO Members and Observers*. Members and Observers. Retrieved February 19, 2021, from https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm
- World Trade Organization. (2021). *WTO | dispute settlement-The disputes-DS366*. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds366_e.htm

ANNEX I

MAPS

MAP OF PARAGUAY AND NEIGHBORING COUNTRIES



(Source: Google Maps, 2021)

MAP OF THE PARAGUAY - PARANÁ WATERWAY



(Source: ResearchGate, 2021)

ANNEX 2

Status of the application of the international legal framework regarding Freedom of Transit in Paraguay and neighboring countries

	1921 Barcelona Convention ¹³⁸	1965 New York Convention ¹³⁹	UNCLOS ¹⁴⁰	GATT ¹⁴¹	TFA ¹⁴²	ATT ¹⁴³	Paraguay – Paraná Waterway Agreement ¹⁴⁴	Additional Protocol on Dispute Settlement ¹⁴⁵
<i>Argentina</i>	<i>Not signed nor ratified</i>	<i>Signed but not ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>
<i>Bolivia</i>	<i>Signed but not ratified</i>	<i>Signed but not ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>
<i>Brazil</i>	<i>Not signed nor ratified</i>	<i>Signed but not ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>
<i>Paraguay</i>	<i>Not signed nor ratified</i>	<i>Signed but not ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>
<i>Uruguay</i>	<i>Signed but not ratified</i>	<i>Not signed not ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>	<i>Ratified</i>

138 (United Nations, n.d.-c)

139 (United Nations, n.d.-a)

140 (United Nations, n.d.-b)

141 (World Trade Organization, n.d.)

142 (World Trade Organization, n.d.)

143 (ALADI, n.d.-a)

144 (ALADI, n.d.-c)

145 (ALADI, n.d.-b)

The book **Available Legal Mechanisms for Paraguay to Resolve Disputes Concerning Freedom of Transit of Goods Through Neighboring States** explores the legal frameworks and mechanisms available to landlocked Paraguay to ensure the smooth transit of its goods through neighboring countries. Paraguay's reliance on international trade and its unique geographical position make freedom of transit critical for its economy.

In this comprehensive thesis, **Ignacio Cazaña** examines historical and recent disputes affecting Paraguay's transit rights, analyzes relevant international treaties, and discusses practical solutions to potential challenges. The work provides an in-depth look at how international law, including instruments like the 1921 Barcelona Convention, UNCLOS, and agreements within MERCOSUR and ALADI, can support Paraguay in resolving disputes and safeguarding its trade routes. This book is essential for legal scholars, policymakers, and international law practitioners interested in trade, transit, and the legal challenges faced by landlocked states.

ISSN 978-99924-21-61-1



9 789992 421611



FONDO
EDITORIAL
INEJ




Ciudad
del Saber
MEMBER