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## The War Triggered by a Ten Cents Tax on Natural Resources

Alvaro Villegas Aldazosa  
*Universidad Privada Boliviana*

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## THE WAR TRIGGERED BY A TEN CENTS TAX ON NATURAL RESOURCES

by

*Alvaro Villegas Aldazosa\**

### ABSTRACT

*This Article is intended to provide an historic tax analysis on the most controversial cause of the Pacific War (1879–1884) between Chile and the alliance of Peru and Bolivia, restating the importance of taxation on natural resources and the political consequences of inadequate tax policy measures.*

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\* LL.M. in International Taxation at University of Florida, founder of the Bolivian Branch of IFA, and Director of the Latin American Research Prize of IFA. Graduate Professor at Universidad Privada Boliviana and Universidad Andina Simon Bolivar—Quito.

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**INTRODUCTION**

This Article is part of a deeper investigation about the denominated “10 cents tax” or “tax on saltpeter,” which is attributed as the most controversial cause of the Pacific War (1879–1884) between Chile and the alliance of Peru and Bolivia.

In terms of tax policy, it is widely accepted that the level and incidence of taxes have an impact on a taxpayer’s behavior. For governments, what and how much to tax are two decisions of great importance, because they will potentially affect each individual and each company. Consequently, these decisions influence the taxpayers and their governments and whether the expected results are obtained.<sup>1</sup>

Dr. Héctor Villegas agrees that “although the tax arises from the unilateral will of the State, the facts have shown the importance of the acquiescence of individuals to the tax norm.”<sup>2</sup> “[T]he important

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1. *See generally* CHRISTOPHER JOHN WALES & CHRISTOPHER PETER WALES. *STRUCTURES, PROCESSES AND GOVERNANCE IN TAX POLICY-MAKING: AN INITIAL REPORT* (2012).

2. HÉCTOR VILLEGAS, *CURSO DE FINANZAS, DERECHO FINANCIERO Y TRIBUTARIO* 86 (1995) (original: “[s]i bien el impuesto surge de la voluntad unilateral del Estado, los hechos han demostrado la importancia que tiene la aquiescencia de los particulares a la norma impositiva”). All translations are by the Article author, unless otherwise indicated.

political reactions that tax systems have caused in history, producing riots, uprisings aimed and true social revolutions,” include, for example, the independence war of the United States, the French Revolution, and the uprising of Naples.<sup>3</sup> In recent Bolivian history, the violent popular protests of February 2003, which mixed with police riots of political origins with an unfortunate balance of dead and wounded,<sup>4</sup> suspended the beginning of the discussion of proposed Draft Law to Reform the Complementary Regime to the Added Value Tax (RCIVA).<sup>5</sup> Without a doubt, the most relevant fact in Bolivia’s tax history was the tax of 10 cents created by the Law of February 23, 1878,<sup>6</sup> addressed in this Article in order to provide an analysis of the historical context, the legal nature, and the legal effects that this tax had and should have had under the Treaty of 1874 celebrated between Bolivia and Chile.

### I. THE STRATEGIC IMPORTANCE OF GUANO AND SALTPEETER EXPLOITATION

A book written by José Mesa et al. titled *History of Bolivia* explains that “the reason why a region as inhospitable as the Atacama became a cause for conflict was the evidence of wealth that was mostly reflected in two products, guano, and saltpeter.”<sup>7</sup> “Both [are] used for land fertilization.

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3. *Id.* (original: “[L]as importantes reacciones políticas que han provocado en la historia los sistemas fiscales, produciendo motines, levantamientos armados y verdaderas revoluciones sociales”).

4. Alvaro Villegas Aldazosa, *Bolivia*, in MEMORIAS DE LAS XXIV JORNADAS LATINOAMERICANAS DE DERECHO TRIBUTARIO INSTITUTO LATINOAMERICANO DE DERECHO TRIBUTARIO: TEMA II LOS PRINCIPIOS TRIBUTARIOS ANTE LAS NUEVAS FORMAS DE IMPOSICIÓN A LA RENTA at ch. 3, 168 n.12 & 201 (2008).

5. See Johnathan Rickman, *Sanchez Abandons Tax Plan Following Violent Protests*, 29 TAX NOTES INT’L 738 (Feb. 24, 2003).

6. Ley 23-02-1878, 23 de Febrero de 1878—Salitres—Se Aprueba la Transaccion de 27 de Noviembre de 1873 con la Compañía de Antofagasta: Impuesto de Diez Centavos, 28 GACETA OFICIAL DE BOLIVIA, <http://www.gacetaoficialdebolivia.gob.bo/edicions/view/GOB-28/page:4> [hereinafter Ley 23-02-1878] (approved on Feb. 14, 1878).

7. JOSÉ D. MESA ET AL., *HISTORIA DE BOLIVIA* (7th ed. 2007) (original: “la razón porque una región tan inhóspita como Atacama se convirtió en motivo de conflicto fue la evidencia de su riqueza que se reflejaba sobre todo en dos productos, el guano y el salitre”). Guano is the excrement of the birds that live in the area, called guanay cormorant (precisely because they produce

Thus, the aridest land in the world had the potential to fertilize other lands on the planet.”<sup>8</sup>

In this context of great importance, guano is defined by the late historian Robert Querejazu as “the discord apple,” being a natural resource in the 19th century that acquired strategic importance in America and Europe for its qualities as a fertilizer because “the sale of

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guano) and boobies; millions of those birds, generated during thousands of years the biggest deposits of guano of the world in the Chinchas islands of Peru and in other islands and coastal hills. See Neil Durfee, *Holy Crap! A Trip to the World's Largest Guano-Producing Islands*, AUDUBON (Apr. 27, 2018), <https://www.audubon.org/news/holy-crap-trip-worlds-largest-guano-producing-islands>; *Guanay Cormorant*, EBIRD, <https://ebird.org/species/guacorl> (last visited Nov. 2, 2020). In Bolivia, the core guano deposits were located in the Mejillones peninsula feature (now part of Chile). See Pedro Pujante & Christophe Pollet, *Archeology of Guano: Preliminary Results of the Survey Conducted in Caleta Robles (Mejillones, Chile), 1862–83*, 38 INDUS. ARCHAEOLOGY REV. 19 (2016). With respect to potash,

En la época colonial la potasa extraída de las sales se usó para la fabricación de pólvora, pero a partir de 1830 se constató su poder estimulante de la productividad agrícola. Complementario del guano, el salitre tuvo gran demanda como fertilizante agrario consumido por naciones europeas y Estados Unidos. Superficial o enterrado a un par de metros bajo tierra, el salitre fue explotado y exportado intensivamente. Fueron los hermanos Latrille los que encontraron por primera vez salitre en el desierto de Atacama en 1857.

MESA ET AL., *supra*, at 346 (translation: “In the colonial era, the potash extracted from the salts was used for the manufacture of gunpowder, but also in 1830 it was verified its stimulating power for agricultural productivity. Complementary to guano, the saltpeter was in great demand as an agricultural fertilizer consumed by European nations and the United States. Superficial or buried a couple of meters underground, the saltpeter was exploited and intensively exported. There were the Latrille brothers who first encountered saltpeter in the Atacama Desert in 1857.”).

8. MESA ET AL., *supra* note 7, at 345 (original: “Ambos [son] utilizados para la fertilización de tierras. Así, la tierra más árida del mundo tenía en su seno la potencialidad para fecundar a otras tierras del planeta.”).

guano was one of the most profitable businesses in Europe at that time,”<sup>9</sup> the largest buyer.

The massive exploitation of guano was done throughout the 19th century, and it is reported that Peru received large revenues for that element. Indeed, in the mid-19th century, Peru exported more than 100,000 tons of guano annually, reaching crucial importance for its public finances.<sup>10</sup> In contrast, in Bolivia, the exploitation began clandestinely in 1841, and between 1842 and 1849 several companies produced an average of 7,500 tons per year.<sup>11</sup> “However, it was the potential to expand this exploitation that resulted in contracts with Chilean, English, and American businessmen.”<sup>12</sup>

In the 1840s, a price of 25 British pounds per ton was reported in London, which 10 years later was reduced to 15. However, by 1851, during the presidency of Isidoro Belzu, Mariscal Andrés de Santa Cruz reports a negotiable price with England and Belgium of just 3 British pounds (equivalent to 19 pesos in Bolivian currency) per ton of guano put on board.<sup>13</sup>

In 1863, the guano deposits of Mejillones are calculated at 2 million tons, quoted in Liverpool between 7 and 8 pounds per ton, meaning 16 millions of sterling pounds.<sup>14</sup> This wealth could generate for Bolivia an estimated annual income of 3 million pesos to the fiscal treasury,<sup>15</sup> enough to balance its public finances.

The truth is that contractors faced difficulties in defining their relationship with the State, because Chile considered itself to have rights on Mejillones. This is so obvious that

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9. ROBERTO QUEREJAZU CALVO, *GUANO, SALITRE Y SANGRE* 53 (3d ed. 1998) (original: “la venta de guano era en esos tiempos uno de los negocios más rentables en Europa”).

10. MESA ET AL., *supra* note 7, at 346.

11. *Id.* Guano of the Bolivian littoral suffered at the beginning of clandestine exploitation to move on to a regime of exclusive extraction and export contracts by English companies effective until 1851. *See* QUEREJAZU CALVO, *supra* note 9, at 30.

12. MESA ET AL., *supra* note 7, at 346 (original: “Pero fue la potencialidad de ampliar esa explotación la que derive en contratos con empresarios chilenos, ingleses, y estadounidenses.”).

13. QUEREJAZU CALVO, *supra* note 9, at 30.

14. *Id.* at 35.

15. *Id.*

in its belief of having rights over the Atacama desert and littoral until grade 23°, Chile granted concession to a Chilean citizen, while Bolivia conferred rights on the same territory to a Brazilian citizen, who sued his rival, compensation for damages, which resulted in the arrest of the Chilean citizen and foreclosure of his house by order of the Bolivian judicial authorities of Mejillones. This resulted in an action of force by the Chilean government defending the interests of the Chilean and the subsequent Bolivian diplomatic reply “rejecting all jurisdictional acts of the Bolivian authorities in those places as unjustifiable aggression against their territory.”<sup>16</sup>

The importance of this commodity of strategic nature led Peru, on January 17, 1873,<sup>17</sup> to declare the saltpeter a fiscal monopoly, with its predominant interest to reach for an “agreement with the Bolivian government to standardize its saltpeter legislation.”<sup>18</sup> In tax matters, by the law of May 28, 1875, the Assembly of that country empowered the Peruvian Government to impose an export tax on saltpeter not less than 15 nor higher than 60 cents per quintal of saltpeter.<sup>19</sup>

According to Alberto Gutiérrez, Peru’s financial plan was based on a project of Saltpeter industrial monopoly in the region, whose execution required the Bolivian government’s participation, so that on one

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16. *Id.* at 37 (original: “en su creencia de tener derechos sobre el desierto y litoral de Atacama hasta el grado 23, Chile otorgó una concesión a un ciudadano chileno, mientras que Bolivia confirió derechos sobre la misma covadera a un ciudadano brasilero, que demandó a su rival el resarcimiento de daños y perjuicios, que derivó en el apresamiento del ciudadano chileno y embargo de su casa por orden de las autoridades judiciales bolivianos de Mejillones. Esto derivó en una acción de fuerza por parte del gobierno chileno en defensa de los intereses del súbdito chileno y la posterior replica diplomática boliviana, sobre la cual se pronunció ‘rechazando todo acto jurisdiccional de las autoridades bolivianas en esos parajes como injustificable agresión a su territorio.’”).

17. *See* ALBERTO GUTIÉRREZ, *LA GUERRA DE 1879*, at 303–04 (1975) (1914).

18. *Id.* at 304 (original: “un acuerdo con el gobierno boliviano para uniformar su legislación en materia salitrera”).

19. *Id.* at 304–05.

hand they “adopt tax laws and regulations similar to those of Peru” and on the other hand bilateral trade agreements might be subscribed.<sup>20</sup>

## II. THE DEFINITION OF LIMITS BETWEEN BOLIVIA AND CHILE

Within the framework of a stage marked by great closeness and friendship between the two countries, as a result of Bolivia’s support to Chile in its warlike conflict of 1866 with Spain, a “Solomonic participation” of guano was defined, postponing in good faith, the need for a boundary agreement.<sup>21</sup> Thus, “it was established that the French company Armand would extract 1,500,000 tons of guano by paying 250,000 gold pesos that would be distributed between Bolivia and Chile.”<sup>22</sup> This agreement about the guano was the auspicious preamble of a boundary treaty between both countries, as a fundamental foundation for peace.

In fact, on August 10, 1866, both countries signed the so-called Treaty of Limits, which was approved in Bolivia by the National Assembly in 1868, which established the following relevant aspects:<sup>23</sup>

- Defined the “parallel 24 of southern latitude” as the boundary line of boundaries between both countries in the Atacama Desert, so that Chile in the south and Bolivia in the north had possession and ownership of the territories.
- In these territories, each country would exercise, respectively, all acts of jurisdiction and sovereignty, among which,

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20. *Id.* at 305.

21. QUEREJAZU CALVO, *supra* note 9, at 53.

22. *Id.* at 56 (original: “quedó establecido que la empresa Francesca Armand extrajera 1.500.000 toneladas de guano pagando 250.000 pesos oro que se repartirían entre Bolivia y Chile”).

23. Tratado de Límites Entre la Republica de Chile y la de Bolivia, Aug. 10, 1866, [http://www.historia.uchile.cl/CDA/fh\\_article/0,1389,SCID%253D15703%2526ISID%253D563%2526PRT%253D15699%2526JNID%253D12,00.html](http://www.historia.uchile.cl/CDA/fh_article/0,1389,SCID%253D15703%2526ISID%253D563%2526PRT%253D15699%2526JNID%253D12,00.html) [hereinafter *Tratado de Límites*]; see also Mario Reveco Peña, *Efectos Jurídico[s] de la Ocupación Militar de la Antigua Provincia Peruana de Tarapacá y de su Posterior Anexión al Territorio Nacional Sobre los Títulos y Derechos Mineros*, 1 REVISTA JURÍDICA REGIONAL Y SUBREGIONAL ANDINA, no. 1, 1999, at 125, 131–32.



of course, is the power to issue coercive legal norms and to exercise the power of empire and tax power.<sup>24</sup>

Despite this clear territorial division, it was agreed that both countries would share equally the following rights and products:

- Products derived from the exploitation of Guano deposits discovered in Mejillones (Bolivian territory) and other deposits of the same fertilizer that would be discovered in the territory between 23° (Bolivian territory) and 25° (territory recognized as Chilean) of southern latitude.
- The export duties received on minerals extracted from the same designated territory space.
- Bolivia had to enable a customs office in Mejillones, as the only fiscal office that could receive guano products and export duties.
- Chile could appoint one or more fiscal employees with supervision or control powers over the entrance's accounts of the Mejillones customs office in order to determine the benefits part corresponding to Chile.
- Bolivia could exercise the same faculty if Chile established a fiscal office in the territory between grades 24° and 25°.
- Products from the territory between grades 24° and 25° of southern latitude that would be extracted through the port of Mejillones would be free of all export rights.

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24. An example of these powers is that the Extraordinary National Assembly of Bolivia approved the Law of November 12, 1873, whose Article 1 provided the creation of a tax in kind on silver ores from the mines located in the Litoral Department of Cobija, with a rate of 6% of the weight of the exploited ore. Ley 12-11-1873, 12 de Noviembre de 1873—Minerales de Plata: El Impuesto Se Recaude en el Litoral por Licitacion, y Se Perciba en Especie, 26 GACETA OFICIAL DE BOLIVIA, <http://www.gacetaoficialdebolivia.gob.bo/edicions/view/GOB-26/page:2>. The conclusion is that Bolivia had the right to legislate on its own territory.

- Natural products from Chile that would be introduced through the port of Mejillones would be free of all import duties.<sup>25</sup>

In 1871, President Melgarejo was overthrown; the modification of the Treaty of 1866 was sought because it generated many difficulties in its execution in the part of the distribution by half.<sup>26</sup> Thus, on December 5th, 1872, the Lindsay-Corral Protocol was concretized, which was seen as a way to continue negotiating a definitive settlement, “stating that the eastern limits of Chile, mentioned in the Treaty of 1866 article 1°, are the highest peaks of the Andes and, therefore, the dividing line of Chile with Bolivia is the 24° of southern latitude starting from the Pacific to the summit of the Andes Mountain range.”<sup>27</sup>

### III. THE ASSOCIATION “SALTPETER AND RAILWAY ANTOFAGASTA COMPANY”

On September 5, 1868, the Government of President Mariano Melgarejo granted to the “Exploration of the Atacama Desert” society a 15-year privilege for the exploitation, processing, and export of saltpeter.<sup>28</sup> Subsequently, the concession of this company was transferred to the company Milbourne, Clark and Co., a company incorporated in Valparaíso with a capital of 300,000 Chilean pesos, which later became the

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25. Tratado de Límites, *supra* note 23.

26. Reveco Peña, *supra* note 23, at 132.

27. *See id.* at 132–33 (original: “se declara que los límites orientales de Chile de que hace mención en el Tratado de 1866, artículo 1°, son las más altas cumbres de Los Andes y, for lo tanto, la línea divisora de Chile con Bolivia es el grado 24° de latitud sur partiendo desde el Pacífico hasta la cumbre de la Cordillera de Los Andes”).

28. According to Rodolfo Becerra de la Roca, this concession lacked legality in form and substance since it did not conform to the provisions of the laws of January 27, May 8, and August 27, 1858, because the assignment was free. It was not carried out by public auction nor were the provisions of the Mining Code fulfilled. RODOLFO BECERRA DE LA ROCA, NULIDAD DE UNA APROPIACIÓN CHILENA: TERRITORIO BOLIVIANO ENTRE LOS PARALELOS 23 Y 24, at 49 (Bolivia 2006).

joint-stock company “Antofagasta Saltpeter and Railway Company”<sup>29</sup> with a capital of USD 2,500,000, represented in 2,500 shares distributed as follows: Agustín Edwards: 848 shares, Francisco Puelma: 848 shares, and Guillermo Gibbs and Co.: 800 shares.<sup>30</sup>

A fundamental aspect of the formation of the capital stock of this company is exposed by Rodolfo Becerra de la Roca in *Invalidity of a Chilean Appropriation: Bolivia Territory Between Parallels 23 and 24*, indicating that, according to Zoilo Flores and Serapio Reyes Ortiz, the company’s shares were issued to the bearer, which logically would not allow the holders to be identified.<sup>31</sup> If this statement is correct about the issuing titles modality, it is appropriate to define the following legal scenario. This will subsequently show its importance in the definition of the subjective field of application of the 1874 Treaty, which will be explained below:

- The “Saltpeter and Railway Antofagasta Company” was incorporated in Antofagasta, maintaining a legal and fiscal domicile in that region. Consequently, it can be affirmed that this company was a Bolivian legal entity with legal

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29. MESA ET AL., *supra* note 7, at 348.

En 1868 Ossa, Puelma y Antonio de Lama crearon la Sociedad Exploradora del Desierto de Atacama que por 10.000 pesos pagados a Bolivia mantuvo el derecho del 66. En 1869 la compañía aceptó capital mayoritario inglés y pasó a llamarse Melbourne y Clarke. Con un capital de 300.000 pesos empezó a explotar con éxito salitre en el salar de El Carmen. En 1872 ante el éxito logrado se creó la Compañía de Salitres y Ferrocarril de Antofagasta con sede en esa ciudad.

*Id.* (translation: “In 1868 Ossa, Puelma and Antonio de Lama created the Atacama Desert Exploration Society that for 10,000 pesos paid to Bolivia, he maintained the right of 66. In 1869 the company accepted the majority capital that was English and went on to be called Melbourne and Clarke. With a capital of 300,000 pesos began to successfully exploit saltpeter in El Carmen Salar. In 1872 due to the reached success, the Antofagasta Railway and Saltpeter Company was created in 1872, based in that city.”).

30. See BECERRA DE LA ROCA, *supra* note 28, at 49–50.

31. See *id.* at 62.

personality and capacity recognized by the Bolivian government.

- Being the capital stock of this company, represented by shares whose owners were not of Bolivian nationality, it is understood that it is a Bolivian company with foreign capital, holding the consequent decision-making power over its administration.<sup>32</sup>

#### IV. APPLICABLE CONSTITUTIONAL FRAMEWORK

The Transaction of November 27, 1873, the Treaty of 1874, and the “taxation” measures adopted on February 23, 1878, were subjects of a concrete constitutional framework that was the Political Constitution of the State of 1871, with unrestricted validity throughout the national territory.<sup>33</sup> Regarding the basic tax principles of the 19th century, we find that the Bolivian Constitution of 1871<sup>34</sup> expressly recognized the Principle of Legality, the Principle of Reserve of Law, the Principle of Equality, the Principle of Generality, and the Principle of Contribution. The latter in a primitive version of what we know today, as the Ability to Pay Principle. In virtue of this, each person has the duty to contribute to the public spending financing in proportion to their economic capacity.

In effect, numeral five of article 45°, of the 1871 Constitution, established as an attribution of the Assembly: “To impose contributions and abolish those established,” defining in that way the Principle of Law Reserve to which all taxes and other kinds of contributions and rights were subjected.<sup>35</sup> From this, the Principles of Generality, Contribution, and Legality are expressed in article 28°, by establishing that “Every Bolivian is obliged to obey the authorities, to contribute to public expenses, in accordance with the laws issued by the Assembly, or to the

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32. It is of great importance to review the public records about the ownership of the company’s shares and the proof of official communication to the Bolivian government.

33. See Reveco Peña, *supra* note 23, at 133–34.

34. CONSTITUCIÓN POLÍTICA DE 1871, Oct. 18, 1871, <https://www.lexivox.org/norms/BO-CPE-18711018.xhtml> [hereinafter 1871 CONSTITUCIÓN].

35. *Id.* art. 45°(5) (original: “Imponer contribuciones y suprimir las establecidas.”).

decrees that according to law, the Executive Power issues.”<sup>36</sup> This rule expressly provides for the duty to contribute, so that no one can be excluded from the scope of a tax, as long as it is established by a law of a general nature.

Finally, the Constitution emphasizes the Principle of Equality in its article 17° by stating that “Equality is the basis of tax and public charges.”<sup>37</sup> This article concludes that everyone is equal before the law. This equality is the basis of the tax, ensuring the same treatment for those who are in similar situations, “excluding any arbitrary, unfair or hostile distinction against certain persons or categories of persons.”<sup>38</sup>

In merit of these principles, any tax burden or contribution must be imposed under a formal and material law of a general and equal character, in a manner that no one might be excluded from its reach by political or other privileges.

Regarding municipal taxes, numeral two of article 89° of the 1871 Constitution recognized tax power to the municipalities, being empowered to “Establish and abolish municipal taxes, prior approval of the State Council.”<sup>39</sup> In that sense, numeral nine of article 59° recognizes as an attribute of the State Council, “To declare the legality or illegality of taxes and establishments created by municipalities.”<sup>40</sup> The exercise of these tax powers deserves special attention at the time of defining the position of the Bolivian State Council in relation to the 1874 Treaty.

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36. *Id.* art. 28° (original: “Todo boliviano está obligado a obedecer a las autoridades, a contribuir a los gastos públicos, conforme a las leyes que dicte la Asamblea, o a los decretos que con arreglo a la ley, expida el Poder Ejecutivo.”)

37. *Id.* art. 17° (original: “La igualdad es la base del impuesto y de las cargas públicas.”)

38. VILLEGAS, *supra* note 2, at 202 (original: “con exclusión de todo distingo arbitrario, injusto u hostil contra determinadas personas o categorías de personas”).

39. 1871 CONSTITUCIÓN, *supra* note 34, art. 89°(2) (original: “Establecer y suprimir impuestos municipales, previa aprobación del Consejo de Estado.”)

40. *Id.* art. 59°(9) (original: “Declarar la legalidad o ilegalidad de los impuestos y establecimientos creados por las municipalidades.”)

## V. THE TREATY OF 1874, THE PROTOCOL OF 1875, AND THE TRANSACTION OF NOVEMBER 27TH, 1873

The governments of Bolivia and Chile, “animated by the desire to consolidate mutual and good relations and to separate by means of solemn and friendly pacts all the causes that may tend to cool them or hinder them,”<sup>41</sup> signed on August 6, 1874, a new Treaty of Limits, replacing the Treaty of 1866, under the following relevant terms. The first article confirms that the “parallel of 24° from the sea to the Andes mountain range in the *divortia aquarum*<sup>42</sup> is the boundary” between the two countries.<sup>43</sup> It established that the existing guano deposits, or those that would be discovered in the perimeter of parallels 23 and 24, would be split in half between Chile and Bolivia.<sup>44</sup> The Treaty continued, “the system of exploitation, administration, and sale shall be carried out by mutual agreement between the two governments of the two Republics in the same way that it has been carried out to date.”<sup>45</sup>

The Treaty declared that “the natural products of Chile that would be imported through the Bolivian coast included between parallels 23 and 24” were “free and exempt from payment of all rights.”<sup>46</sup> It continued, “in reciprocity an identical release stays with the natural products of Bolivia that would be imported to the Chilean coast within parallels 24

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41. Tratado de Límites, Chile-Bol., Aug. 6, 1874, [http://www.historia.uchile.cl/CDA/fh\\_article/0,1389,SCID%253D15704%2526ISID%253D563%2526PRT%253D15699%2526JNID%253D12,00.html](http://www.historia.uchile.cl/CDA/fh_article/0,1389,SCID%253D15704%2526ISID%253D563%2526PRT%253D15699%2526JNID%253D12,00.html) [hereinafter 1874 Treaty of Limits] (original: “animadas del deseo de consolidar sus mutuas y buenas relaciones y de apartar por medio de pactos solemnes y amistosos todas las causas que puedan tender a enfriarlas o entorpecerlas”).

42. Latin term indicating the watershed.

43. 1874 Treaty of Limits, *supra* note 41, art. 1° (original: “El paralelo del grado 24 desde el mar hasta la Cordillera de los Andes en el divortia aquarum es el límite entre las repúblicas de Chile y de Bolivia.”).

44. *Id.* art. 3° (original: “[l]os depósitos de guano existentes o que en adelante se descubran en el perímetro de que habla el artículo anterior, serán partibles por mitad entre Chile y Bolivia”).

45. *Id.* (original: “el sistema de explotación, administración y venta se efectuará de común acuerdo entre los gobiernos de las dos repúblicas en la forma y modo que se ha efectuado hasta el presente”).

46. *Id.* art. 3° (original: “[q]uedan libres y exentos del pago de todo derecho los productos naturales de Chile que se importaren por el litoral boliviano comprendido dentro de los paralelos 23 y 24”).

and 25.”<sup>47</sup> Article four provided that for the term of 25 years, “the export duties imposed on the minerals exported in the referred area of land, in the articles above, will not exceed the quota that is currently charged, and the Chilean persons, industries and capitals will not be subject to any kind of additional contributions than those that currently exist.”<sup>48</sup>

The 1871 Treaty abrogated in all its parts the Treaty of 1866, “disappearing the participation in customs rights of minerals, being conserved only for the guano.”<sup>49</sup> According to Judge Mario Reveco Peña, this fact “implied a new concession from Chile in favor of Bolivia; but with a counterpart, the one of not increasing during twenty five years the contributions to the Chilean producing industries in the zone.”<sup>50</sup>

The truth is that article four of the 1874 Treaty constituted an international tax agreement, and therefore it was governed by the principles of public international law, whether positive or customary, although neither the Treaty nor the resolution had the purpose of what is modernly understood as an agreement to avoid international double taxation. Rather, to distribute the exercise of taxing rights between both States, it is evident that this provision limited the Bolivian taxing rights, preventing Bolivia from increasing rates and creating new “contributions” in that area.

According to Querejazu, the only contribution that existed at that date was a “patent of 40 Bolivians per 50 hectares,”<sup>51</sup> whose legal

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47. *Id.* (original: “en reciprocidad quedan con idéntica liberación los productos naturales de Bolivia que se importen al litoral chileno dentro de los paralelos 24 y 25”).

48. *Id.* art. 4° (original: “Los derechos de exportación que se impongan sobre los minerales explotados en la zona de terreno de que hablan los artículos procedentes, no excederán la cuota de la que actualmente se cobra, y las personas, industrias y capitales chilenos no quedarán sujetos a más contribuciones de cualquiera clase que sean que las que al presente existen.”).

49. Reveco Peña, *supra* note 23, at 133 (original: “desapareció la participación en los derechos aduaneros de los minerales, conservándose únicamente para el guano”).

50. *Id.* (original: “implicó una nueva concesión de Chile en favor de Bolivia; pero con una contrapartida, la de no aumentar durante 25 años las contribuciones a las industrias productoras chilenas en la zona”).

51. ROBERTO QUEREJAZU CALVO, ACLARACIONES HISTÓRICAS SOBRE LA GUERRA DEL PACÍFICO 94 (1995) [hereinafter QUEREJAZU CALVO, ACLARACIONES HISTÓRICAS] (original: “patente de 40 bolivianos por hectáreas”).

nature would not be comparable to that of a tax. Another aspect of relevance, which was noted above was that the subjective scope of this tax clause limited its application to “Chilean persons, industries and capitals” who were the only ones directly entitled to claim the benefits of article four of the Treaty.<sup>52</sup> The term “persons” had a specific meaning as a subject or entity with legal personality recognized in Chile. In the case at hand, it was explained that the “Antofagasta Saltpeter and Railway Company” was a legal entity incorporated and domiciled in Antofagasta, consequently, legally recognized as a Bolivian person. The term “industry” does not refer to a specific legal figure but to an activity that is developed by a “person” that, in the studied specific matter, was clearly developed by a Bolivian person, with a Board of Directors in which, according to Querejazu, three were English (“figureheads of the firm ‘Guillermo Gibbs y Company,’ which in turn was a subsidiary of ‘Anthony Gibbs and Sons’ of London”<sup>53</sup>) and three were Chilean.<sup>54</sup> The most important, and also the most controversial element of the subjective scope, relies on the definition of the term “Chilean capitals” to determine whether the “Antofagasta Saltpeter and Railway Company” was entitled to claim as a beneficiary owner the application of the benefits of the 1874 Treaty.

If what was stated by the Bolivian Minister Zoilo Flores and a Bolivian lawyer and politician Serapio Reyes Ortiz was correct and the company’s shares were issued to the bearer or endorsed without registration,<sup>55</sup> there was no legal certainty to apply the benefits of the treaty. Even if ownership had been proven and registration of the actions in favor of Chilean persons and companies, the 1874 Treaty did not define the amount of shares that a company should have to be considered Chilean capital,<sup>56</sup> so it should be referred to the Bolivian regulations in

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52. See *supra* note 48 and accompanying text.

53. QUEREJAZU CALVO, *supra* note 9, at 173 (original: “testaferros de la firma ‘Guillermo Gibbs y Compañía’, que a su vez era subsidiaria de ‘Anthony Gibbs e Hijos’ de Londres”).

54. See *id.*

55. See *supra* note 31 and accompanying text.

56. It is important for this purpose to review the reference that Querejazu makes about the composition of the share capital of the company, in which at the beginning of 1879, 2,012 shares of 2,500 were registered in the name of “Testamentaria Edwards” (1,058) and “Guillermo Gibbs y Compañía” (954). QUEREJAZU CALVO, *supra* note 9, at 172.



force at that time, as a valid interpretation mechanism. Finally, once established that it would have been the owner of the shares in the name of Chilean citizens or companies, it was important to determine if they were the effective beneficiaries of the Treaty to claim their benefits so that a third State would not take illegitimate benefit of clauses reserved only for Chilean capital companies.<sup>57</sup> An interesting aspect highlighted by several authors is that the ministers of War, of the Treasury, and of Foreign Relations of the government of Chile were shareholders of the Company.<sup>58</sup>

Whatever the situation, the truth is that the interpretation and application of article four of the 1874 Treaty was not a simple task. At least, it must be recognized that there were very controversial aspects derived from the complexity in itself of foreign investment in the exploitation of a large natural resource.

Subsequently, at the request of the Bolivian Assembly, both governments signed on July 21, 1875, a Protocol or Complementary Treaty to the Treaty of 1874, whose article two establishes a unique mechanism for the resolution of disputes through arbitration, in the following terms: "All matters that may arise from the intelligence and execution of the Treaty of August 6th, one thousand eight hundred and seventy-four, should be submitted to arbitration."<sup>59</sup>

This arbitration clause was binding and mandatory for the governments of Bolivia and Chile to solve any dispute that might arise from the application and execution of the 1874 Treaty. It was, in short, an excluding mechanism of the ordinary jurisdiction of each country and, of course, prevented the use of force to solve tax conflicts. In that sense, it was beyond dispute that arbitration only concerned both governments, while conflicts between the Bolivian State and Chilean companies or

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57. In this latter part, it is important to define whether the great interest of the British Government in defending the Company was due to the fact that the Chairman of the Board was English or if it protected British investments in Bolivia.

58. See QUEREJAZU CALVO, *supra* note 9, at 172.

59. Protocolo al Tratado de 1874 art. 2º, Chile-Bol., July 21, 1875, [http://www.historia.uchile.cl/CDA/fh\\_article/0,1389,SCID%253D15704%2526ISID%253D563%2526PRT%253D15699%2526JNID%253D12,00.html](http://www.historia.uchile.cl/CDA/fh_article/0,1389,SCID%253D15704%2526ISID%253D563%2526PRT%253D15699%2526JNID%253D12,00.html) (original: "Todas las cuestiones a que diere lugar la inteligencia y ejecución del tratado del seis de agosto de mil ochocientos setenta y cuatro, deberán someterse al arbitraje.").

individuals must have been subjected to Bolivian jurisdiction. That is to say, in general, any foreign company or citizen that stayed in Bolivian territory should have complied with the constitution and Bolivian laws. Any dispute that arose between the individual and the Bolivian State should have been substantiated before the Bolivian courts. If in the stated controversy, an invocation to the 1874 Treaty was presented, it should correspond that, in parallel to the domestic resolution of the dispute, both States were required to apply the arbitration clause, as is currently done under dispute resolution mechanisms provided by modern tax treaties.

## VI. THE TRANSACTION OF 1873 AND THE TAX ON SALTPETER

The law of February 14, 1878, promulgated on February 23, 1878, established: "The transaction held by the Executive on November 27th, 1873, with the attorney of the saltpeter and railway anonymous company of Antofagasta is approved, on condition to make effective, as minimum, a tax of ten cents in exported saltpeter quintal (weight unit equivalent to 100 pounds)."<sup>60</sup> The transaction arose as a result of the

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60. Ley 23-02-1878, *supra* note 6 (original: "Se aprueba la transaccion celebrada por el Ejecutivo en 27 de noviembre de 1873 con el apoderado de la compañía anónima de salitres y ferrocarril de Antofagasta, a condicion de hacer efectivo, como mínimo, un impuesto de diez centavos en quintal de salitre exportado.").

La Compañía Anónima de Salitres y Ferrocarril de Antofagasta tenía del Gobierno de Bolivia una concesión que databa del 13 de abril de 1872, la que de acuerdo a la transacción de 27 de noviembre de 1873, aprobada por el Supremo Gobierno de Bolivia tuvo una notable disminución, quedando reducida a las salitreras actualmente explotaba en el Salar del Carmen y a la parte de las Salitreras de Salinas. En la base 40 de la transacción se señalaba que reconocía a la Compañía por el término de quince años, contados desde el 1° de enero de 1874, el derecho de exportar libremente los depósitos de salitres que existían en los terrenos designados las bases 1° y 2° y el de exportar por el puerto de Antofagasta los productos de esos depósitos, libre de todo derecho de exportación y de cualquiera otro gravamen municipal o fiscal.

declaration of nullity of the acts of administration of President Melgarejo, stipulated by laws of August 9 and 14, 1871, which covered all operations, sale, or alienation of any kind.<sup>61</sup> Of course, this nullity caused damage to different foreign companies, which could be entitled to compensation determined by the Supreme Court of Justice within 90 days.<sup>62</sup> However, “in accordance with a principle of equity,”<sup>63</sup> under the administration of President Agustín Morales, the National Assembly approved the law of November 22, 1872, establishing as a general rule that “the claims of foreign citizens for compensation arising from concessions or contracts concluded with the government will be filed before the Supreme Court of Justice, which will meet them in contentious proceedings, being the Public Ministry the representative of the national interests.”<sup>64</sup>

As an alternative way, article two of the law:

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Reveco Peña, *supra* note 23, at 134 (translation: “The Company Anónima of Saltpeter and Railway of Antofagasta had a concession from the Government of Bolivia that dated April 13, 1872, which according to the transaction of November 27, 1873, approved by the Supreme Government of Bolivia had a notable decrease, being reduced to saltpeter currently exploited in “El Carmen Salar” and the part of the Salinas Saltpeter. In base 4° of the transaction it was indicated that it recognized the Company for the term of 15 years, counted from January 1, 1874, the right to freely export the saltpeter deposits that existed in the designated lands, the bases 1° and 2°, and that of exporting through the port of Antofagasta the products of those deposits, free of all export rights and any other municipal or fiscal tax.”).

61. See BECERRA DE LA ROCA, *supra* note 28, at 50. The specific nullity of the saltpeter and borates land concessions was set forth in article 12 of the Decree of January 8, 1872. *Id.*

62. *Id.*

63. QUEREJAZU CALVO, *supra* note 9, at 154 (original: “atendiendo a un principio de equidad”).

64. Ley 22-11-1872, 22 de Noviembre de 1872—Reclamos Contra el Estado: Autorizacion al Gobierno para Transar Acerca de Ellos, art. 1°, 24 GACETA OFICIAL DE BOLIVIA, <http://www.gacetaoficialdebolivia.gob.bo/normas/buscar/page:1486> (original: “[l]os reclamos de los ciudadanos extranjeros por indemnizaciones provenientes de concesiones o contratos celebrados con el Gobierno serán entablados ante la Corte Suprema de Justicia, la cual conocerá de ellos en juicio contencioso, representando el Ministerio público los intereses nacionales”).

Authorizes the Executive to settle on compensation and other claims currently pending against the State, either by nationals or foreigners; and to agree with the interested parties on the most convenient way to fulfill their respective obligations; differing these matters, just in case of no compromise, to the decision of the Supreme Court, charged to report to the next legislature.<sup>65</sup>

In this regard, it is important to highlight the expression “charged to report to the next Legislature,” since it indicates that the transactions to which the Executive would arrive with nationals or foreigners should be approved later in the next legislative period, especially if they involved state assets. A different interpretation, although lacking legal logic, is that this would have indicated that the cases that had been submitted to the Supreme Court would be brought to legislative approval.

With this explanation, there is no difficulty in understanding that this transaction would only be perfected if the approval of the Assembly would be fulfilled. Since, according to numeral 25 of article 71° of the 1871 Constitution, the Executive only has powers to administer national assets according to law.<sup>66</sup>

So far, the first part of the Law of February 23, 1878, has been explained, referring to the approval of the transaction with the “Saltpeter and Railway Company of Antofagasta.” Now, it is necessary to analyze the suspensive condition to which the validity of the transaction was subjected, consisting of paying at least a 10-cent tax per exported saltpeter quintal (equivalent to 100 pounds).

Mesa et al. refer to the origin of this condition in their text *History of Bolivia* by stating that the Bolivian Assembly studied and approved the transaction “with the variation that instead of the 10% participation, originally obtained by the representative of the Saltpeter Company, [it] introduced a Bolivian tax of 10 cents per saltpeter exported

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65. *Id.* art. 2° (original: “Se autoriza al Ejecutivo para transar sobre indemnizaciones y otros reclamos pendientes en la actualidad contra el Estado, ya sea por nacionales o extranjeros; y para acordar con las partes interesadas la forma mas conveniente en que habrán de llenarse sus obligaciones respectivas; defiriéndose estos asuntos, solo en caso de no avenimiento, a la decision de la Corte Suprema, con cargo de dar cuenta a la próxima Lejislatura.”).

66. 1871 CONSTITUCIÓN, *supra* note 34, art. 71°(25).

quintal.”<sup>67</sup> However, for the Chilean government, the validity of this tax meant the annulment of the 1874 Treaty and the restitution of the rights that Chile claimed before the 1866 Treaty.<sup>68</sup> There are several authors who present arguments that the “tax” created by the Law of February 23, 1878, did not violate article four of the 1874 Treaty, holding fundamentally that the use of the term “tax” is incorrect because it did not correspond to the enforceable legal nature of a contribution created in merit to the State Taxing Powers, but it depended on the voluntary acceptance of the “Saltpeter and Railway Company of Antofagasta” as well as the approval of the transaction.<sup>69</sup> In this regard, we agree that the enforcement of a tax may not be subject to the taxpayers’ acceptance or rejection. As Professor García Novoa points out, in the tax “it is fully revealed that coercive payment is determined by the unilateral decision of the public authorities to enforce, the duty to contribute.”<sup>70</sup>

It is also argued that this “contribution” had not the nature of a tax because it did not comply with the Generality Principle, since it was applied only to one person. In fact, the Generality Principle is not a positive concept, but a negative one; it is not about everyone paying a tax, but that no one is excluded from its scope, on merit to special privileges. Therefore, the “tax” results clearly against the Constitutional Principle and the Equality Principle. Which, in its most genuine Aristotelian version requires that those who have equal contributory capacity be treated equally and in an uneven way to those who have different capacity. This analysis does not lead us to conclude that this “tax” lacked tax nature, but that it was imperfect in its configuration, corresponding to its constitutional abrogation.

On the other hand, it has been argued that it was not a “tax” in itself, but rather a remuneration or compensation for the concessions

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67. MESA ET AL., *supra* note 7, at 341 (original: “con la variante que en lugar de la participación del 10%, que originalmente había obtenido el representante de la Compañía de Salitres, puso como impuesto boliviano 10 centavos por quintal de salitre exportado”).

68. QUEREJAZU CALVO, *supra* note 9, at 170.

69. See, e.g., GUTIÉRREZ, *supra* note 17, at 312.

70. CÉSAR GARCÍA NOVOA, *EL CONCEPTO DE TRIBUTO* 176 (2009) (original: “se pone de manifiesto de manera plena que la coactividad viene determinada por la decisión unilateral de los poderes públicos de hacer que se cumpla el deber de contribuir”).

granted in the transaction.<sup>71</sup> While this position makes sense, especially because of the background presented by Mesa et al., it is appropriate to recognize that the legal formulation of the text of the law is totally inappropriate, because of being difficult to reach that conclusion even with the application of teleological interpretation methods.

However its legal nature was configured, it is most probable that there are more arguments to show that if it was not a tax *per se*, we are facing a generic contribution. In merit to which an individual is obliged to pay the State a sum of money due to the occurrence of a fact, act, or situation. Consequently, being that according to the text of article four of the 1874 Treaty, “the Chilean persons, industries and capitals will not be subject to any kind of additional contributions than those that currently exist,”<sup>72</sup> it can be inferred that the limitation to the exercise Taxing Rights applied to taxes, including any other kind of fee or payment that had the characteristic of mandatory contribution. In our opinion, if the “tax” is considered a “voluntary” compensatory payment to maintain an operating concession, we are faced with a mandatory payment very similar to a royalty, which is a type of non-tax contribution of the exploitation of the natural resources.

Gutiérrez indicates that “in the intimacy of our conscience, we decided to find it wrong and fatal, contrary to what [was] agreed in the 1874 Treaty. However, we are very far away from the light of historical

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71. Gutiérrez transcribes a publication that states:

El gravamen de diez centavos se sancionó con el congreso en 1781, no en forma de impuesto, sino como condición de aprobación de la transacción que había celebrado la Compañía de Antofagasta con el gobierno de Bolivia para conservar la mayor parte de las extensas concesiones que le había otorgado el despótico gobierno de Melgarejo y de las que hemos hablado más arriba.

GUTIÉRREZ, *supra* note 17, at 312 (translation: “The tax of ten cents was approved by the congress in 1781, not in the form of a tax, but as an approval condition of the transaction that the Antofagasta Company had concluded with the government of Bolivia in order to conserve most of the extensive concessions granted by the despotic government of Melgarejo and of which we have spoken above.”).

72. 1874 Treaty of Limits, *supra* note 41, art. 4; *see also supra* note 48 and accompanying text.

logic in considering that fact as the true and real cause of the Pacific war.”<sup>73</sup> This criterion, with which we fully agree, has the advantage of separating from the discussion the fruitless debate about the legal nature of the “tax” created by the Law of February 23, 1878, and rather concentrating on that this could not have motivated the direct and immediate rupture of the 1874 Treaty.

In this regard, it is important to state categorically that Chile should have had to apply in good faith the arbitration clause provided for in the 1874 Treaty, as recognized in the State Council of Chile of January 16, 1879, by Mr. Domingo Santa Maria, indicating that in his opinion,

all conciliation measures should be exhausted, insisting on setting up the arbitration. Nevertheless, if, despite all this, and even accepting arbitration, Bolivia would not repeal or suspend the effects of the enacted tax law. Chile would have to declare broken all the pacts adjusted until today and consider things as they were in 1866 . . .<sup>74</sup>

## VII. BOLIVIAN POSITION ON THE CREATION OF MUNICIPAL TAXES IN ANTOFAGASTA

The Decree of August 27, 1875, was issued by the Bolivian State Council, which is an organ of constitutional level consisting of nine deputies competent to “Declare the legality or illegality of taxes and establishments created by municipalities.”<sup>75</sup> It determined “illegal and

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73. GUTIÉRREZ, *supra* note 17, at 310 (original: “en lo íntimo de nuestra conciencia, nos decidimos por encontrarlo errado y funesto, opuesto a lo pactado en el convenio de 1874. Pero estamos muy lejos a la luz de la lógica histórica de considerar ese hecho como la causa verdadera y eficiente de la guerra del Pacífico.”).

74. *Id.* at 314 (original: “debía agotarse todas las medidas conciliatorias, insistirse en la constitución del arbitraje, pero que si, a pesar de todo esto, y aún aceptándose el arbitraje, Bolivia no derogaba o no suspendía los efectos de la ley tributaria que había dictado, Chile debía declarar rotos todos los pactos ajustados hasta hoy y considerar las cosas como si estuviésemos en 1866 . . .”).

75. 1871 CONSTITUCIÓN, *supra* note 34, art. 59°(9) (original: “Declarar la legalidad o ilegalidad de los impuestos y establecimientos creados por las municipalidades.”).

inadmissible” a three cents tax on every quintal (weight unit equivalent to 100 pounds) of exported nitrate, which the Municipal Board of Antofagasta wanted to implement for the balance of its public finances.<sup>76</sup> The application of approval was made to the central government on May 4, 1875, going first to review of the Municipal Council of Cobija. The report submitted to La Paz expressed that there was a contradiction between the request of the Municipal Board and the Limits Treaty of 1874.<sup>77</sup> However, this rejection was not because this was a contribution contrary to the 1874 Treaty, but because it was a tax of national competence.

Subsequently, in 1878 the Municipal Board of Antofagasta,<sup>78</sup> chaired by the Chilean Hernán Puelma, established a public lighting service fee to be paid by property owners according to four types of categories, being the lowest of 20 cents per month. This fee was not paid by the “Antofagasta Railway and Saltpeter Company” under the argument that it was released from all kinds of tax in merit to the transaction of 1873 and the 1874 Treaty. This breach resulted in the Board ordering the Municipal Commissioner the execution of Tax Authority measures against taxpayer’s assets for a tax debt of 150 Bolivian currency,<sup>79</sup> as well as the company’s manager’s capture. This order was fulfilled by the Municipal Commissioner on October 22, 1878, and suspended with the provisional deposit of 200 Bolivian currency.

In response to a claim by the Chilean Consul regarding the collection of the tax, the Finance Minister of Bolivia, Mr. Eulogio Doria Medina, replied “that the Municipality was entitled to establish the contributions that it considers appropriate, without this signify a violation of the agreement that rules the Chilean-Bolivian relationship.”<sup>80</sup>

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76. QUEREJAZU CALVO, *supra* note 9, at 82 (original: “ilegal e improcedente”).

77. *See* QUEREJAZU CALVO, ACLARACIONES HISTÓRICAS, *supra* note 51, at 81–82.

78. *See* QUEREJAZU CALVO, *supra* note 9, at 158.

79. *See* QUEREJAZU CALVO, ACLARACIONES HISTÓRICAS, *supra* note 51, at 84.

80. *Id.* at 85 (original: “que la Municipalidad estaba en su derecho de establecer las contribuciones que creyese convenientes, sin que ello significase violación del pacto que regulaba las relaciones chileno bolivianas”).



### VIII. THE COMPULSORY TAX COLLECTION AND WAR

On December 17, 1878, President Daza instructed the Antofagasta Governor to collect the tax of 10 cents for each quintal (100 pounds) of exported saltpeter since February 14, 1878.<sup>81</sup> As the collection could not be made effectively, the compulsory trial resulted in the auction of the taxpayer's assets by the amount of 90,848 and 13 cents of Bolivian currency. For this purpose, the seizure was carried out at 11 a.m. on January 11, 1879, by means of an Act drawn up by the Treasury Commissioner.<sup>82</sup>

Due to the deterioration of the diplomatic relations that this collection caused between both countries, President Daza decided to terminate the transaction contract of November 27, 1873, signed with the "Antofagasta Salt and Railway Company," under the following arguments set forth in the Decree of February 1, 1879:

- The company's right to exploit saltpeter on the Bolivian coast emanates from the Transaction agreement, so according to the Law of February 23rd, 1878, this transaction is valid only on the condition that the tax of 10 cents per exported quintal (100 pounds) is paid.
- The Company's protest against this Law has rendered the transaction invalid, since it takes away the consent of one of the parties, consequently, as there is no transaction, there is no exploitation contract with the Company.
- In the absence of a contract, it is not appropriate to collect the tax and, no existing tax, there is no violation of the 1874 Treaty.
- All claims of the company must be conducted through the Supreme Court of Justice of Sucre, Bolivia.<sup>83</sup>

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81. QUEREJAZU CALVO, *supra* note 9, at 175

82. *See id.* (referring to the book GUERRA DEL PACÍFICO (Chilean Army Im. University Santiago of Chile, 1920)).

83. Decree of Feb. 1, 1879, *reprinted in* ALEJANDRO BERTRANS, MEMORIA ACERCA DE LA CONDICIÓN ACTUAL DE LA PROPIEDAD SALITRERA EN

It was assumed that the entry into force of the Decree had to be suspended definitively and immediately the continuation of the coercive trial initiated against the “Antofagasta Saltpeter and Railway Company.” However, due to communication difficulties of the time, the Decree took time to be known by the Antofagasta Governor who, on February 4, 1879, notified the company with the appraisal of the assets, defining that the auction would take place on February 14, 1879.

On the other hand, this Decree was communicated by Bolivian Foreign Minister Martín Lanza to the Chargé d'affaires of Chile by means of a note dated February 6, 1879, stating that “in case of a new incident, which I do not expect, my government will always be willing to lean on, if necessary, on the arbitration recourse set forth in the second article of the 1875 Treaty.”<sup>84</sup>

The Chargé d'affaires of Chile, Mr. Videla, responded on February 8, 1879, to the letter of the Bolivian Foreign Ministry expressing the willingness of his government to resort to the arbitration procedure<sup>85</sup> in the following unusual terms in international diplomacy: “I hasten to beg your Excellency to declare definitively, in a frank and categorical answer, whether your Excellency’s government accepts or not the arbitration established in the pact of 1875, previously suspending all innovation made on the littoral with respect to the issue in which we deal.”<sup>86</sup>

Unfortunately, the first attempts to achieve compliance of the arbitration clause invoked by Bolivia were vain because at 06:30 am on

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CHILE 155, <http://www.bibliotecanacionaldigital.gob.cl/colecciones/BND/00/SM/SM0000601.pdf>.

84. QUEREJAZU CALVO, *supra* note 9, at 183 (original: “en caso de suscitarse un nuevo incidente, que no lo espero, mi gobierno estará siempre dispuesto a apoyarse, en caso necesario, en el recurso arbitral consignado en el artículo segundo del tratado de 1875”).

85. *See id.* at 199.

86. *Id.* (original: “me apresuro a rogar a vuestra Excelencia que se sirva declararme definitivamente, en una contestación franca y categórica, si el gobierno de Vuestra Excelencia acepta o no el arbitraje establecido en el pacto de 1875, suspendiendo previamente toda innovación hecha en el litoral con respecto a la cuestión en que nos ocupamos.”).

February 14, 1879, Chile occupied in a warlike way the bay of Antofagasta with the battleships “Cochrane” and “O’Higgins.”<sup>87</sup>

## IX. THE ETHICAL-POLITICAL FOUNDATION OF THE TAX

The ethical-political basis of the tax “must be sought in the same need that led from the past tense to the creation of the State as the only way to achieve order and cohesion in coexistence. If citizens have created the State, it is logical that they contribute to its support.”<sup>88</sup> In the same line, Alejandro Altamirano points out that

in order to live in society, it is essential to contribute to the support of the State in accordance with what is established by law. Being this, one of the ways in which the State is sustained on the necessary economic resources to fulfill the mission under its charge. This one is identified with the promotion of the common good.<sup>89</sup>

The preceding quotations are intended to contextualize the surreptitious policy of the government of Chile on the need to grant full tax exemption to the operations of the Saltpeter and Railway Company of Antofagasta. As it was widely explained, it was not admissible for the Chilean government that this company had to contribute taxes, however minimal, to the maintenance of public finances in the region in which natural wealth was being exploited with large profit margins. That is, it

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87. See GONZALO BÚLNES, *GUERRA DEL PACÍFICO DE ANTOFAGASTA A TARAPACÁ* 123 (1911), <http://www.memoriachilena.gob.cl/archivos2/pdfs/mc0007407.pdf>.

88. VILLEGAS, *supra* note 2, at 74 (original: “debe buscarse en la misma necesidad que desde tiempo pretérito llevó a los integrantes de una comunidad a crear el Estado como única forma de lograr orden y cohesión en la convivencia. Si los ciudadanos han creado el Estado, es lógico que contribuyan a su sostenimiento.”).

89. ALEJANDRO C. ALTAMIRANO, *DERECHO TRIBUTARIO—TEORÍA GENERAL* 23 (2012) (original: “para vivir en sociedad, es indispensable contribuir al sostenimiento del Estado de conformidad con lo que establezca la ley, pues es una de las formas con las que el Estado se nutre de los recursos económicos indispensables para cumplir con la misión a su cargo, que se identifica con la promoción del bien común.”).

ruled out the indispensable principle of contributing to the satisfaction of public needs in the poor region of Antofagasta, ignoring the natural obligation to contribute to achieving order and cohesion in living together.

The first thing that arises in a technical analysis against this statement is that it is completely natural and legitimate for a country to seek the development and competitiveness of its companies abroad, mainly in emerging markets. Under that premise, it would be perfectly justifiable to agree with the receiving states tax concessions, such as full exemption. However, it should be noted that this policy has to be consistent over time, as the opposite would mean revealing an intention to harm the development of the region of the country that sacrificed its sovereignty to impose taxes.

In this regard, Gutiérrez rescues a publication of the time in La Paz, Bolivia, which showed that once Chile took physical possession of the Bolivian territory, with the use of force, the government raised the tax “to one peso and eighty-five cents [Bolivian currency] per quintal [100 pounds], that means, 20 times more, without anyone having protested.”<sup>90</sup>

Coincidentally, Miguel Calvo Rebollar indicates that the company’s shareholders not only did not obtain benefits under the Chilean regime (although the first year they received high dividends), “but finally it recovered just a fraction of the capital invested.”<sup>91</sup> This is explained because “[i]n 1879, the Chilean state imposed an export rate of 40 cents per hundredweight which increased the following year to 80 cents per hundredweight.”<sup>92</sup> He continues pointing out:

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90. GUTIÉRREZ, *supra* note 17, at 312 (original: “a un peso ochenta y cinco centavos por quintal, es decir, 20 veces más, sin que nadie haya protestado”).

91. Miguel Calvo Rebollar, *Dinero No Veían, Solo Fichas. El Pago de Salarios en las Salitreras de Chile Hasta 1925*, 12 DE RE METALLICA 9, 13 (2009) (original: “sino que recuperaron finalmente solo una fracción del capital invertido”) (referring to OSCAR BERMÚDEZ MIRAL, HISTORIA DEL SALITRE. DESDE LA GUERRA DEL PACÍFICO HASTA LA REVOLUCIÓN DE 1891 (1984)).

92. Calvo Rebollar, *supra* note 91, at 13 (original: “[e]n 1879, el estado chileno impuso una tasa de exportación de 40 centavos de peso for cada quintal métrico, que se elevó el año siguiente a 80 centavos por quintal.”) (referring to ROBERTO HERNÁNDEZ CORNEJO, EL SALITRE (1930)).

If the Antofagasta Railway and Saltpeter Company had resisted with full force a tax of 10 cents per hundred-weight, it would still do so in one of the 80 cents, but its opposition had no fruit. The export taxes of saltpeter became the main income of the Chilean State, after all the deposits were in its possession, at the end of the Pacific War. If in 1880 they represented 5% of income, in 1885 they already represented 34% and in 1890 they reached 52%.<sup>93</sup>

Likewise, Manuel Ravest Mora noting that on September 12, 1879:

the law was published taxing with 40 cents the “metric quintal” (hundredweight) of exported saltpeter [. . .]. Thirteen months later it was replaced by another tax amounting to \$ 1.60 for every hundred kilos exported. The export of iodine was also taxed, a by-product that the Company successfully developed since 1879.<sup>94</sup>

Judge Reveco states, on the other hand that the law of October 1, 1880, allowed the delivery of saltpeter lands to owners of domain titles. This ended, in that way, any attempt of the State monopoly, as was the claim of English businessmen, and established an export tax on processed saltpeter in the territory of the Republic.<sup>95</sup>

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93. See Calvo Rebolgar, *supra* note 91, at 13 (original: “Si la Compañía de Salitres y Ferrocarril de Antofagasta se había resistido con todas sus fuerzas a un impuesto de 10 centavos el quintal, más aún lo haría a uno de 80, pero su oposición no tuvo ningún fruto. Tras quedar todos los yacimientos en su poder, al finalizar la Guerra del Pacífico, los impuestos a la exportación del salitre se convirtieron en los principales ingresos del Estado chileno. Si en 1880 representaban un 5% de los ingresos, en 1885 eran ya un 34%, y en 1890 alcanzaban el 52%).

94. MANUEL RAVEST MORA, *LA COMPAÑÍA SALITRERA Y LA OCUPACIÓN DE ANTOFAGASTA 1878–1879*, at 201 (1983) (original: “fue publicada la ley gravando con 40 cts. el quintal métrico de salitre exportado [. . .]. Trece meses después era sustituido por otro impuesto ascendente a \$1.60 por cada cien kilos exportados. También se gravó la exportación de yodo, subproducto que la Compañía elaboraba con éxito, desde 1879.”).

95. Reveco Peña, *supra* note 23, at 140.

In coincidence with the previous authors, Argentina historian Luis Vitale is also categorical in stating that:

It is effective that Bolivia violated the 1874 Treaty that freed Chilean saltpeter entrepreneurs, but the insignificant 10-cent tax was not a sufficient cause to trigger the outbreak of war. The 10 cent tax was so low that the Chilean Government, shortly after the end of the war, fixed a customs tariff of \$ 1.60 per 100 pounds of exported saltpeter.<sup>96</sup>

All of the explained above demonstrates that maintaining a full tax exemption regime in favor of the “Antofagasta Saltpeter and Railway Company” in the Bolivian territory, lost interest for the Chilean government as soon as the Antofagasta occupation was consumed, thus causing the fading of the main motive that Chile invoked to terminate the 1874 Treaty, without previously resorting to the binding arbitration agreed in such treaty.

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96. LUIS VITALE, INTERPRETACIÓN MARXISTA DE LA HISTORIA DE CHILE TOMO IV: ASCENSO Y DECLINACIÓN DE LA BURGUESÍA CHILENA (1861–1891) 88 (2011) (original: “Es efectivo que Bolivia violó el Tratado de 1874 que liberaba de gravámenes a los empresarios chilenos del salitre, pero el insignificante impuesto de 10 centavos no era causa suficiente como para provocar el estallido de una guerra. El impuesto de 10 centavos era tan bajo que el gobierno chileno, poco después del término de la guerra, fijó un arancel aduanero de \$ 1,60 por quintal de salitre exportado.”).