



## **DUMUNC – ICJ – TOPIC ONE**

### **Dispute over the Status and Use of the Waters of the Silala (Chile vs. Bolivia)**

#### **Introduction**

The Silala is a water body with origins in Bolivia and a flow that enters Chilean territory. The river also functions as an aquifer. For years, the division of the flow from this water body has been the source of dispute between the two bordering nations. Chile has claimed that the current route makes it an international river. However, Bolivia rejects this claim, denying that the body of water is even considered a river. Described by the Bolivian government as a 'spring', claims have been made that the Silala wouldn't naturally flow into Chilean territory if canals hadn't been built over a hundred years ago.

This dispute is a classic example of the complexities of historical, political and legal claims, ultimately requiring resolution by judiciary. Historically, water bodies have been a key argument between Bolivians and Chileans. Many Bolivians recall the War of the Pacific (1879-1883), in which Bolivia lost its outlet to the sea in favor of Chile. In addition to the dispute in the region, the importance of water rights has been the basis of provocative actions and restatements of sovereignty, such as Chilean military presence and the building of Bolivian military facilities.

These two nations had no official diplomatic relations, resulting in several political pressures. Although foreign ministers of both countries held meetings discussing such issues, nothing came of them. Threats to institute legal proceedings were first made by the Bolivian government back in 2013, when the country brought an application to the ICJ against Chile regarding access to the Pacific Ocean.

The case is like none other, considering the historical background to the conflict,

in which tradition makes a great connection. A resolve would require a ground-breaking legal solution, making the ICJ the best place for a resolution to be made possible. Without a doubt, the case must be deliberated by the top activists in environmental law, and follow strict guidelines and procedures.

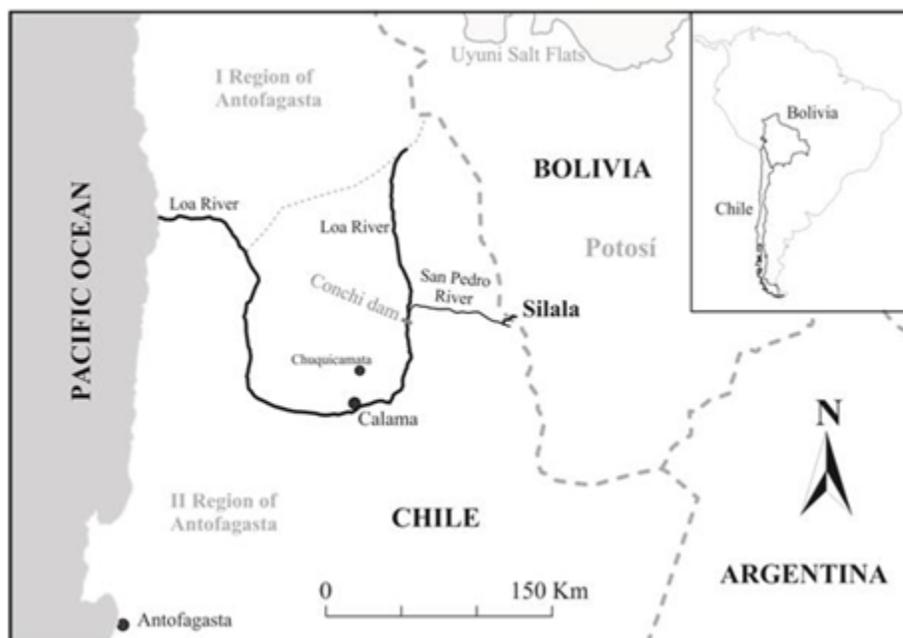
In this sense, a resolution in this case would be provide a basis for future cases in the political area as well as in international environmental law.

### **History of the Problem**

The dispute territory is the water flow into the Atacama Desert across the Bolivian-Chilean border. A canal was constructed in the beginning of the 20<sup>th</sup> century to bring water for the use of a railroad between Antofagasta (in Chile) and Bolivia.

In 1997, a concession for the supply of water was removed by the Bolivian government, who argued that the waters had long been used for water utilization, mining and sanitation services, and uses besides that in the original terms.

In 2007, the Silala watershed was considered the only 'high risk' basin of water in all of South America, and 'one of the most hydro-politically vulnerable basins in the world.'



## **Current Climate**

The diplomatic relations between the two nations is as non-existent as ever and political tension is heightened. The ICJ considers this case on-going, and currently awaits Chile to submit a Counter-Memorial, by mid-2018. Bolivia contested to its neighbor that they should have the obligation to negotiate a long-claimed access to the Pacific Ocean.

In March 2016, Bolivian President, Evo Morales, has publicly stated that Bolivia would sue Chile to settle the claims to the Silala and to determine whether Chile has any obligation to compensate Bolivia for the use of Silala water in past decades.

Morales was also vocal in alleging that Chile violated international treaties by building a military facility just 15 km away from the border.

Bolivian researches believe that the water is emitted by an aquifer below the surface and the springs are the natural discharges. Therefore, they come to the conclusion that the water would never have travelled to Chile without the interference of the railroad company that built the canal. Hence, the Bolivian government believe that is it their right to control the flow of the water, or at least charge Chile for the use of the water.

Chile rejects the findings by Bolivia, suggesting instead that the waters were never diverted from the springs, and instead naturally canalized to form what is now the Silala River.

Bolivia and Chile have not been able to agree whether the basin is international or not and have each taken a hard stance on their positions. Therefore, the rule of the ICJ is crucial in coming to resolve. It is also imperative that the definition of an international watercourse is established, and a decision made as to whether or not the Silala falls under this definition.

## **Applicable Laws and the Problem at Hand**

### *International Customary Law*

Sources of international law include treaties, international customs, general principles of law as recognized by civil nations, the decisions of national and lower courts, and scholarly writings. The rule of recognition is the heart of any legal

system and provides authoritative criteria for identifying primary rules, and this can be called the rules of international law.

Article 38 of the ICJ Statute is widely recognized as an authoritative statement of these sources as all UN Member States *ipso facto* parties to the Statute. According to article 38(1):

“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

Custom is a long and well-established source for international law. Both state practice and *opinio juris* are elements. If these two elements can be proven, then customary rules can be formed and become binding.

On the other hand, *opinio juris* turns mere usage into a rule of customary international law. It is a belief by States that conduct in question is not just convenient, right or in accordance with tradition, but legal obligation. "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

The 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses states in article 2, definitions of water law terminology:

(a) “**Watercourse**” means a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

(b) “**International watercourse**” means a watercourse, parts of which are situated in different States;

(c) “Watercourse State” means a State Party to the present Convention in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated;

(d) “Regional economic integration organization” means an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it.

**GUIDING QUESTIONS** – This convention does not have a binding force on both of the parties. Why is this?

The court’s ruling on the significance of the Watercourses Convention will be a game changer. How and why?

### *International water law*

There are several bodies of water that flow between borders, and these have been subject to several international agreements, treaties, and conventions in the past. The development and optimal use of shared water resources has been the key aim when drafting legal provisions. A framework of principles and rules to be applied or adjusted is made to suit the characteristics of particular international watercourses.

The Watercourses Convention states in articles 2(a) and 2(b) that a watercourse is a “means a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”. If at any point the watercourse touches two or more states, then it can be claimed as international. The convention also further outlines several principles and rights, regarding equitable and reasonable utilization and participation, reducing harm, and to share data. However, it is necessary to understand that the Convention is not in force.

**GUIDING QUESTION** – Are there any other conventions or treaties that Bolivia/Chile may or may not be part of in which other principles and rights are stated?

### *Human right to water*

Member States of the United Nations have all signed the Millennium Declaration, which is the basis of the Millennium Development Goals. Goal 7, which is to ensure environmental sustainability, encompassed a target to halve the number of people without ready access to safe drinking water by 2015. 63 million people still lack access to safe fresh water now in 2018.

The right to water has been included in several UN resolutions, international treaties – notably the International Covenant of Economic, Social and Cultural Rights.

**GUIDING QUESTION** – What were Bolivia and Chile’s respective reactions to this treaty?

The treaty states that "each state party undertakes to take steps to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant".

### **Advice**

- Create a summary of arguments
- Remain confident with the positions of each nation
- Further research existing treaties or conventions
- Prepare your own guide

### **Questions a Judgement Should Answer**

- A. Could the Convention be accepted as an international customary law, and govern the case?
- B. If there is more than one definition of an international watercourse, which one most legally applies?
- C. What is the view on water access being a human right and how does this apply in this case?