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The Political and Legal Stakes of a Feud Over a Tiny South American River

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A Quechua indigenous person walks beside the stream of the Silala River, Potosi, Bolivia, March 28, 2013 (AP photo by Juan Karita).

Earlier this month, Bolivian President Evo Morales publicly berated (http://www.laht.com/article.asp?ArticleId=2439452&CategoryId=14919) his Chilean counterpart, Michelle Bachelet, for allegedly disclosing the contents of a filing before the International Court of Justice in The Hague concerning the two countries' battle over the Silala River. It was just the latest flare-up in a dispute that has further poisoned relations between the South American neighbors. In an email interview, Chrisopher Rossi, an adjunct faculty member at the University of Iowa College of Law who has published detailed accounts of this dispute in the Stanford Journal of International Law and the Inter-American Law Review, explains the two countries' positions and the case's implications for other water conflicts.

WPR: What are the origins of the dispute between Chile and Bolivia over the Silala River, and what's at stake for both countries?

Christopher Rossi: The Silala is an 8.5-kilometer waterway formed by groundwater springs in Bolivia. It flows for 4 kilometers before entering Chile. Bolivia granted a Chilean mining concessionaire rights to extract the water in 1908. The concessionaire blasted out canals that Bolivia claims adulterated the flow of the water. If allowed to return to its pre-1908 condition, Bolivia claims the water would pool in place and never enter into Chile.

In 1997, Bolivia reversed and annulled the 1908 concession, but Chile had long before converted the use of the water for its own purposes. Bolivia's claim that Chile is stealing the water has turned this area, according to the United Nations, into one of the most hydropolitically vulnerable basins in the world.

The narrow dispute can be stated simply: Is the Silala really an international river? In modern legal parlance, the question can be reframed: Is the Silala an international watercourse?

The meaning of an international watercourse is different from the traditional meaning of a river.

Watercourses involve the hydrological commingling of groundwater and surface water regimes; they interpret the physical relationship between surface waters and groundwaters as a unitary whole, and include the holistic consideration of subterranean conditions involving aquifers and soil porosity. Watercourses broadly incorporate groundwater basins that straddle borders and may feed surface waters. If the Silala involves the hydrological interconnectivity of an aquifer that straddles the Chilean-Bolivian border in this remote area—and it may—then customary and conventional international law suggest that the water must be shared in an equitable way.

If the surface water is not connected to a transboundary groundwater regime, it may still be an international river. Some evidence suggests alluvial erosion patterns on the surface rock pre-existed the period of canalization. This evidence would suggest the Silala at one time—although perhaps intermittingly—presented a natural topographical water flow with a downward slope from the Bolivian Altiplano into Chile. If the water does not naturally cross a border, and no hydrological connectivity to groundwater regimes avail, then the water would belong to Bolivia, where the water originates.

Broader interests are also at stake. Climate change affects the great hydrographic basins in the world, as has been measured, for instance, in the Great Lakes region of Africa. However, this case involves one of the tiniest and most remote catchments on earth. In a world where 40 percent of the population share transboundary waters—covering 45 percent of the earth's surface space—this micro-dispute suggests many more challenges ahead for international law over conflicts for dwindling freshwater supplies. This case highlights the evolving and only recently recognized regard for the relevance of groundwater regimes to surface water.

WPR: How does the issue play politically in both countries, and can these political ramifications pose a barrier to accepting an International Court of Justice ruling in the case?

Rossi: The politically charged nature of this dispute drives this case. Some evidence suggests that Chile brought the case before the ICJ only to deprive Bolivia of the satisfaction of presenting itself as the aggrieved party. Both countries have forestalled efforts to shine more scientific light onto the hydrological relationship between the underground and surface systems. Their penchant has not been to resolve the dispute but to use it as a form of ceremonial profanation, perhaps even as a bargaining chip over Bolivia's politically consuming effort to re-establish sovereign access to the Pacific Ocean.

Indeed, it is impossible to completely understand this dispute without considering a separate conflict between the two countries pending before the ICJ. In 2013, Bolivia filed a suit claiming that Chile, through prior official pronouncements, had obligated itself to conclude an agreement granting Bolivia a sovereign corridor to the Pacific. Chile claims that, at most, it is obliged only to negotiate a peaceful solution with Bolivia, but that an obligation to negotiate in good faith does not compel the parties to arrive at an

agreement. The final resolution of this earlier case may be complicated by an adverse judgment over the Silala waters.

Observers have noted the mutual culture of enmity that now colors this bilateral relationship. The two countries seem locked into an intractable stalemate, punctuated by a rupture in diplomatic relations. Yet this impasse, paradoxically, pays dividends. Relations between Bolivia and Chile serve performative functions that satisfy internal and international constituencies for both countries, for example by fueling national narratives of victimization by the other. It also engages conversations dating to the Spanish conquest of Latin America and Spain's messy 19th-century exit from the New World. Spain's confusing imperial borderlines imprecisely divided the viceroyalties across a landscape separated by mountains, jungles and, as is the case here, the Atacama Desert. That system of colonial rule again serves as a reminder of the need for the employment of international law's reviled tool to settle disputes over territory: uti possidetis, which holds that new states have the same borders they had before independence.

Bolivia has had more success than Chile in framing the narrative before international forums such as the United Nations and the Organization of American States.

WPR: To what extent is the issue a driver of tensions between the two countries, and to what extent do broader tensions embitter this particular dispute?

Rossi: Bolivia and Chile are caught up in a dispute dating to the War of the Pacific, which took place between 1879 and 1884. Chile defeated Bolivia and its ally, Peru. It completely destroyed Peru's armada, occupied Lima for three years, and annexed all of Bolivia's Pacific coastline, which has psychologically shaken Bolivia's national identity by instantaneously turning Bolivia into a nation of landlubbers. Bolivia did not even have a navy when it ceded control of its Pacific littoral to Chile more than 135 years ago. Chile and Peru later came to terms, which ruled out any Bolivian access to the sea. That agreement simultaneously cleaved Bolivia from Peru, its historical ally with which it once formed a confederation in the 1830s. Ironically, Bolivia, the poorest country in Latin America, still maintains an armada, whose activities are restricted to the brown water ports of Lake Titicaca, various internal river patrols, a militarily meaningless presence at the Peruvian port near Ilo, and the stately parade during Bolivia's annual Day of the Sea observation.

Chile's annexation of a major portion of the Atacama Desert has deprived Bolivia of tremendous wealth, first from lost 19th-century fertilizer and nitrate revenues, then—and significantly today—from lost copper sales, a market that Chile dominates worldwide. A rebellion in the rubber-rich Acre region forced Bolivia to cede territory to Brazil in the early 20th century. A war with Paraguay in the Gran Chaco region ended in 1935 with the loss of 20,000 square miles of oil and gas fields to Paraguay—the bloodiest hemispheric

war since the U.S. Civil War. Now, in an age dominated by climate change concerns, and in an area identified as one of the driest and most remote places on earth, Bolivia has placed immense importance on maintaining control over the waters of the Silala, which trickle into the Pacific Ocean and provide Bolivia with its only remaining link to blue water.