



# Transboundary freshwater security governance train

Interactive Online Session:  
**IWL & International Dispute  
Settlement**

21 September 2021





# Event Moderator



**Dr. Yumiko Yasuda**

## Senior Network and Transboundary Water Cooperation Specialist, GWP

- Yumiko leads GWP's thematic work on transboundary water, and is the lead faculty of the MOOC on Transboundary Freshwater Security, designed and directed the production of the course.
- Her area of expertise lies in the analysis of water and environmental governance, water diplomacy, political economy analysis surrounding natural resources management, with a focus on transboundary rivers and non-state actors' engagements in natural resources management.
- Dr. Yasuda obtained her PhD degree from the Centre for Water Law, Policy and Science at the University of Dundee, MA in environmental policy from the Tufts University, and MSc in environmental science from Tsukuba University. Her research on the Mekong has culminated in the publication of a book entitled "Rules, Norms and NGO Advocacy Strategies: Hydropower Development on the Mekong River" by Routledge in 2015.

**Fun fact! Yumiko performed stand-up comedy in Scotland.**



**The biggest achievement in life:  
Still working on it!**





# Event Chairs

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**Professor Otto Spijkers**

Founding Staff Member,  
International Water Law  
Academy, Wuhan  
University



**Dr. Patricia Wouters**

Founder, Wuhan  
International Law  
Academy (CIBOS),  
University of Wuhan





Founding Staff Member of the International Water Law Academy (IWLA), Professor at the China Institute of Boundary and Ocean Studies (CIBOS) and at the Research Institute of Environmental Law (RIEL) of Wuhan University

- Otto Spijkers studied international law at the University of Amsterdam, New York University School of Law, and the Hague Academy of International Law. He studied philosophy at the University of Amsterdam and the University of Malta. He obtained a Diplôme approfondi de langue française.
- Prior to joining the IWLA of CIBOS, Professor Spijkers was Lecturer of Public International Law at Utrecht University, and researcher at the Utrecht Centre for Water, Oceans and Sustainability Law.
- He also was a visiting lecturer at the Grotius Centre for International Legal Studies of Leiden University, Xiamen University's China International Water Law Programme, the Università degli Studi di Salerno (Italy), and the Association pour la promotion des droits de l'homme en Afrique centrale (APDHAC) of the Université Catholique d'Afrique Centrale (Yaoundé, Cameroon).

“ **Fun fact! Otto recently got a Chinese name, 高海平. His name is inspired by his height – Otto is very tall – and the fact that he was born near the ocean.**

**Biggest achievement in life: finding a home in lots of different countries.**



**Professor Otto Spijkers**





# Founding Director, Wuhan International Water Law Academy (CIBOS) University of Wuhan

- Professor Wouters has close to 30 years experience in the field of international law that governs transboundary waters. Her legal education includes BA and LLB at the University of Ottawa, Canada; LLM, University of Berkeley, California; DES, PhD, Graduate Institute of International Studies/University of Geneva, Switzerland.
- Professor Wouters has published and consulted broadly on international water law, including for the UN, World Bank, regional bodies and national governments, across most regions of the world. She was founding director of the University Dundee UNESCO Centre for Water Law and Policy (Scotland), and established the China International Water Law group at Xiamen Law School, where she was appointed under the Chinese Thousand Talent programme (2012).

“ **Fun fact! Patricia has a dual nationality - Canadian and Belgian, and lives mostly in Scotland (commuting to Wuhan).**

**The biggest achievement in life:  
My healthy family!**



**Professor Patricia Wouters**





# Dispute Settlement (DS) in International Law (IL)

- Introduction
- Dispute Settlement in International Law
- Dispute Settlement in International Water Law (IWL)



# Charter of the United Nations

All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered' (Art. 2(3))

'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall ... seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or other peaceful means of their own choice'

(Art. 33)



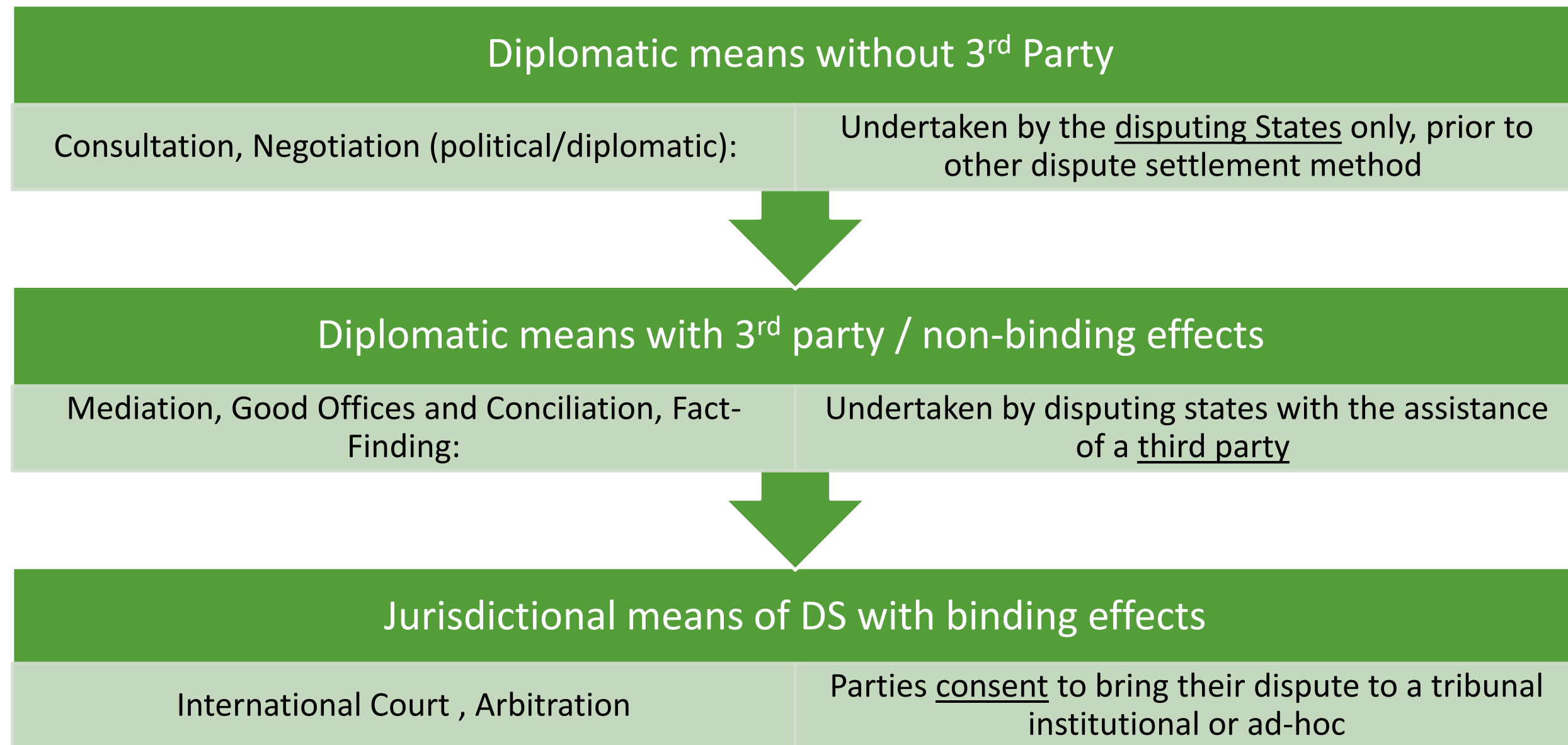
# Principles of international DS

1. Peaceful means
2. Requires Consent
3. Range of options





# Dispute Settlement Mechanisms





# Diplomatic means of DS (third party)

Requires  
Consent

Good Offices	Mediation	Conciliation
<ul style="list-style-type: none"><li>• 3<sup>rd</sup> party 'go between'</li><li>• (Individual, neutral state, IO)</li><li>• Indus Treaty (World Bank)</li></ul>	<ul style="list-style-type: none"><li>• 3<sup>rd</sup> party facilitates negotiation - 'honest broker'</li></ul>	<ul style="list-style-type: none"><li>• 3<sup>rd</sup> party has a more active role in the process</li><li>• Fact-finding*</li><li>• 3<sup>rd</sup> party suggests terms of settlement</li><li>• Conciliator leads and controls the process</li></ul>

**In all methods the outcome is not binding\* on the disputing parties**





# International Court & International Arbitration

Requires  
Consent

## Arbitration

- Flexibility
- Party appointed arbitrators
- Arbitral tribunal devise own procedural rules /institution (PCA Optional Rules)
- Decision/award binding on the parties
- No appeal mechanism

## Adjudication

- Consent to submit to International Court of Justice (or other Tribunal)
- Parties are not free to appoint the judges (generally)
- Set rules of procedure, (Statute of the ICJ and rules of procedure)
- Decision binding upon the parties
- No appeal mechanism



# UN Watercourses Convention

...if after six months from the time of the request for negotiations referred to in paragraph 2, the parties concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraph 2, the dispute **shall** be submitted, at the request of any of the parties to the dispute, to impartial fact-finding' (Article 33(3) UNWVC)



# Third Party Involvement by Diplomatic means

## International Water Law Treaty Practice

- **UNECE Water Convention (1992):** The Parties shall seek a solution by negotiation or by any *other means* of dispute settlement acceptable to the parties to the dispute [...] Article 22(1).
- **Mekong Agreement (1995):** [...] The Governments may request the assistance of *mediation* (Article 35)
- **Almaty Agreement (Aral Sea basin – 1992):** All disputes shall be settled by the heads of national water agencies, with involvement of *third party, if necessary* (Article. 13)
- **Indus Treaty (1960):** [...] “differences” are to be resolved by a Neutral Expert (Article IX)
- **Sava River Basin Agreement (2002):** [...] 2) may jointly seek good services, mediation or conciliation from a third party (Article 22 (2))





# Negotiations (involving joint commissions)

## International Water Law Treaty Practice

- **Indus Treaty (1960):** “questions” are handled by the *Commission* [...] (Article IX)
- **Almaty Agreement (Aral Sea Basin - 1992):** All disputes shall be settled by the heads of *national water agencies*, (with involvement of *third party*, if necessary) [...] (Article 13)
- **Mekong Agreement (1995):** *the Commission* shall first make every effort to resolve the issue as provided in Articles 18.C and 24.F (Article 34).
- **Rhine Convention (1998):** 1) the parties concerned will strive for a solution by means of *negotiations* [...] (Article 16)
- **Zamcom Agreement (2005):** 1) Enter into *consultations and negotiations* [...] (Article 22(1))



# Jurisdictional Dispute Settlement Mechanisms

## International Water Law Treaty Practice

- **UNECE Water Convention (1992):** ‘[...] 2) ‘opt in’ formula for compulsory arbitration or adjudication.’ (Article 22)
- **Indus Treaty (1960):** “disputes” are to be referred to a seven-member *Court of Arbitration*.’ (Article IX)
- **Treaty on the Lesotho Highlands Water Project (1986):** ‘(8) If a dispute cannot be resolved by negotiation between the Parties, such dispute shall be submitted to the Arbitral Tribunal as hereinafter provided.’ (Article 16)
- **Rhine Treaty (1998)** ‘2. If the dispute cannot be settled in this manner, it shall, unless the Parties to the dispute decide otherwise, be submitted, at the request of one of them, to arbitration in accordance with the provisions of the Annex to this Convention, which shall form an integral part thereof.’ (Article 16)





# Summary: IWL DS

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1. Peaceful dispute settlement
2. Requires **Consent**
3. Range of options and state practice in IWL



# Speakers

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- 1. Lingjie Kong**, Professor of International Law and Associate Dean for Research and International Cooperation at the China Institute of Boundary and Ocean Studies, Wuhan University, on “International Water Law and Dispute Settlement (Introduction)”.
- 2. Ximena Fuentes**, Associate Professor of Public International Law at the Faculty of Law of the University of Chile, and Agent of the Republic of Chile before the ICJ on “Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)”.
- 3. Gábor Baranyai**, Ambassador, International Water Conflict Negotiator, Senior Lecturer, NUPS, Hungary, on “Gabčíkovo-Nagymaros Project (Hungary/Slovakia)”.







**Professor Lingjie Kong**

## Professor of International Law, International Water Law Academy and Associate Dean for Research and International Cooperation, Institute of Boundary and Ocean Studies, Wuhan University

- Professor Kong's research interest lies in peaceful settlement of international disputes, territorial, transboundary water and maritime disputes in particular. His legal education includes LLM at Wuhan University, Diploma in international law and international relations at Johns-Hopkins University and Nanjing University, PhD at University of Paris Sud and Wuhan University.
- His articles appear on European Journal of International Law, Chinese Journal of International Law and other law journals. His recent research centers on the jurisprudence of the law of international watercourses and development of the law by the International Court of Justice and other tribunals. He was appointed under the New Century Talent Programme of the Chinese Ministry of Education (2013).

**Fun fact! Lingjie Kong is a 76 generation descendant of Confucius. He is not sure whether he looks like his ancestor. He tries to teach international law by reference to the Confucian thought on education.**



**The biggest achievement in life:  
Survived the lockdown of Wuhan and continues to live  
happily with his family in this lovely city.**





National Director of Boundaries and Border Areas of the Chilean Ministry of Foreign Affairs, Associate Professor of Public International Law at the University of Chile, and Agent of the Republic of Chile before the ICJ

- Ximena Fuentes, obtained her First Degree in Law at the University of Chile. She later obtained a Doctoral Degree at the University of Oxford. Her D. Phil thesis was on the criteria of equitable utilization of international watercourses in international law, which served as the basis for her articles: Sustainable Development and the Equitable Utilization of International Watercourses and The Criteria for the Equitable Utilization of International Rivers, published in the British Yearbook on 1996 and 1998 respectively.
- Prior to becoming the National Director of Boundaries and Border Areas, she acted as legal adviser of the Government of Chile before the ICJ in the *Peru v. Chile Maritime Dispute* case and in the *Bolivia v. Chile* case regarding an obligation to negotiate access to the Pacific Ocean. She has also participated in investor-State arbitrations (ICSID cases) as off Counsel at Chilean law firm Álvarez Hinzpeter Jana in the following arbitrations: *Vieira v. Chile*, *Quiborax v. Bolivia* and *Flughafen Zurich v. Venezuela*.
- She was the Co-Rapporteur of the Committee on International Law on Sustainable Development of the International Law Association. At present she is the Vice-President of the Chilean Society of International Law.

“**Fun fact! At age 11 she was a TV star in the national television's children show “The Flying Coffee Maker”.**

**Biggest achievement in life: climbing to over 5,000 m.a.s.l. during in situ visits to the Chilean border areas as the Head of the National Directorate of Boundaries and Border Areas.**



**Dr. Ximena Fuentes**





## Ambassador, International Water Conflict Negotiator, Senior Lecturer at the University of Public Service, Hungary



**Gábor Baranyai**

- Gábor Baranyai graduated from the Faculty of Law of Eötvös Loránd University, Budapest Hungary. He subsequently obtained a masters degree in environmental law at the University College London and a PhD at Pázmány Péter Catholic University, Budapest.
- Following a short commercial legal practice he served as Hungary's environmental attaché during Hungary's accession to the European Union. Ever since he has held various managerial positions in the national public administration. Since May 2020 he has been one of Hungary's ambassadors to the EU (deputy permanent representative).
- Gábor Baranyai has been engaged in the resolution of the longest pending case before the International Court of Justice (Gabčíkovo-Nagymaros) since 2004, of which he has acted as government plenipotentiary from 2014.

**Fun fact! Four (little) children.**



**Biggest achievement in life: four (little) children, what else?**





# The major cases

## ▪ PICJ and ICJ

1. River Oder case, PICJ, 1929
2. River Meuse case, PICJ, 1937
3. Gabčíkovo-Nagymaros Project case, ICJ, 1997
4. Kasikili/Sedudu Island case, ICJ, 1999
5. The Dispute regarding Navigational and Related Rights case, ICJ, 2009
6. Pulp Mills case, ICJ, 2010
7. Certain Activities Carried Out by Nicaragua in the Border Area, ICJ, 2015
8. Construction of a Road in Costa Rica along the San Juan River, ICJ, 2015
9. Certain Activities Carried Out by Nicaragua in the Border Area: Compensation, ICJ, 2018
10. Silala Waters case, 2016, pending before the ICJ

## ▪ Institutional/ad hoc Arbitration

Faber case, Lake Lanoux Arbitration, Argentine-Chile Frontier case, Gut Dam case, Rhine Chlorides Arbitration, Indus Waters Kishenganga Arbitration...





# The major cases: subject-matters

- **River boundaries**
  - Identification of the main channel
  - Determination of the thalweg or median line
  - Location of certain section of the boundaries
  - Sovereignty over islands in the river
- **Definition and nature of transboundary water**
  - Definition of international watercourse
  - Territorial scope of international waterway
  - Transboundary shared natural resource
- **Navigational uses**
  - Freedom of navigation along waterways of international concern
  - Right of navigation for commercial purposes
  - Regulation of navigation and other matters related to navigation on international and boundary rivers
- **Non-navigational uses and protection**
  - Hydro power generation
  - Activities on, in, related to the river
  - Potential and actual harm
  - Environmental protection



# The major cases: applicable law

- **Adjudicate solely by special treaties or watercourse agreements**
  - River Meuse case
- **Interpret relevant provisions of the treaties in light customary/general international law**
  - River Oder case
  - Lake Lanoux Arbitration,
  - Gabčíkovo-Nagymaros Project case
  - Pulp Mills case
- **Adjudicate solely by general international law**
  - Costa Rica/Nicaragua cases
  - Silala Waters case
- **Interpret and apply provisions of other international treaties**
  - Ramsar Convention
  - CBD
  - Espoo Convention





# Int'l Jurisprudence: legal questions

- **Definition of international watercourse, its nature and characters**
  - What is an international watercourse
  - What is the international watercourse itself, and utilization thereof and benefits therefrom are in international law
- **Basic principles of the law of international watercourses**
  - A community of interests and rights of the riparian States
  - Equitable and reasonable use
  - Non-significant harm
  - Sustainable development
  - Good neighborliness and general obligation of cooperation
- **Rights of the watercourse States**
  - Right to equitable and reasonable use and participation
  - Equality and reciprocity
- **Obligations of the watercourse States**
  - Procedural obligations: notification, consultation, EIA
  - Substantive obligations
- **Responsibility of watercourse States**
  - State responsibility
  - Reparation
  - Compensation



# Int'l case law: article 38 of the ICJ Statute

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.**







International Court of Justice -  
Dispute over the Status and Use of the  
Waters of the Silala (Chile v. Bolivia)

**Ximena Fuentes T.**

Director, Difrol and  
Agent of Chile



**DIFROL**  
Ministerio de  
Relaciones  
Exteriores

Gobierno de Chile



國際水法中心  
INTERNATIONAL WATER LAW ACADEMY



武汉大学  
WUHAN UNIVERSITY



# Chile and Bolivia Today





# The Location of the Silala River Basin

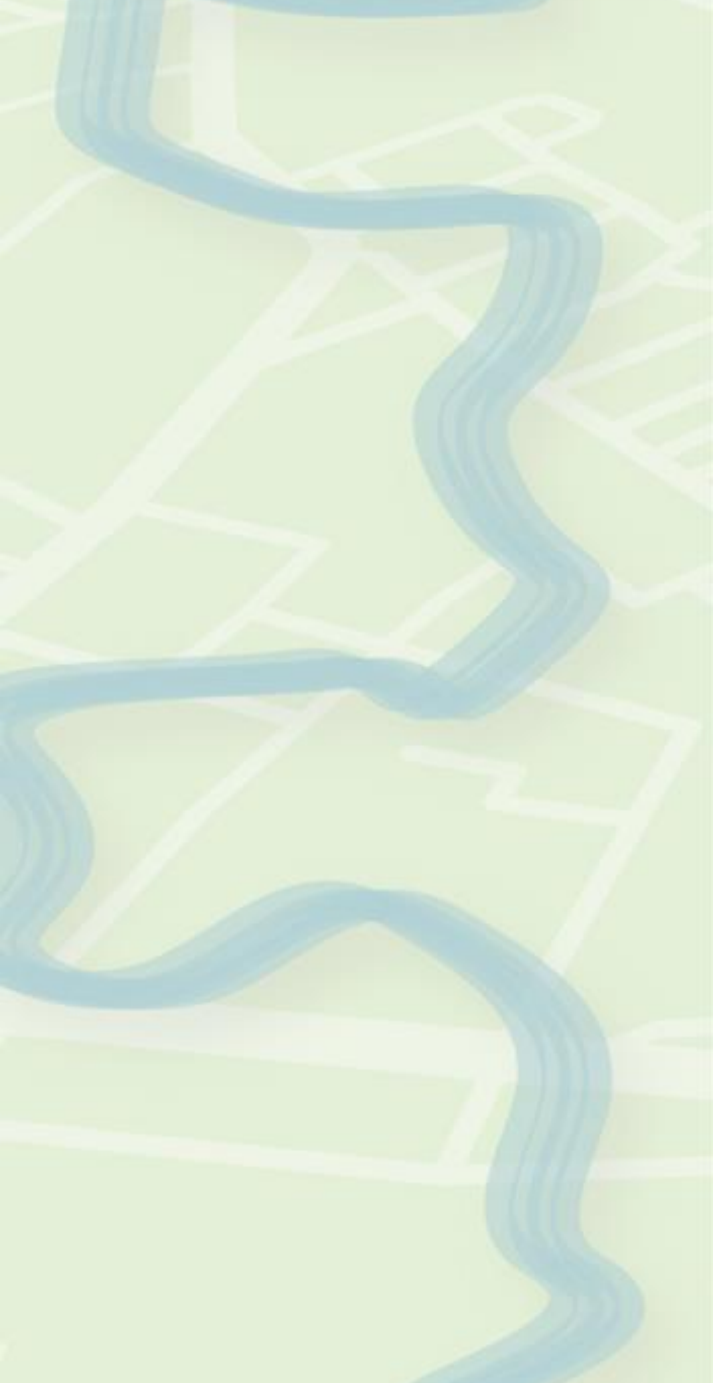




# The Silala Ravine on both Sides of the International Boundary







2016/11/18 14:17







2017/01/17 16:42





# Basic Facts on the Use of the Silala River

**1906** - Chile grants concession of the waters of the Silala - on Chilean territory- to British company The Antofagasta (Chili) and Bolivia Railway Company Ltd. (FCAB).

**1908** - Bolivia also grants concession of the waters of the Silala -on Bolivian territory- to FCAB.

**1997** - Bolivia (the Prefect of Potosí) declares FCAB's Bolivian concession terminated; FCAB continues to operate its Chilean concession.

**1999** - Bolivia starts denying the status of the Silala as an international river, claiming that the Silala does not naturally flow to Chile and exclusively pertains to Bolivia.

**2000** - Bolivia grants concession to the waters of the Silala to Bolivian company Ductec for their commercialization and/or exportation to Chile; DUCTEC sends invoices to Codelco (Chile's national copper company) and FCAB for the use of the water.



# The Development of the Dispute

**Between 2001 and 2010**, Chile and Bolivia engaged in various technical conversations and activities to establish a common understanding of the Silala River.

**2010** – Conversations break down due to Bolivia’s insistence on denying that the Silala River is an international watercourse and Bolivia’s contention that it has rights to the 100% use of the waters, including payment of a “historic debt”.

**Between 2012 and 2014**, Chile repeatedly requests information on projects developed by Bolivia near the headwaters of the Silala River.

**23 March 2016** – Bolivia’s President Evo Morales announces a future claim against Chile before the ICJ for the “unlawful” use of the waters of the Silala.

**6 June 2016** - Chile initiates proceedings against Bolivia before the ICJ.





# Procedural Development of the Dispute before the ICJ

**3 July 2017** - Chile submits its Memorial

**3 September 2018** - Bolivia submits its Counter-Memorial, together with three Counter-Claims

**15 November 2018** – the Court sets the dates for Reply and Rejoinder, limited to the Counter-Claims

**15 February 2019** – Chile submits its Reply on the Counter-Claims

**15 May 2019** – Bolivia submits its Rejoinder on the Counter-Claims

**18 September 2019** – Chile submits Additional Pleadings on the Counter-Claims



# Chile's Submissions before the ICJ in the Application

## V. DECISION REQUESTED

50. Based on the foregoing statement of facts and law, and reserving the right to modify the following requests, Chile requests the Court to adjudge and declare that:

- (a) The Silala River system, together with the subterranean portions of its system, is an international watercourse, the use of which is governed by customary international law;
- (b) Chile is entitled to the equitable and reasonable use of the waters of the Silala River system in accordance with customary international law;
- (c) Under the standard of equitable and reasonable utilization, Chile is entitled to its current use of the waters of the Silala River;
- (d) Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in the vicinity of the Silala River;
- (e) Bolivia has an obligation to cooperate and to provide Chile with timely notification of planned measures which may have an adverse effect on shared water resources, to exchange data and information and to conduct where appropriate an environmental impact assessment, in order to enable Chile to evaluate the possible effects of such planned measures, obligations that Bolivia has breached.





# Bolivia's Public Statements Prior to the Presentation of its Counter-Memorial

## **1) The Silala is not a river because it arises from springs in Bolivia, and therefore is 100% Bolivian.**

*Many rivers originate from groundwater springs. A State cannot claim property of an international river on the ground that the river originates in its territory.*

## **2) If not for the canalization of the Silala, the water would not flow to Chile but remain immobilized on Bolivian territory**

*The springs of the Silala are located at 1 (straight) mile from the International Boundary and at 2,5 miles following the ravine. The downhill gradient is 4,3% on average. Water always flows downhill.*

*The channels were built years after the 1906 and 1908 concessions. Their purpose is to avoid contamination of the water.*





# Bolivia's Public Statements Prior to the Presentation of its Counter-Memorial

## **3) Chile requested a concession on Bolivian territory in 1908, which shows that the waters did not naturally flow into Chile.**

*Chile never requested any concession on Bolivian territory. The 1908 concession was requested by private company FCAB. Moreover, Chile itself granted a concession to FCAB in 1906, prior to the Bolivian concession.*

## **4) Chile was willing to pay for the water of the Silala in a pre-agreement reached in 2009**

*Chile never agreed to pay for the water; it was only willing to concede Bolivia 50% of the water, which may be offered for sale to Chilean users.*

## **5) It never rains near the Silala so there is no recharge of the groundwater**

*Average precipitation is 160 mm. Most rain falls during January-March but there is also occasional snowfall in winter.*





# Bolivia's Counter-Claims

Whereas, in its Counter-Memorial, Bolivia states that, “[i]n accordance with Article 80 of the Rules of Court, [it] submits three Counter-Claims”;

Whereas,

“[a]s to Bolivia’s Counter-Claims, Bolivia respectfully requests the Court to adjudge and declare that:

- (a) Bolivia has sovereignty over the artificial channels and drainage mechanisms in the Silala that are located in its territory and has the right to decide whether and how to maintain them;
- (b) Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no right to that artificial flow;
- (c) Any delivery from Bolivia to Chile of artificially-flowing waters of the Silala, and the conditions and modalities thereof, including the compensation to be paid for said delivery, are subject to the conclusion of an agreement with Bolivia”;

*Order of the Court of 15 November 2018*







# The Gabčíkovo-Nagymaros “affair”: an update

## Gábor Baranyai,

Ambassador, Hungarian plenipotentiary -  
Gabčíkovo-Nagymaros Project, senior  
lecturer (University of Public Service,  
Budapest)





# Historical background

- Two communist countries to plan a joint hydropower megaproject
- Limited sovereignty, strong Soviet push
- 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System
  - Two large and separate multifunctional dam systems
  - Peak operation
  - 50%-50%
    - investment, ownership, control
    - share in benefits (electricity)
  - No consideration for environmental, social, etc. side effects









# What happened?

- **1989** Hungary suspends and – subsequently – cancels the Nagymaros (downstream) barrage
- **1992** May Hungary unilaterally terminates 1977 Treaty
- **1992** October Czechoslovakia unilaterally diverts the Danube (Variant C)
- **1993** Czechoslovakia dissolves, Slovakia succeeds to the project
- **1993** April Special Agreement to refer the case to the International Court of Justice
- **1995** Interim Water Sharing Agreement
- **1997** September Judgement of the ICJ delivered





# The judgement

- A landmark in the context of the law of
  - the treaties
  - State succession
  - State responsibility
  - environmental protection
- **BUT**
  - Does not clearly decide on the obligation of the parties („go back and negotiate in good faith”)
  - Contains contradictory statements on certain key elements





# Where do we stand now?

- Negotiations on and off since 1997
- No real desire to clash – improving bilateral relations
- Slovakia is unilateral beneficiary – no desire to give up positions
- Diametrically opposed framing: nation building versus environmental protection
- Contradictory judgement





# Further reading

- Gábor Baranyai – Gábor Bartus: Water Policy (2016): Anatomy of a deadlock: a systemic analysis of why the Gabčíkovo–Nagymaros dam dispute is still unresolved. Water Policy (2016) 18 (1): 39–49. 18 (1): 39–49.  
<https://doi.org/10.2166/wp.2015.040>







Thanks to all the  
speakers  
& participants!

Interactive Online Session:  
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21 September 2021

