



Reports and analyses

Caimanes and the Water – Infinite Legal Struggles about a Finite Good

Comments on the Chilean Supreme Court Judgement of 21 October 2014, rol 12.983-2013

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Abstract

This report is intended to shed more light on the ongoing water struggle in Caimanes, a small urban area in the central northern area of Chile, neighbouring Latin America's biggest tailings dam. Undoubtedly, the water in Caimanes is running out and the conflict between the opponents of the dam and its owner, a multinational copper enterprise, is getting more and more attention by the national and also international media. In the discussion a judgment of the Chilean Supreme Court from last October plays a central role, because it is said to have granted the people from Caimanes their right to water. After a short introduction with some details about Caimanes and the tailings from the dam El Mauro, the key points of this judgment shall be outlined. The final part of the report is dedicated to various institutional problems of the Chilean resources law and policy that can become virulent for the water supply and the environmental well-being of many other urban areas in the industrialized north of Chile.

"Art 19 The Constitution guarantees to all persons [...] N°8 The right to live in an environment free from contamination. It is the duty of the State to watch over the protection of this right and the preservation of nature.[...]"

(Political Constitution of the Republic of Chile)

Introduction

Agriculture, mining, urbanization and water

The production of food and mining are related through water. Water is obviously crucial to produce all kinds of food, water - potable water - itself is indispensable to food and water is also needed for the extraction of all sorts of minerals. Therefore, especially when water is scarce, there are problems of allocation between mining, agriculture, and the (potable) water supply in adjacent villages and cities. This hydrological relationship is, however, more complex, since there is not only water consumption via condensation (Withanachchi, 2012). The extrac-

tion of minerals leads to considerable chemical contamination of ground and surface water (Withanachchi et al. 2014). This creates a series of problems for agriculture and causes potable water stress in neighbouring settlements. The problematic entanglement of mining, agriculture, urbanization and (scarce) water is the issue of the following report.

Media and social media: #Caimanes

When searching social media for Caimanes, a small urban area with approximately 2000 inhabitants, in the region of Coquimbo (IV Región), the north of

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Chile, there are reports and images of street blockades, hunger strikes and tough police intervention. Numerous tweets, posts and small articles inform about a water fight between a multinational mining enterprise and the inhabitants of Caimanes. It is thereby furthermore conveyed that the people from Caimanes are deprived from their right to water, although a judgment of the Chilean Supreme Court last October has granted it to them. Apparently, Caimanes has for some people become a new symbol for the desperate resistance of a small community against a multinational company that does not respect the environment and the rule of law. Established newspapers and broadcasting corporations in Chile, on the other hand, have not covered the on-going events for a long time and now seem to take a quite neutral position. Other media are more in favour of the mining enterprise Los Pelambres S.A., which argues that it has the law on its side. The following paragraphs shall briefly provide information on what the discussion is about.

Latin America's biggest tailings dam and legal procedures

At the end of the Pupío valley, lies Caimanes, where Latin America's biggest tailings dam is situated. The dam receives its name from the huge natural basin at the high end of the valley, where it was built: El Mauro. The El Mauro basin gathers major parts of the water that runs through the Pupío Valley to Caimanes where it is being used for private consumption and for agriculture. Traditionally, the community of Caimanes has had usage rights related to this water. The El Mauro dam was established by the owner of Chile's 5th biggest copper mine, Minera Las Pelambres, situated around 60km from Caimanes, as a deposit for the mine's tailing waste to be produced until the planned shut down in 2043. The tailings

are transported through a watered tube system from Los Pelambres to the basin and retained by a 1.400 meters long and around 250 m high wall. Undoubtedly, the construction entails economic benefits for Caimanes, including long-term employment of locals in Los Pelambres. Nevertheless, several inhabitants of Caimanes, among them farmers, have been contesting the dam since its first projection in 2003. They have been arguing that the dam has negative effects on the water in Caimanes, both in quantity and in quality. They formed civil society groups and issued numerous environmental and technical objections against the project. Los Pelambres S.A. counter that there is no negative influence on the water situation in Caimanes, since the water run-off from El Mauro to Caimanes is filtered and



Figure 1: A mega mining plant in Chile, Photo credit: James Byrum via Flickr

clean (*aguas claras*). Also the competent administrative authorities, the National Water Agency (DGA) and the Regional Environmental Commission in Coquimbo (COREMA) did not find that there was any substantive infringement of respective regulation and approved the project which encloses the El Mauro basin by a 1.400 meter long and 237 meter high wall. By the end of 2008 the tailings dam El Mauro started to operate. Legal remedies of the opponents were brought before the District Court Los



Vilos and the Appellate Courts of La Serena and Santiago but were only partly successful. However, last October the Chilean Supreme Court has rendered a judgement which was celebrated as a victory for the activists. Hereafter the said judgement of the Chilean Supreme Court shall be presented and discussed.

The Supreme Court's Judgement

Facts of the Case

On 3 October 2008 three individuals from Caimanes issued a so-called claim of new building (*denuncia de obra nueva*) against Minera Los Pelambres S.A. before the regional court in Los Vilos. As argued in older claims and objections, the applicants alleged that the denounced construction had harmful effects for the local community of Caimanes. They stated that it would infringe water rights of all entitled persons situated downstream of the area where the construction of the tailings dam has been permitted, including the intervention in natural riverbeds which run at the El Mauro basin. The alleged violations of water rights included the change of the water supply sources for all users and environmental problems not only for the water but also for the whole environment throughout the Pupío Valley. Additionally, the applicants argued that the denounced construction was hampering the community by creating a considerable risk for the maintaining of natural resources, mainly the human consumption of drinking water and the use of water as means of production, thereby perturbing natural riverbeds and affecting collective social goods (*bienes sociales colectivos*), as is living in an environment free from contamination guaranteed by Article 19 N° 8 Chilean Constitution. Finally, the applicants postulated that the functioning of the tailing dam El Mauro should be entirely prohibited and that those parts of the construction altering the course, the flow, or the bed of water rivers should be demolished.

The respondent denied that the tailings dam was to be considered as a new building, since it had been finished by November 2008 and that furthermore no right or servitude existed that could be affected by the tailings dam. Additionally it claimed that there was no environmental perturbation and even if there was, it was not caused by a new building. According to the respondent, the construction was fully in compliance with the re-

spective regulation and the applicants had not contested Resolution N° 1.791, 30 November 2005, by which COREMA arguably approved the construction and the functioning of the tailings dam.

With judgement of 12 November 2012 (rol C-7.957-



Figure 2: The demonstration against the Pascua-Lama gold mine in Chile and the Conga gold mine in Peru (Codi Yeager-Kozacek, <http://www.circleofblue.org/>)

Photo credit: *The future is unwritten* via Flickr

2008) the District Court of Los Vilos entirely rejected that the construction was a new building, without granting costs. The Appellate Court of La Serena, then, took up the applicants' appellative claim and by the decision of 28 August 2013 essentially maintained the District Court's decision, solely repealing the costs decision. Against this final decision



the applicants lodged an appeal of merits (*recurso de casación en el fondo*) claiming that there had been infringements of law of substantial effect. The applicants asked the Supreme Court to render a new judgment (*sentencia de reemplazo*) this time entertaining the initial claim of new building.

the dam wall or other suitable construction works.

Ruling of the Court

When assessing the applicants' legal capacity to sue the respondent party (*locus standi*) the court firstly had to examine whether the tailing dam el Mauro was to be considered as a new building (*obra nueva*), this being a necessary prerequisite for claim of new building provided for in Articles 930 and 931 of the Chilean Civil Code.

The court added that the public interest claim according to Art 948 Chilean Civil Code widens the personal scope of the *locus standi*, thereby allowing all inhabitants of Caimanes to raise the claim of new building, when buildings are planned to be built in streets, squares or other areas of public usage. The court found that the construction of the tailings dam consisted on the one hand in the construction of pavement distress as a foundation, but that the rest of the dam wall was and is made additionally of rough tailing material proceeded from the mine Los Pelambres through the mentioned channel system. Through the permanent deposition of tailing materials onto the dam wall, the court came to the conclusion that construction of the tailings dam is not concluded during its functioning and that therefore it is to be seen as a new building within the meaning of Articles 330 and 931 Chilean Civil Code.

Secondly, the court had to deal with the question as to whether the functioning of the El Mauro dam injured the applicants' water rights. The court repeated that in 2008 administrative authorities had taken four different samples from the clear water run-off at the El Mauro basin and that the samples did not exceed the maximum limits prescribed by the respective regulation in force. However, the court found that this was not sufficient evidence to exclude future incidents and that water would be free of contamination throughout the functioning of the dam. Hence, the court continued by citing hydrological and medical expert opinions and derived that there was evidence of aluminium, boron, iron, manganese and mercury in the Pupío river and the main drinking water fountain in Caimanes, exceeding the levels for drinking water laid down in the regulation. Besides, the court stated that according to another expert opinion there had been an incident in 2008, in which contaminated water infiltrated into



Decision

By judgment of 21 October 2014 the Supreme Court's third chamber (Chamber of Constitutional and Contentious-Administrative Procedures) entertained the claim with three against two votes. The High Court stated that the respondent Los Pelambres S.A. was obliged to restore the natural course of the water in El Mauro due to violation of water rights held by the Community of Caimanes. He ordered that Los Pelambres S.A. should present an execution plan before the local court of Los Vilos within a month consisting in entire or partial demolition of



the tubes carrying the clear water run-off. Additionally, the court held that the National Water Agency had missed to control the subterranean water flows.

In view of the court, this affected fundamental freedoms and rights under the Chilean Constitution. Given the facts, the court held, there has been an interference with the right to live in an environment free from contamination (Article 19 Section 8 CPCH) and the duty of the state to protect every person's physical and mental health (Article 19 Section 1 CPCH). To assess the constitutional framework the court deemed necessary to take into account the "global problem" (*problemática global*) the dispute entails, even when dwelling on topics that could in limine be seen as a digression of the subject matter.

The court started its "global" deliberations evoking the contribution of the mining industry to increment the GDP and to improve living conditions in Chile. It continued by stating that it is the duty of the state to strive for a development of an avant-garde mining industry in which "in complete harmony with the natural environment and its interaction with human beings living in this place and by means of the security of production processes and works can be carried out in a framework of good relations with contiguous communities". Moreover the Supreme Court deduced from the constitutional framework that there is an obligation of the state to actively prevent contamination (*principio de prevención*) even when scientific certainty about the contamination cannot be reached (*principio de precaución*).

Referring to a former reasoning by the Appellate Court of Santiago, the High Court evoked that the position of the tailings dam 45 km away from the mine Los Pelambres was exclusively owed to economic considerations, such as lower costs for the mining enterprise, whereas the impact on the biological habitat and the people living in the area even further than 45 km away from the mine is – in view of the court – more serious and contravenes constitutionally granted rights. Furthermore, the court added that in its judiciary experience once the tailings deposits are filled with mining waste, the constructions are often abandoned making environmental prevention "very complex". The court specified that due to its constitutional rank, environmental protection and the principles it entails have to be observed

by all mining activities as well as the respective statutory environmental law which implements the said constitutional mandate. Taking all these considerations together the court came to the conclusion that the applicants' claim had to be entertained.

Assessment

The north of Chile (I-IV Región), one of the most arid regions in the world, has seen both its natural and social landscape shaped by mining. Mainly large deposits of copper have placed Chile as number one producer of this metal. Urban areas in this region are intensely connected with mining. Veritable business cities like Calama or Copiapó, once quiet villages, have been witness to the economic boom (Penaglia Vásquez, Francesco Emmanuel & Van Treek, Esteban Valenzuela, 2014). However, the environmental sacrifice of this wealth is not yet foreseeable and available water sources are diminished continuously, thereby dramatically increasing resource competition among the mining industry, agriculture and the urban areas themselves. The court also alludes to another aggravating phenomenon: that due to the depletion of mineral resources in more remote areas the production industry is more and more approaching towards urban areas and zones of agricultural use (Pokhrel & Dubey, 2013) and that last but not least the leaking of tailings dams represents an especially high risk (Hansen, Rojo, & Ottosen, 2005).

In view of these circumstances it may be surprising that Chile arguably has the most liberal water law in the world. With the implementation of the free market-oriented Water Code in 1981, but also as a consequence of Article 19 Section 24 of the Chilean Constitution, water has been legally turned into nearly untouchable private property (Bauer, 1997). Technically speaking, in Chile water law has to be seen nearly exclusively as private law, possibly subject to all forms of treaties and private agreements. The Water Code of 1981 is just the opposite of European water codes containing numerous state regulations on water protection, special procedures for different kinds of water, which in case of infringement are all enforceable by the competent administrative authorities. The institutional configuration of the Chilean model is therefore also different, leaving only restricted power to the National Water Agency DGA and putting the resolution of water conflicts



mainly in the hands of the judiciary (Bauer, 2013).

This explains why the Supreme Court had to deal with a civil law claim deriving from the Roman *interdictum operis novis nuntiatione* (enabling to sue the constructor of the allegedly harming building before the Pretor). In legal systems with a mainly state-dominated environmental law this claim may occasionally still exist (e.g. Section 340 Austrian Civil Code), but in cases of a dimension comparable to the El Mauro tailings dam an application is just not imaginable. Admittedly, it is creative that the applicants argued that the huge tailings dam was a new building because its construction continues by means of the mining waste deposit. Admittedly, it is positive from an environmental perspective that the court adopted this viewpoint. However, it points at the weakness of the competent administrative authorities both in their legal capacity and in their risk prevention management. Without being able to study all the decisions and approvals made by the COREMA and the DGA, it is at least surprising that the project was repeatedly approved, seemingly for a period of 40 years. The apparent lack of administrative state control of the El Mauro dam becomes even more worrying when bearing in mind the elevated seismic activity in the north of Chile.

The second part of the judgment is less technical and mainly tries to enforce Art 19 N° 8 of the Chilean Constitution. Environmental lawyers may find it positive that the High Court connects the provision not only with the principle of prevention but with another principle originally deriving from international environmental law: the principle of precaution. Some of the court's "global" considerations partly read – at least from an Austrian Public Lawyer's position – rather like a political program than the merits of a High Court interpreting the law. Again, this hints at the feebleness of the administrative (and possibly legislative) power related to integrative resource management, especially water management.

Conclusion

From a legal perspective this case shows the challenges a free market based resource law means for urban areas, above all because it shifts the main responsibility to the judiciary; (Chilean) judges are not sufficiently empowered to definitively solve complex resource conflicts, among other things

they will be always dependent on the administrative authorities to execute their orders. Additionally, the concrete judgement at issue has got two other problems. On the one hand, it leaves the respondent party the choice to take other measures than the demolition of the dam wall, although practically there is no other way to re-establish the natural flow of the waters in the El Mauro basin. On the other hand, decisions of the Chilean Supreme Court only rule on a restricted object and do not yet represent binding precedents (Bravo-Hurtado, 2013). At this point it has to be mentioned that shortly before finishing this report, the Appellate Court of La Serena repealed a decision by the District Court of Los Vilos that had ordered the demolition of the dam wall. One can only hope that the Chilean administrative and the judiciary collaborate to take the necessary measures to prevent a major contamination. For the future institutional change seems to be vital.

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Conflict of Interests

The author hereby declares that there is no conflict of interests.

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