DOI:10.1017/ilm.2023.26

INTRODUCTORY NOTE TO DISPUTE OVER THE STATUS AND USE OF THE WATERS OF THE SILALA (CHILE V. BOL.) (I.C.J.)

BY KOMLAN SANGBANA*

[December 1, 2022]

Introduction

On December 1, 2022, the International Court of Justice (ICJ) rendered its judgment in the *Dispute Concerning the Status and Use of the Waters of the Silala (Chile v. Bolivia)*.[1] There is no basin agreement governing the Silala, and Chile and Bolivia have ratified neither the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses nor the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes. In the absence of a treaty regime applicable to the waters of the Silala River, the Court had the opportunity in this case to consider the legal framework applicable to international watercourses under customary international law.

Background

The Silala waters originate in Bolivia near its border with Chile. The river, which has both surface water and groundwater, is located in an arid region bordering the Atacama Desert at an altitude of approximately 4,300 meters. This is one of the driest parts of the planet and home to unique mountain wetlands known as *bofedales.* Since 1928, the Silala has been heavily canalized on the Bolivian and Chilean sides of the border.

The case arose in 2016 when Bolivia demanded compensation for Chile's use of the river, arguing that Chile had no rights to the river's waters because the watercourse flows into Chile only through artificial channels. Subsequently, Chile instituted proceedings against Bolivia before the Court to request a declaratory judgment that the Silala River system is an international watercourse, the use of which is governed by customary international law (CIL). At the core of this dispute were the "nature" and the "use" of the Silala. Chile affirmed that it is an international watercourse, and that its current use of the water is equitable and reasonable. Bolivia denied Chile's view and claimed sovereignty over both the channels located in its territory and the enhanced portion of the surface flows that benefitted Chile. Bolivia also sought a ruling that any future deliveries of enhanced flows of the Silala to Chile had to be subject to an agreement.

The case on this complex watercourse for both countries takes place in a tense political and diplomatic context characterized by the absence of diplomatic relations since the 1970s. In this respect, it is important to note that the present case should be analyzed in the light of the case on *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*.[2] In that case, Bolivia claimed Chile has an obligation under international law to negotiate with Bolivia with the view of granting to the latter access to the Pacific ocean, an access it lost during the Pacific war with Chile in 1890. In its judgment on the merits on October 1, 2018, the ICJ, while refuting the existence of an obligation for Chile to negotiate Bolivia's sovereign access to the Pacific Ocean, reminded both parties of the importance of continuing exchanges and dialogue in the spirit of good neighborliness, with a view of finding solutions in their mutual interest. The present case on the Silala River echoes this principle of cooperation in international water law.

Significance

The Court analyzed the content of general principles of international law applicable to an international watercourse, including the principle of equitable and reasonable utilization, the obligation not to cause significant harm and the duty to exchange information. It rightly noted that the fact that part of the Silala River is "artificially improved" by canals has no bearing on the application of customary international law.[3]

The Court recalled the jurisprudence of its predecessor, the Permanent Court of International Justice (PCIJ), when it affirmed that an international watercourse "constitutes a shared resource over which the riparian States have a common right."[4] The PCIJ had declared in 1929, with regard to navigation on the Oder, that there is a community of interests between the riparian states of an international watercourse that constitutes "the basis of a common legal

*Dr. Komlan Sangbana is Legal Officer in the Water Convention Secretariat hosted by the UN Economic Commission for Europe, Geneva, Switzerland. The views expressed herein are those of the author and do not necessarily represent the views of the United Nations.

right."[5] More recently, the Court has used the concept of "community of interest" in its judgments on the *Gabčíkovo-Nagymaros Project* (para. 85) and the *Pulp Mills on the River Uruguay* (Order 2006, paras 39 and 64).[6]

The principle of equitable and reasonable utilization is the cornerstone of the customary international law regime applicable to international watercourses. In the Silala case, the Court emphasized that each riparian state of an international watercourse "has both a right to equitable and reasonable utilization and participation and an obligation not to exceed that right by depriving other riparian States of their equivalent right to reasonable utilization and participation."[7] The Court, while recalling its jurisprudence in the *Pulp Mills on the River Uruguay* case, noted "the need to reconcile the varied interests of riparian States in a transboundary context and, in particular, in the use of a shared natural resource."[8]

The Court also noted that taking into account the particularities of each international watercourse does not reduce the normative application of the principle of equitable and reasonable utilization.[9] For the Court, this principle, whose features may change over time, "is not applied in an abstract or static manner but by a comparison of the situations and uses of the waters of the watercourse by the States concerned at a given time."[10]

The principle of equitable and reasonable utilization is closely linked to the obligation not to cause significant harm. As the Court states, "under customary international law, the Parties have both the right to equitable and reasonable utilization of the waters of the Silala as an international watercourse, and the obligation, when using that international watercourse, to take all appropriate measures to prevent significant harm to the other Party."[11] Each riparian state has a duty to exercise due diligence so as not to cause significant harm to other riparian states (para. 146). Recalling its jurisprudence in the *Pulp Mills on the Uruguay River* case of 2010 and *Certain Activities of Nicaragua in the Border Region* and *Construction of a Road in Costa Rica Along the San Juan River* of 2015, the Court stressed that "the State is under an obligation to use all the means at its disposal to prevent activities within its territory, or in any space under its jurisdiction, from causing significant harm to the environment of another State" in a transboundary context and in particular in relation to a shared resource.[12] Taking into account the convergence of positions between Bolivia and Chile, the Court emphasized that both states agreed that "the obligation to prevent transboundary harm is an obligation of conduct and not an obligation of result, and that it may require notification to and exchange of information with other riparian States and the carrying out of an environmental impact assessment."[13]

The Court highlighted the importance of the procedural obligations that accompany the implementation of the principle of equitable and reasonable utilization and the obligation not to cause significant harm. In particular, the Court recalled the importance of cooperation between riparian states, which it had already stressed in the *Pulp Mills on the River Uruguay* case.[14] The Court explained that "the obligations to cooperate, notify and consult are an important complement to the substantive obligations of each riparian State."[15] Although the Court reduced the customary scope of the duty to exchange information, it reaffirmed the customary nature of the obligation to notify and consult with other riparian states concerned.[16] It clarified that "each riparian State is obliged under customary international law to notify and consult with the other riparian State in respect of any planned activity involving a risk of significant harm to the latter."[17]

The Court underscored that Chile and Bolivia needed to cooperate with a view to ensuring equitable and reasonable use of the waters of the Silala by each party. The Court recalled that the parties must conduct ongoing consultations in a spirit of cooperation, in order to ensure respect for their respective rights and obligations and the protection and preservation of the environment related to the waters of the Silala.[18]

Conclusion

It is still too early to assess the impact of the Court's judgment, which was delivered just four months before this note was written. The Court applied a transactional and restrictive approach of "not resolving the issue in dispute, but rather gives attention to the question as to whether that dispute persists."[19] Such an approach has probably not allowed the Court to pronounce with greater clarity on the contours of rights and obligations under customary international water law. From the perspective of international water law, some authors have questioned, for example, whether the clarifications on procedural obligations such as notification have been progressive or regressive.[20] The Court insisted on the importance for parties to disputes to continue to cooperate. Yet the judgment was less clear on the extent to which riparians must cooperate to fulfill their obligations to notify and consult, both on the

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

nature of an international watercourse and on the need to take into account the "uniqueness" of a watercourse in applying the principle of equitable and reasonable utilization. It is also surprising that the Court only considered the ILC's commentaries from the 1990s and not subsequent practice when it examined the scope of the duty to exchange information pursuant to Article 11 of the 1997 Convention.

The ICJ's judgment provides a basis for future cooperation between the two countries. In this respect, the Parties' evolving positions toward agreement and the legal consequence that the Court drew from this were also questioned. Indeed, the Court considered in the present case that due to the fact that parties had reached an agreement, claims had become without object and therefore required no declaratory judgement. The question then arose as to whether the legal effect of a declaratory judgment would not have been underestimated in this case. In this regard, see the Declaration of Judge Charlesworth[21] and the separate opinion of Judge *ad hoc* Simma.[22] As Juliette McIntyre notes, a declaratory judgment is a mere declaration of the law and a final, binding determination of the parties' rights, which has a concrete effect on the parties' relations.[23] The contribution of such a declaratory judgment would have been stronger if the operative part of the judgment expressly included the agreement reached by the parties. Such approach would have more strongly contributed to the clarification and stabilization of the parties' legal relations. Nevertheless, by reaffirming that the obligation to cooperate is on both parties, the Court highlighted the significance of the principle of good neighborliness and the concept of community of interest in international water law.

The risk of potential negative effects from river use are numerous in a vulnerable environment such as that of the Silala. Encouraging cooperation to prevent damage to the environment is therefore a crucial step.[24] This is also an important signal to support the development of cooperative mechanisms and arrangements for shared watercourses in general. According to the recent report on Global Status of Sustainable Development Goal Indicator 6.5.2, only 24 countries have all their transboundary areas covered by cooperation agreements.[25] The ICJ's judgment could read as a call addressed to states to enhance and institutionalize cooperation in line with customary international water law as enshrined in the two global conventions of 1992 and 1997.

ENDNOTES

1 Judgment (Dec. 1, 2022), https://www.icj-cij.org/case/162/judgments [hereinafter Judgment].

2 2018 I.C.J. Rep. 507 (Oct. 1), https://www.icj-cij.org/sites/default/files/case-related/153/153-20181001-JUD-01-00-EN.pdf.

3 Judgment, ¶ 63.

4 *Id.* ¶ 96.

5 Territorial Jurisdiction of the International Oder Commission, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27).

6 Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Rep. 1997, p. 7; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 113.

7 Judgment, ¶ 97.

8 *Id.* ¶ 97, quoting *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010 (I), p. 74, ¶ 177.

9 Judgment, ¶ 95.

10 *Id.* ¶ 98.

11 *Id.* ¶ 97.

12 *Id.* ¶ 99.

13 *Id.* ¶ 83.

14 Pulp Mills, *supra* note 6, ¶ 77.

15 Judgment, ¶ 101.

16 *Id.* ¶¶ 111–129; 114.

17 *Id.* ¶ 118.

18 *Id.* ¶ 129.

19 See Declaration of Judge Charlesworth, Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), p.1; see also the separate opinion of Judge *ad hoc* Simma. Both are available at https://www.icj-cij.org/case/162/judgments.

20 F. Sindico, L. Movilla Pateiro, G. Eckstein, Preliminary Reflections on the ICJ Decision in the Dispute Between Chile and Bolivia over Status and Use of the Waters of the Silala, EJIL Blog, could be found: https://www.ejiltalk.org/preliminary-reflections-on-the-icj-decision-in-the-dispute-between-chile-and-bolivia-over-the-status-and-use-of-the-waters-of-the-silala.

21 Charlesworth, *supra* note 19.

22 Simma, *supra* note 19.

23 Juliette McIntyre, *The Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility*, 29 Leiden J. Int'l L. 177 (2016), 179.

24 Laurence Boisson de Chazournes and Mara Tignino, *The Platform for International Water Law and the Dispute over the Status and Use of the Waters of Silala*, University of Geneva Platform for International Water Law (Dec. 13, 2022), https://www.unige.ch/droit/eau/en/une/2023/silala.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

25 *See* UNECE & UNESCO, *Progress on Transboundary Water Cooperation. Global Status of S.D.G Indicator 6.5.2 and acceleration needs*, UN-Water, 2021, https://www.unesco.org/en/articles/progress-transboundary-water-cooperation-global-status-sdg-indicator-652-and-acceleration-needs-2021.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

DOI:10.1017/ilm.2023.26

DISPUTE OVER THE STATUS AND USE OF THE WATERS OF THE SILALA (CHILE V. BOL.) (I.C.J.)*
[December 1, 2022]

1 DECEMBER 2022

JUDGMENT

DISPUTE OVER THE STATUS AND USE OF THE WATERS OF THE SILALA

(CHILE *v.* BOLIVIA)

DIFFÉREND CONCERNANT LE STATUT ET L'UTILISATION DES EAUX DU SILALA

(CHILI c. BOLIVIE)

1er DÉCEMBRE 2022

ARRÊT

*This text was reproduced and reformatted from the text available at the International Court of Justice website (visited May 2, 2023), https://www.icj-cij.org/case/162/judgments.

TABLE OF CONTENTS

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

INTERNATIONAL COURT OF JUSTICE

2022 **YEAR 2022**

1 December
General List
No. 162

1 December 2022

DISPUTE OVER THE STATUS AND USE OF THE WATERS OF THE SILALA

(CHILE *v.* BOLIVIA)

Geography of the Silala River — Concessions granted by the Parties for use of the Silala waters — Channelization works carried out in Bolivian territory — Question of status of the Silala and character of its waters had become point of contention by 1999 — Failure of attempts to reach bilateral agreement — Decision by Chile to request Judgment from the Court.

*

The Court's jurisdiction under Article XXXI of Pact of Bogotá | Existence of a dispute is a condition of the Court's jurisdiction under this provision — Dispute must continue to exist at time when the Court makes its decision — Events occurring subsequent to filing of an application may render application without object | The Court has to ascertain whether specific claims have become without object — Request by each Party for declaratory judgment — No call for declaratory judgment if the Court finds that parties have come to agree in substance regarding a claim or counter-claim — The Court will take note of any such agreement and conclude that a claim or counter-claim has become without object | The Court will not pronounce on any hypothetical situation which may arise in future.

* *

Claims of Chile.

Submission (a)*: the Silala River system is an international watercourse governed by international law.*

The respective rights and obligations of the Parties are governed by customary international law — Chile's submission that the Silala waters are an international watercourse which are governed in their entirety by customary international law rules relating to international watercourses — Bolivia's position during written phase of proceedings that rules on non-navigational uses of international watercourses under customary international law do not apply to "artificially enhanced" surface flow of the Silala — Positions of the Parties have converged in course of proceedings — Acknowledgment by Bolivia during oral proceedings that the Silala waters qualify in their entirety as an international watercourse under customary international law, which applies both to "naturally flowing" waters and "artificially enhanced" surface flow of the Silala — Parties agree with respect to legal status of the Silala River system as an international watercourse and on applicability of customary international law on non-navigational uses of international watercourses to all waters of the Silala — Claim made by Chile in its final submission (a) *no longer has any object — The Court is therefore not called upon to give decision thereon.*

*

Submission (b)*: Chile's entitlement to equitable and reasonable utilization of waters of the Silala River system.*

Claim of Chile positively opposed by Bolivia when proceedings were instituted — Parties have come to agree that principle of equitable and reasonable utilization applicable to entirety of waters of the Silala | Parties agree that they are both entitled to equitable and reasonable utilization of the Silala waters | Not for the Court to address

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

hypothetical difference of opinion regarding future use of these waters — Claim made by Chile in its final submission (b) *no longer has any object | The Court is therefore not called upon to give decision thereon.*

*

Submission (c)*: Chile's entitlement to its current use of waters of the Silala River system. Claim of Chile regarding "artificially enhanced" parts of the Silala flow initially positively opposed by Bolivia — Parties now agree that Chile has right to use of equitable and reasonable share of waters irrespective of "natural" or "artificial" character or origin of water flow — No claim by Bolivia in these proceedings that Chile owes compensation for past uses of waters of the Silala — Chile not claiming acquired right to current rate of flow and volume of water — Statements by Chile that it is within Bolivia's sovereign powers to dismantle channels and to restore wetlands in its territory — Claim made by Chile in its final submission* (c) *no longer has any object — The Court is therefore not called upon to give decision thereon.*

*

Submission (d)*: Bolivia under obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in vicinity of the Silala River system.*

Parties agree that they are bound by customary obligation to prevent significant transboundary harm — Obligation may encompass duty to notify and exchange information, and duty to conduct environmental impact assessment — Contention by Bolivia during written proceedings that obligation to prevent significant transboundary harm only applicable to naturally flowing waters of the Silala — Recognition by Bolivia during oral proceedings that this obligation is applicable to the Silala waters in their entirety | Parties in agreement on threshold for application of obligation of prevention of transboundary harm — Claim made by Chile in its final submission (d) *no longer has any object — The Court is therefore not called upon to give decision thereon.*

*

Submission (e)*: Bolivia under obligation to notify and consult with respect to measures that may have adverse effect on the Silala River system.*

Disagreement concerning scope of obligation to notify and consult, threshold for its application and whether Bolivia complied with it — The Silala is international watercourse subject in its entirety to customary international law — Right of riparian State under customary international law to equitable and reasonable sharing of resources of international watercourse — Corresponding obligation not to exceed that entitlement by depriving other riparian States of equivalent right to reasonable use and share — Obligation to take all appropriate measures to prevent causing significant harm to other riparian States — Procedural obligations to co-operate, notify and consult as important complement to substantive obligations — Obligation of riparian State under customary international law to notify and consult other riparian State with regard to any planned activity that poses risk of significant harm to latter State — Question of Bolivia's compliance with obligation to notify and consult — Failure of Chile to demonstrate any risk of significant harm linked to measures planned or carried out by Bolivia — Bolivia has not breached obligation to notify and consult — Claim made by Chile in its final submission (e) *rejected.*

* **

Counter-claims of Bolivia.

Admissibility of Bolivia's counter-claims.

Conditions set out in Article 80, paragraph 1, of the Rules of Court — Counter-claim must come within jurisdiction of the Court and be directly connected with subject-matter of claim of other party — The Court's jurisdiction over Bolivia's counter-claims based on Article XXXI of Pact of Bogotá — Counter-claims directly connected with subject-matter of principal claims — Counter-claims not offered merely as defences to Chile's submissions, but set out separate claims — Bolivia's counter-claims are admissible.

* **

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

First counter-claim: Bolivia's alleged sovereignty over artificial channels and drainage mechanisms installed in its territory.

Parties in agreement that Bolivia has sovereign right to construct, maintain or dismantle infrastructure in its territory — That right to be exercised in accordance with applicable rules of customary international law — Bolivia may rely on Chile's acceptance of Bolivia's right to dismantle the channels — No disagreement regarding Bolivia's right to dismantle installations in its territory — The Court may pronounce only on dispute that continues to exist at time of adjudication — Counter-claim made by Bolivia in its final submission (a) *no longer has any object — The Court is therefore not called upon to give decision thereon.*

*

Second counter-claim: Bolivia's alleged sovereignty over the "artificial" flow of the Silala waters engineered, enhanced or produced in its territory.

Bolivia no longer claims right to determine conditions and modalities for delivery of artificially flowing waters of the Silala — Neither does Bolivia claim that any use of such waters by Chile is subject to Bolivia's consent — Bolivia seeking declaration that Chile does not have acquired right to maintenance of current situation — Statement by Chile that it is not claiming such an "acquired right" — Recognition by Chile that any reduction in flow of waters of the Silala into Chile resulting from dismantlement of infrastructure would not in itself constitute violation by Bolivia of its obligations under customary international law — Counter-claim made by Bolivia in its final submission (b) *no longer has any object — The Court is therefore not called upon to give decision thereon.*

*

Third counter-claim: alleged need to conclude agreement between the Parties for any future delivery to Chile of "enhanced flow" of the Silala.

Bolivia seeking opinion from the Court on future, hypothetical situation — Not for the Court to pronounce on hypothetical situations — The Court may rule only in connection with concrete cases where actual dispute between the parties exists at time of adjudication — Counter-claim made by Bolivia in its final submission (c) *rejected.*

JUDGMENT

Present: *President* DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE, CHARLESWORTH; *Judges* ad hoc DAUDET, SIMMA; *Registrar* GAUTIER.

In the case concerning the dispute over the status and use of the waters of the Silala,

between

the Republic of Chile,

represented by

H.E. Ms Ximena Fuentes Torrijo, Vice-Minister for Foreign Affairs of the Republic of Chile, Professor of Public International Law, University of Chile,

as Agent, Counsel and Advocate;

Ms Carolina Valdivia Torres, Former Vice-Minister for Foreign Affairs of the Republic of Chile,

as Co-Agent;

H.E. Ms Antonia Urrejola Noguera, Minister for Foreign Affairs of the Republic of Chile, H.E. Mr. Hernán Salinas Burgos, Ambassador of the Republic of Chile to the Kingdom of the Netherlands,

as National Authorities;

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

Mr. Alan Boyle, Emeritus Professor of Public International Law, University of Edinburgh, Barrister, Essex Court Chambers, member of the Bar of England and Wales,

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization, University of Geneva, member of the Institute of International Law,

Ms Johanna Klein Kranenberg, Legal Adviser and General Co-ordinator, Ministry of Foreign Affairs of the Republic of Chile,

Mr. Stephen McCaffrey, Carol Olson Endowed Professor of International Law, University of the Pacific, McGeorge School of Law, former Chair of the International Law Commission,

Mr. Samuel Wordsworth, KC, Barrister, Essex Court Chambers, member of the Bar of

England and Wales, member of the Paris Bar,

as Counsel and Advocates;

Ms Mariana Durney, Professor and Head of Department of International Law, Pontificia Universidad Católica de Chile,

Mr. Andrés Jana Linetzky, Professor of Civil Law, University of Chile,

Ms Mara Tignino, Reader, University of Geneva, Lead Legal Specialist of the Platform for International Water Law at the Geneva Water Hub,

Mr. Claudio Troncoso Repetto, Professor and Head of Department of International Law, University of Chile,

Mr. Luis Winter Igualt, former Ambassador of the Republic of Chile, Professor of International Law, Pontificia Universidad Católica de Valparaíso and Universidad de Los Andes,

as Counsel;

Ms Lorraine Aboagye, Barrister, Essex Court Chambers, member of the Bar of England and Wales,

Ms Justine Bendel, Lecturer in Law, University of Exeter, Marie Curie Fellow at the University of Copenhagen,

Ms Marguerite de Chaisemartin, JSD Candidate, University of the Pacific, McGeorge School of Law,

Ms Valeria Chiappini Koscina, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of the Republic of Chile,

Ms María Trinidad Cruz Valdés, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of the Republic of Chile,

Mr. Riley Denoon, JSD Candidate, University of the Pacific, McGeorge School of Law, member of the Bars of the provinces of Alberta and British Columbia,

Mr. Marcelo Meza Peñafiel, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of the Republic of Chile,

Ms Beatriz Pais Alderete, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of the Republic of Chile, as Legal Advisers;

Mr. Coalter G. Lathrop, Special Adviser, Sovereign Geographic, member of the Bar of the State of North Carolina, as Scientific Adviser;

Mr. Jaime Moscoso Valenzuela, Minister Counsellor, Embassy of the Republic of Chile in the Kingdom of the Netherlands,

Mr. Hassán Zeran Ruiz-Clavijo, First Secretary, Embassy of the Republic of Chile in the Kingdom of the Netherlands,

Ms María Fernanda Vila Pierart, First Secretary, Embassy of the Republic of Chile in the Kingdom of the Netherlands,

Mr. Diego García González, Second Secretary, Embassy of the Republic of Chile in the Kingdom of the Netherlands,

Ms Josephine Schiphorst, Executive Assistant to the Ambassador, Embassy of the Republic of Chile in the Kingdom of the Netherlands,

Ms Devon Burkhalter, Farm Press Creative,

Mr. David Swanson, Swanson Land Surveying, as Assistant Advisers,

and

the Plurinational State of Bolivia, represented by

H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Rogelio Mayta Mayta, Minister for Foreign Affairs of the Plurinational State of Bolivia,

Mr. Freddy Mamani Laura, President of the Chamber of Deputies of the Plurinational State of Bolivia,

Ms Trinidad Rocha Robles, President of the International Policy Commission of the Chamber of Senators of the Plurinational State of Bolivia,

Mr. Antonio Colque Gabriel, President of the Commission for International Policy and Protection for Migrants of the Chamber of Deputies of the Plurinational State of Bolivia,

H.E. Mr. Freddy Mamani Machaca, Vice-Minister for Foreign Affairs of the Plurinational State of Bolivia,

Mr. Marcelo Bracamonte Dávalos, General Adviser to the Minister for Foreign Affairs of the Plurinational State of Bolivia,

as National Authorities;

Mr. Alain Pellet, Professor Emeritus of the University Paris Nanterre, former Chairman of the International Law Commission, President of the Institut de droit international,

Mr. Rodman R. Bundy, former *avocat à la Cour d'appel de Paris*, member of the Bar of the State of New York, partner, Squire Patton Boggs LLC, Singapore,

Mr. Mathias Forteau, Professor, University Paris Nanterre, member of the International Law Commission,

Mr. Gabriel Eckstein, Professor of Law, Texas A&M University, member of the Bar of the State of New York and the Bar of the District of Columbia,

as Counsel and Advocates;

Mr. Emerson Calderón Guzmán, Professor of Public International Law, Universidad Mayor de San Andrés and Secretary General of the Strategic Directorate for Maritime Claims, Silala and International Water Resources (DIREMAR),

Mr. Francesco Sindico, Associate Professor of International Environmental Law, University of Strathclyde Law School, Glasgow, and Chairman of the IUCN World Commission on Environmental Law Climate Change Law Specialist Group,

Ms Laura Movilla Pateiro, Associate Professor of Public International Law, University of Vigo,

Mr. Edgardo Sobenes, Consultant in International Law (ESILA), Ms Héloïse Bajer-Pellet, member of the Paris Bar,

Mr. Alvin Yap, Advocate and Solicitor of the Supreme Court of Singapore, Associate, Squire Patton Boggs LLP, Singapore,

Mr. Ysam Soualhi, Researcher, Centre Jean Bodin, University of Angers, as Counsel;

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

Ms Alejandra Salinas Quiroga, DIREMAR,

Ms Fabiola Cruz Morena, Embassy of the Plurinational State of Bolivia in the Kingdom of the Netherlands,

as Technical Assistants,

THE Court,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 6 June 2016, the Government of the Republic of Chile (hereinafter "Chile") filed in the Registry of the Court an Application instituting proceedings against the Plurinational State of Bolivia (hereinafter "Bolivia") with regard to a dispute concerning the status and use of the waters of the Silala.

2. In its Application, Chile sought to found the Court's jurisdiction on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such).

3. The Registrar immediately communicated the Application to the Bolivian Government, in accordance with Article 40, paragraph 2, of the Statute of the Court. He also notified the Secretary-General of the United Nations of the filing of the Application by Chile.

4. In addition, by letters dated 20 June 2016, the Registrar informed all Member States of the United Nations of the filing of the above-mentioned Application.

5. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar subsequently notified the Members of the United Nations through the Secretary-General of the filing of the Application, by transmission of the printed bilingual text.

6. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute of the Court to choose a judge *ad hoc* to sit in the case. Chile chose Mr. Bruno Simma, and Bolivia, Mr. Yves Daudet.

7. By an Order of 1 July 2016, the Court fixed 3 July 2017 and 3 July 2018 as the respective time-limits for the filing of a Memorial by Chile and a Counter-Memorial by Bolivia. Chile filed its Memorial within the time-limit thus fixed.

8. By a communication dated 10 July 2017, the Government of the Republic of Peru, referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the President of the Court decided to grant that request. The Registrar duly communicated that decision to the Government of Peru and to the Parties.

9. By an Order of 23 May 2018, the Court, at the request of Bolivia, extended until 3 September 2018 the time-limit for the filing of the Counter-Memorial. Bolivia filed its Counter-Memorial within the time-limit thus extended. In Chapter 6 of its Counter-Memorial, Bolivia, making reference to Article 80 of the Rules of Court, submitted three counter-claims.

10. At a meeting held by the President of the Court with the representatives of the Parties on 17 October 2018, Chile indicated that it did not intend to contest the admissibility of the counter-claims of Bolivia and that a second round of written pleadings was not warranted. Bolivia expressed the view that a second round of written pleadings was necessary so that both Parties could properly address the factual and legal issues raised, in particular those underpinning the counter-claims.

11. In an Order dated 15 November 2018, the Court stated that, in the absence of any objection by Chile to the admissibility of Bolivia's counter-claims, it did not consider that it was required to rule definitively at that stage on the question of whether the conditions set forth in Article 80, paragraph 1, of the Rules of Court had been fulfilled.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

The Court further indicated that it considered a second round of written pleadings limited to the Respondent's counter-claims to be necessary. By the same Order, it thus directed the submission of a Reply by Chile and a Rejoinder by Bolivia and fixed 15 February 2019 and 15 May 2019 as the respective time-limits for the filing of those written pleadings. The Reply and the Rejoinder were filed within the time-limits thus fixed.

12. By an Order of 18 June 2019, the Court authorized the submission by Chile of an additional pleading relating solely to the counter-claims of Bolivia and fixed 18 September 2019 as the time-limit for the filing of that pleading. Chile filed its additional pleading within the time-limit thus fixed.

13. By a letter dated 5 November 2018, Chile requested that Bolivia make available certain digital data used in support of the technical report and conclusions contained in Annex 17 of its Counter-Memorial. By the same letter, Chile also requested that Bolivia communicate certain documents referred to in Annexes 17 and 18 of its Counter-Memorial, which were not publicly available and were not filed by Bolivia as part of its pleading. By a letter dated 27 May 2019, Chile further requested Bolivia to provide the digital data referred to in Annex 25 of Bolivia's Rejoinder. In the course of various exchanges of correspondence between the Parties, Bolivia furnished the documents and digital data requested by Chile.

14. By a letter dated 3 September 2019, Bolivia requested Chile to furnish certain documents referred to in Appendix A to Annex II of Volume 4 and Annex 55 of Volume 3 of its Memorial. In response, Chile provided eleven of the requested documents but indicated that two documents had not been found.

15. By letters dated 15 October 2021, the Registrar informed the Parties that the Court had decided that hearings would be held from 1 to 14 April 2022. A detailed schedule of the hearings was communicated to the Parties under cover of that letter. The Parties were also informed that, pursuant to the decision of the Court, each of them was requested to call during the course of the hearings the experts whose reports were annexed to the written pleadings and to provide, by 14 January 2022, a written statement summarizing those reports. The Parties were instructed that those written statements should be limited in content to a summary of the experts' findings already provided in their reports and should set out the points on which the Parties considered themselves to be in agreement, while primarily focusing on the issues on which the experts remained divided. The Parties were informed, moreover, that no further written comments or observations on the written statements would be accepted.

16. By the same letters, the Registrar notified the Parties of the following details regarding the procedure for examining the experts at the hearing. After having made the solemn declaration required under Article 64 of the Rules of Court, the experts would be asked by the Party calling them to confirm their written statement. The written statements would therefore replace the examination-in-chief. The other Party would then have an opportunity for cross-examination on the content of the experts' written statement or their earlier reports. Re-examination would thereafter be limited to subjects raised in cross-examination. In cross-examination and re-examination, the questions would be addressed collectively to the group of experts being heard, and it would be up to the latter to decide as to who should reply to a particular question. Finally, the judges would also have an opportunity to put questions to the experts.

17. Chile and Bolivia filed the written statements summarizing the experts' reports within the time-limit as fixed by the Court (see paragraph 15 above). The written statement of the experts appointed by Chile was prepared by Drs. Howard Wheater and Denis Peach, and that of the experts appointed by Bolivia was prepared by Mr. Roar A. Jensen, Dr. Torsten V. Jacobsen and Mr. Michael M. Gabora, on behalf of DHI (formerly named "Dansk Hydraulisk Institut" (Danish Hydraulic Institute)).

18. By letters dated 15 February 2022, the Registrar informed the Parties that, having considered the ongoing restrictions in place as a result of the COVID-19 pandemic, the Court had decided that the hearings would be held in a hybrid format, in accordance with Article 59, paragraph 2, of the Rules of Court, and on the basis of the Court's Guidelines for the parties on the organization of hearings by video link, adopted on 13 July 2020. A revised schedule of the hearings was subsequently communicated to them.

19. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings and the documents annexed thereto, as well as the written statements of the experts, would be made accessible to the public on the opening of the oral proceedings.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

20. Hybrid public hearings were held on 1, 4, 5, 6, 7, 8, 11, 13 and 14 April 2022. During the oral proceedings, a number of judges were present in the Great Hall of Justice, while others joined the proceedings via video link, which allowed them to view and hear the speaker and see any demonstrative exhibits displayed. Each Party was permitted to have up to eight representatives present in the Great Hall of Justice and was offered the use of an additional room in the Peace Palace, from which members of the delegation were able to follow the proceedings remotely. The members of each Party's delegation were also given the opportunity to participate via video link from other locations of their choice. The experts called by the Parties participated in the hearings in person.

21. During the above-mentioned hearings, the Court heard the oral arguments and replies of:

For Chile: H.E. Ms Ximena Fuentes Torrijo,
Mr. Alan Boyle,
Ms Laurence Boisson de Chazournes,
Ms Johanna Klein Kranenberg,
Mr. Stephen McCaffrey,
Mr. Samuel Wordsworth.

For Bolivia: H.E. Mr. Roberto Calzadilla Sarmiento,
Mr. Alain Pellet,
Mr. Rodman R. Bundy,
Mr. Mathias Forteau,
Mr. Gabriel Eckstein.

22. The experts called by the Parties were heard at two public hearings, in accordance with Article 65 of the Rules of Court. On the afternoon of 7 April 2022, Chile called Drs. Howard Wheater and Denis Peach as experts; and on the afternoon of 8 April 2022, Bolivia called Mr. Roar A. Jensen, Dr. Torsten V. Jacobsen and Mr. Michael M. Gabora as experts. The experts were cross-examined and re-examined by counsel for the Parties. Members of the Court put questions to the experts, to which replies were given orally.

23. At the hearings, a Member of the Court also put a question to Chile, to which a reply was given in writing, pursuant to Article 61, paragraph 4, of the Rules of Court. In accordance with Article 72 of the Rules, Bolivia submitted comments on the written reply provided by Chile.

24. In the course of the hearings, by a letter dated 5 April 2022, the Agent of Chile, referring to Article 56 of the Rules of Court and Practice Direction IX, requested the inclusion in the case file of a document referred to as "Draft Agreement of 2019", together with its accompanying letter from the Vice-Minister for Foreign Affairs of Chile to her Bolivian counterpart. In accordance with Article 56, paragraph 1, of the Rules of Court, copies of the above-mentioned document and covering letter were communicated to the other Party, which was requested to inform the Court of any observations that it might wish to make with regard to the production of this document. By a letter dated 6 April 2022, the Agent of Bolivia informed the Court that his Government "ha[d] no objection" to Chile's request. By letters also dated 6 April 2022, the Registrar informed the Parties that, taking into account the lack of objection by Bolivia to the production of the above-mentioned document, the document had accordingly been added to the case file.

*

25. In the Application, the following claims were made by Chile:

> "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:

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

(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 co-operate 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."

26. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Chile,

in the Memorial:

"Chile therefore 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 utilization 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 so far as concerns its obligation to notify and consult Chile with respect to activities that may affect the waters of the Silala River or the utilization thereof by Chile."

in the Reply and in the additional pleading:

"With respect to the counter-claims presented by the Plurinational State of Bolivia, Chile requests the Court to adjudge and declare that:

(a) The Court lacks jurisdiction over Bolivia's Counter-Claim *(a)*, alternatively, Bolivia's Counter-Claim *(a)* is moot, or is otherwise rejected;

(b) Bolivia's Counter-Claims *(b)* and *(c)* are rejected."

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

On behalf of the Government of Bolivia,

in the Counter-Memorial:

"1. Bolivia respectfully asks the Court to dismiss and reject the requests and submissions of Chile and to adjudge and declare that:

(a) The waters of the Silala springs are part of an artificially enhanced watercourse;

(b) Customary international rules on the use of international watercourses do not apply to the artificially-flowing Silala waters;

(c) Bolivia and Chile are each entitled to the equitable and reasonable utilization of the naturally-flowing Silala waters, in accordance with customary international law;

(d) The current use of the naturally-flowing Silala waters by Chile is without prejudice to Bolivia's right to an equitable and reasonable use of these waters;

(e) Bolivia and Chile each have an obligation to take all appropriate measures to prevent the causing of significant transboundary environmental harm in the Silala;

(f) Bolivia and Chile each have an obligation to cooperate and provide the other State with timely notification of planned measures which may have a significant adverse effect on naturally-flowing Silala waters, exchange data and information and conduct where appropriate environmental impact assessments;

(g) Bolivia did not breach the obligation to notify and consult Chile with respect to activities that may have a significant adverse effect upon the naturally-flowing Silala waters or the lawful utilization thereof by Chile.

2. As 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.

3. The present submissions are without prejudice to any other claim that Bolivia may formulate in relation to the Silala waters."

in the Rejoinder:

"With respect to the Counter-Claims presented by the Plurinational State of Bolivia, Bolivia 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;

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

(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."

27. At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of Chile,

at the hearing of 11 April 2022, on the claims of Chile:

"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 utilization 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 so far as concerns its obligation to notify and consult Chile with respect to activities that may affect the waters of the Silala River or the utilization thereof by Chile."

at the hearing of 14 April 2022, on the counter-claims of Bolivia:

"[T]he Republic of Chile requests the Court to adjudge and declare that:

(a) To the extent that Bolivia claims sovereignty over the channels and drainage mechanisms in the Silala River system that are located in its territory and the right to decide whether to maintain them, the Court lacks jurisdiction over Bolivia's Counter-Claim *(a)* or, alternatively, Bolivia's Counter-Claim *(a)* is moot; to the extent that Bolivia claims that it has the right to dismantle the channels in its territory without fully complying with its obligations under customary international law, Bolivia's Counter-Claim *(a)* is rejected;

(b) Bolivia's Counter-Claims *(b)* and *(c)* are rejected."

On behalf of the Government of Bolivia,

at the hearing of 13 April 2022, on the claims of Chile and the counter-claims of Bolivia:

"Bolivia respectfully requests the Court to:

(1) Reject all of Chile's submissions.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

(2) To the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that:

(a) The waters of the Silala constitute an international watercourse whose surface flow has been artificially enhanced;

(b) Under the rules of customary international law on the use of international watercourses that apply to the Silala, Bolivia and Chile are each entitled to an equitable and reasonable utilization of the Silala waters;

(c) Chile's current use of the waters of the Silala is without prejudice to Bolivia's right to an equitable and reasonable use of these waters;

(d) Bolivia and Chile each have an obligation to take all appropriate measures to prevent the causing of significant transboundary harm in the Silala;

(e) Bolivia and Chile each have an obligation to cooperate, notify and consult the other State with respect to activities that may have a risk of significant transboundary harm when confirmed by an environmental impact assessment;

(f) Bolivia has not breached any obligation owed to Chile with respect to the waters of the Silala."

"Bolivia respectfully requests the Court to adjudge and declare that:

(a) Bolivia has sovereignty over the artificial canals 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 acquired right to that artificial flow;

(c) Any request by Chile made to Bolivia for the delivery of the enhanced flow of the Silala, and the conditions and modalities thereof, including the compensation to be paid for said delivery, is subject to the conclusion of an agreement with Bolivia."

*

* *

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

I. GENERAL BACKGROUND

28. The Silala River has its source in the territory of Bolivia. It originates from groundwater springs in the Southern (Orientales) and Northern (Cajones) wetlands, located in the Potosí Department of Bolivia, approximately 0.5 to 3 kilometres north-east of the common boundary with Chile at an altitude of around 4,300 metres (see sketch-map below). These high-altitude Andean wetlands, which are also referred to as *bofedales*, are located in an arid region bordering the Atacama Desert. Following the natural topographic gradient which slopes from Bolivia towards Chile, the flow of the Silala, comprised of surface water and groundwater, traverses the boundary between Bolivia and Chile. In Chilean territory, the Silala River continues to flow south-west in the Antofagasta region of Chile until its waters discharge into the San Pedro River at about 6 kilometres from the boundary.

29. Over the years, both Parties have granted concessions for the use of the Silala waters. This use of the waters of the Silala started in 1906, when the "Antofagasta (Chili) and Bolivia Railway Company Limited" (known as the "FCAB", from the Spanish acronym for Ferrocarril de Antofagasta a Bolivia) acquired a concession from the Chilean Government for the purpose of increasing the flow of drinking water serving the Chilean port city Antofagasta. Two years later, in 1908, the FCAB also obtained a right of use from the Bolivian Government for the purpose of supplying the steam engines of the locomotives that operated the Antofagasta-La Paz railway. The FCAB built an intake (Intake No. 1) in 1909 on Bolivian territory, at approximately 600 metres from the boundary. In 1910, the pipeline from Intake No. 1 to the FCAB's water reservoirs in Chile was officially put into operation. In 1928, the FCAB constructed channels in Bolivia. Chile claims that this was done for sanitary reasons, to inhibit breeding of insects and avoid contamination of potable water. According to Bolivia, the channelization had the purpose of artificially drawing the water from the surrounding springs and *bofedales*, which enhanced the surface flow of the Silala into Chile. In 1942, a second intake and pipeline were built in Chilean territory at approximately 40 metres from the international boundary.

30. On 7 May 1996, the Minister for Foreign Affairs of Bolivia issued a press release in response to certain articles in the Bolivian press referring to an alleged diversion by Chile of the waters of the "boundary Silala river". In the press release, the Minister stated that, according to a technical report on the international character of the Silala prepared by Bolivia's National Commission of Sovereignty and Boundaries, the Silala was a river that originated in Bolivian territory, and then flowed into Chilean territory. He also indicated that there was "no water diversion" as confirmed during the field work carried out by the Mixed Boundary Commission in 1992, 1993 and 1994. The Minister noted, however, that he would include the issue on the bilateral agenda "given that the waters of the Silala river have been used since more than a century by Chile" at a cost to Bolivia.

31. On 14 May 1997, the Prefect of the Potosí Department, by Administrative Resolution No. 71/97, revoked and annulled the concession granted to the FCAB in 1908 to exploit the spring waters of the Silala, on the grounds that its object, cause and purpose had disappeared, as steam locomotives were no longer in use, and that the company no longer existed as "an active corporate in Bolivian territory". Supreme Decree No. 24660 of 20 June 1997, which gives the above-mentioned administrative resolution the legal status of a presidential supreme decree, makes reference to "evidence of the improper use" of the Silala waters "outside the granting of their use, with prejudice to the interests of the State and in clear violation of Articles 136 and 137 of the State Political Constitution".

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

32. By 1999, the question of the status of the Silala and the character of its waters had become a point of contention between the Parties. In particular, on 3 September 1999, the Ministry of Foreign Affairs of Bolivia addressed a diplomatic Note to the Consulate General of Chile in La Paz contending that, despite the annulment in 1997 by Bolivia of the concession granted to the FCAB in 1908 to exploit the spring waters of the Silala, the company persisted in its use of those waters. The Ministry added that the matter was one that remained in the private sphere and

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

was, as such, under Bolivia's jurisdiction. The Ministry moreover asserted that the spring waters of the Silala, which were entirely located in Bolivian territory, created wetlands, from where the waters were conducted by means of artificial works, "generating a system that lack[ed] any characteristic of a river, let alone of an international river of a successive course".

33. In response, the Chilean Government sent two diplomatic Notes to the Ministry of Foreign Affairs of Bolivia. By a Note Verbale dated 15 September 1999, the Ministry of Foreign Affairs of Chile expressed disagreement with the statement that the Silala lacked "any characteristic of a river" and affirmed that, until that point, the "Bolivian Government had never officially disowned the fact that the Silala [was] a river that naturally respond[ed] to the definition that international law takes into account for that purpose". The Ministry further emphasized that any calls for tenders by the Bolivian Water Resources Superintendency should bear in mind the "binational nature of this shared water resource" and the need to "include the rights of Chile in its capacity as sovereign over the downstream course". By a Note Verbale dated 14 October 1999, the General Consulate of Chile in La Paz expressed concern that the

> "Bolivian Water Resources Superintendency insist[ed] on carrying out a public tendering process of the waters of the Silala river, disregarding the clear principles of international law that safeguard the legitimate rights and interests of the Republic of Chile over said water resource".

34. The Ministry of Foreign Affairs of Bolivia replied to the above communications by a diplomatic Note dated 16 November 1999, reaffirming its position that the waters of the Silala were governed by Bolivia's national legal system "in full exercise of the territorial sovereignty that is recognized by the rules and principles of international law". According to the Ministry, the waters of the Silala were "formed in Bolivian territory and . . . would be consumed in that same territory", were it not for the channelization works made by the concessionaire company as a result of the 1908 concession granted by Bolivia.

35. In April 2000, Bolivia granted a concession to a Bolivian company, DUCTEC, authorizing the commercialization of the waters of the Silala. That company later sought to invoice two Chilean companies for their use of Silala waters within Chilean territory. Chile protested against the concession on the grounds that it disregarded the international nature of the Silala and the rights of Chile over the Silala River.

36. The two Parties attempted to reach a bilateral agreement on "the 'rational and sustainable management' of the waters of the Silala" in the period up to 2010. During that period, a bilateral Working Group on the Silala Issue was created to carry out joint technical and scientific studies to determine the nature, origin and flow of the waters of the Silala. Two draft agreements were drawn up in 2009 but were never signed.

37. Chile indicates that it decided to request a judgment from the Court on "the nature of the Silala River as an international watercourse and of Chile's rights as a riparian State", following several statements made by the President of Bolivia, Mr. Evo Morales, in 2016, in which he accused Chile of illegally exploiting the waters of the Silala without compensating Bolivia, stated that the Silala was "not an international river" and expressed an intention to bring the dispute before the Court. Chile accordingly instituted proceedings against Bolivia before the Court on 6 June 2016 (see paragraph 1 above).

38. As mentioned above (see paragraph 24), during the oral proceedings, Chile produced a new document, referred to as "Draft Agreement of 2019", which it had submitted to Bolivia in June 2019 as a new proposal aimed at bringing the dispute over the Silala to an end. According to Chile, the proposal received no reply from Bolivia.

II. EXISTENCE AND SCOPE OF THE DISPUTE: GENERAL CONSIDERATIONS

39. The Court must, at the outset, determine whether it has jurisdiction to entertain the claims and the counterclaims of the Parties and, if so, whether there are reasons that prevent the Court from exercising its jurisdiction in whole or in part. Chile seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. That provision reads:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

(a) [t]he interpretation of a treaty;

(b) [a]ny question of international law;

(c) [t]he existence of any fact which, if established, would constitute the breach of an international obligation;

(d) [t]he nature or extent of the reparation to be made for the breach of an international obligation."

The existence of a dispute between the Parties is a condition of the Court's jurisdiction under Article XXXI of the Pact of Bogotá. A dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). For the Court to have jurisdiction, the "dispute must in principle exist at the time the Application is submitted to the Court" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46). The initial written pleadings of the Parties revealed a number of questions of law and fact on which the Parties disagreed (see Sections III and IV). The Parties have not contested that Article XXXI of the Pact of Bogotá provides the Court with jurisdiction to adjudicate the dispute between them. The only exception is Chile's assertion that the Court lacks jurisdiction in respect of Bolivia's first counter-claim. Leaving aside this objection, which will be addressed below (see Section IV), the Court is satisfied that it has jurisdiction to adjudicate the dispute between the Parties.

40. The Court observes that some positions of the Parties have evolved considerably during the course of the proceedings. Each Party now contends that certain claims or counter-claims of the other Party are without object or present hypothetical questions and are thus to be rejected. Before examining the claims and counter-claims of the Parties, the Court makes some general observations with respect to these assertions.

41. The Court recalls that, even if it finds that it has jurisdiction, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29; see also *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 69, para. 45). The Court has emphasized that "[t]he dispute brought before it must . . . continue to exist at the time when the Court makes its decision" and that "there is nothing on which to give judgment" in situations where the object of a claim has clearly disappeared (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 271-272, paras. 55 and 59). It "has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 14, para. 32; see also *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66). Such a situation may cause the Court to "deci[de] not to proceed to judgment on the merits" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 12-13, para. 26; see also *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 467-468, para. 88).

42. The Court has held "that it cannot adjudicate upon the merits of the claim" when it considers that "any adjudication [would be] devoid of purpose" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 38). The Court observes that its task is not limited to determining whether a dispute has disappeared in its entirety. The scope of a dispute brought before the Court is circumscribed by the claims submitted to it by the parties. Therefore, in the present case, the Court also has to ascertain whether specific claims

have become without object as a consequence of a convergence of positions or agreement between the Parties, or for some other reason.

43. To this end, the Court will carefully assess whether and to what extent the final submissions of the Parties continue to reflect a dispute between them. The Court has no power to "substitute itself for [the parties] and formulate new submissions simply on the basis of arguments and facts advanced" (*Certain German Interests in Polish Upper Silesia, Merits, Judgment, No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 35). However, it is "entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29). In undertaking this task, the Court will take into account not only the submissions, but also, *inter alia*, the Application as well as all the arguments put forward by the Parties in the course of the written and oral proceedings (see *ibid.*, p. 263, paras. 30-31). The Court will thus interpret the submissions, in order to identify their substance and to determine whether they reflect a dispute between the Parties.

44. Each Party maintains that certain submissions of the other Party, while reflecting points of convergence between the Parties, remain vague, ambiguous or conditional, and therefore cannot be taken to express agreement between them. Each has therefore requested the Court to render a declaratory judgment with respect to certain submissions, pointing to the need for legal certainty in their mutual relations. The Applicant emphasized the need for a declaratory judgment to prevent the Respondent from changing its position in the future on the law applicable to international watercourses and to the Silala.

45. The Court notes that "[i]t is clear in the jurisprudence of the Court and its predecessor that 'the Court may, in an appropriate case, make a declaratory judgment'" (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 662, para. 49, citing *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37). The Court further recalls that the purpose of a declaratory judgment

> "is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20).

46. Given that the Court's role in a contentious case is to resolve existing disputes, the operative paragraph of a judgment should not, in principle, record points on which the Court finds the parties to be in agreement (see *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, pp. 71-73, paras. 53-59). Statements made by the parties before the Court must be presumed to be made in good faith. The Court carefully assesses such statements. If the Court finds that the parties have come to agree in substance regarding a claim or a counter-claim, it will take note of that agreement in its judgment and conclude that such a claim or counter-claim has become without object. In such a case, there is no call for a declaratory judgment.

47. The Court notes that, in the present case, many submissions are closely interrelated. A conclusion that a particular claim or counter-claim is without object does not preclude the Court from addressing certain questions that are relevant to such a claim or counter-claim in the course of examining other claims or counter-claims that remain to be decided.

48. The Court further recalls that its function is "to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 138, para. 123). The Court reaffirms that "it is not for the Court to determine the applicable law with regard to a hypothetical situation" *(ibid)*. In particular, it has held that it does not pronounce "on any hypothetical situation which might arise in the future" (*Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 32, para. 73).

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

49. In assessing the Parties' claims and counter-claims, the Court will be guided by the above considerations.

III. Claims of Chile

1. SUBMISSION *(A)*: THE SILALA RIVER SYSTEM AS AN INTERNATIONAL WATERCOURSE GOVERNED BY CUSTOMARY INTERNATIONAL LAW

50. In its submission *(a)*, Chile asks the Court to adjudge and declare that "[t]he 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". Chile maintains that the definition of "international watercourse" contained in Article 2 *(a)* and *(b)* of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter referred to as the "1997 Convention") reflects customary international law and that the Silala waters, irrespective of their "natural" or "artificial" character, qualify as an international watercourse. Chile further maintains that the customary international law rules applicable to international watercourses apply to the Silala waters in their entirety.

51. Chile's position with respect to submission *(a)* has remained unchanged throughout the proceedings. While acknowledging that "Bolivia has belatedly accepted" that submission *(a)* "is true to an extent", Chile maintains that the Parties continue to disagree on its submission *(a)*.

*

52. Bolivia's position with respect to Chile's submission *(a)* has evolved in the course of the proceedings. In its Counter-Memorial, Bolivia requested the Court to adjudge and declare that "*(a)* [t]he waters of the Silala springs are part of an artificially enhanced watercourse; *(b)* [c]ustomary international rules on the use of international watercourses do not apply to the artificially-flowing Silala waters". Bolivia opposed the contention that the Silala qualifies, in its entirety, as an international watercourse under customary international law. Bolivia also contested that the definition of the term "international watercourse" contained in Article 2 of the 1997 Convention reflects customary international law as far as the artificially enhanced parts of the Silala waters are concerned. Bolivia further argued that the rules of customary international law applicable to international watercourses only apply to the natural flow of watercourses.

53. During the oral proceedings, Bolivia acknowledged | referring to the findings by the experts appointed by each Party | that the Silala waters, including those parts that are artificially enhanced, qualify as an international watercourse. Bolivia now also recognizes that the customary international law applicable to the non-navigational uses of international watercourses applies to the entirety of the Silala waters. Bolivia concludes that the dispute between the Parties with respect to Chile's submission *(a)* has disappeared in the course of the oral proceedings. On this basis Bolivia requests the Court, in its final submissions, to reject Chile's submission *(a)* for absence of a dispute and, "[t]o the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that: *(a)* [t]he waters of the Silala constitute an international watercourse whose surface flow has been artificially enhanced".

* *

54. The Court observes at the outset that neither Chile nor Bolivia is party to the 1997 Convention or to any treaty governing the non-navigational uses of the Silala River. Accordingly, in the present case, the respective rights and obligations of the Parties are governed by customary international law.

55. The Court notes that Chile's submission *(a)* contains the legal propositions that the Silala waters are an international watercourse under customary international law, and that the customary international law rules relating to international watercourses apply to the Silala waters in their entirety. The Court observes that the legal position originally taken by Bolivia in its Counter- Memorial positively opposed both legal propositions advanced by Chile. In particular, Bolivia contested that the rules on the non-navigational uses of international watercourses under customary international law apply to the "artificially enhanced" surface flow of the Silala.

56. The Court observes that the positions of the Parties with respect to the legal status of the Silala waters and the rules applicable under customary international law have converged in the course of the proceedings. During the oral

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

proceedings, Bolivia has on several occasions expressed its agreement with Chile's claim that | despite the "artificial enhancement" of the surface flow of the Silala River | the Silala waters qualify in their entirety as an international watercourse under customary international law and stated that, therefore, customary international law applies both to the "naturally flowing" waters and the "artificially enhanced" surface flow of the Silala.

57. The Court notes that Bolivia, while recognizing that the Silala waters qualify as an international watercourse, does not consider Article 2 of the 1997 Convention to reflect customary international law. The Court also notes that Bolivia maintains that the "unique characteristics" of the Silala, including the fact that parts of its surface flow are "artificially enhanced", have to be taken into account when applying the customary rules on international watercourses to the Silala waters. In its final submissions Bolivia thus asks the Court to reject Chile's submission and, if it does not do so, to find that the surface flow of the Silala has been "artificially enhanced".

58. For the purpose of determining whether Bolivia agrees with the position of Chile regarding the legal status of the Silala as an international watercourse under customary international law, the Court does not consider it necessary for Bolivia to have recognized that the definition contained in Article 2 of the 1997 Convention reflects customary international law. Furthermore, Bolivia's insistence on the relevance of the "unique characteristics" of the Silala waters in the application of the rules of customary international law does not change the fact that it has expressed its unequivocal agreement with the proposition that the customary international law on non-navigational uses of international watercourses applies to all of the Silala waters. In this regard, the Court takes note of Bolivia's response to a question put by one of its Judges during the oral proceedings in which Bolivia confirmed "the Silala's nature as an international watercourse independent of its undisputable special characteristics, which have no bearing on the existing customary rules", and emphasized that it "has not attached any conditions or restrictions to its acceptance of the application of customary law". The Court takes note of Bolivia's acceptance of the substance of Chile's submission *(a)*.

59. Given that the Parties agree with respect to the legal status of the Silala River system as an international watercourse and on the applicability of the customary international law on non-navigational uses of international watercourses to all the waters of the Silala, the Court finds that the claim made by Chile in its final submission *(a)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

2. SUBMISSION *(B)*: CHILE'S ENTITLEMENT TO THE EQUITABLE AND REASONABLE UTILIZATION OF THE WATERS OF THE SILALA RIVER SYSTEM

60. In its submission *(b)*, Chile asks the Court to adjudge and declare that "Chile is entitled to the equitable and reasonable utilization of the waters of the Silala River system in accordance with customary international law". Chile maintains that its entitlement to the waters of the Silala under the principle of equitable and reasonable utilization is not affected by the fact that parts of the flow of the Silala are "artificially enhanced".

61. Chile's position with respect to submission *(b)* has remained unchanged throughout the proceedings. In support of its final submission, Chile confirms that, in its view, Bolivia is equally entitled to equitable and reasonable use of the waters of the Silala. Chile also maintains that, contrary to Bolivia's allegations, it has never contested Bolivia's entitlement. Chile requests the Court to adjudicate on its submission *(b)* in order to ensure legal certainty between the two States.

*

62. Bolivia's position with respect to Chile's submission *(b)* has evolved in the course of the proceedings. In its Counter-Memorial, Bolivia claimed that the principle of equitable and reasonable utilization only applies to the "naturally flowing" parts of the Silala waters. Bolivia further maintained that the use of "artificial flows" of the Silala waters by Chile depends on Bolivia's consent. Bolivia emphasized that, with respect to the "naturally flowing" parts of the Silala, both Parties are entitled to the equitable and reasonable use of the water under customary international law, and that Chile's claim should be dismissed to the extent that it only concerns Chile's rights and disregards Bolivia's rights.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

63. During the oral proceedings, Bolivia acknowledged that the right to equitable and reasonable use of the waters of the Silala covers the entirety of the waters. In its view, any dispute between the Parties concerning Chile's submission *(b)* now only concerns the "nuance" that, according to Bolivia, both Parties are entitled to equitable and reasonable utilization. On this basis, Bolivia requests the Court, in its final submissions,

> "[t]o the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that: . . . [u]nder the rules of customary international law on the use of international watercourses that apply to the Silala, Bolivia and Chile are each entitled to an equitable and reasonable utilization of the Silala waters".

* *

64. The Court observes that, when these proceedings were instituted, Chile's claim regarding its entitlement to the equitable and reasonable use of the waters of the Silala, which includes both the "naturally flowing" and "artificially enhanced" parts, was positively opposed by Bolivia. During the course of the proceedings, however, it became apparent that the Parties agree that the principle of equitable and reasonable utilization applies to the entirety of the waters of the Silala, irrespective of their "natural" or "artificial" character. The Parties also agree that they are both entitled to the equitable and reasonable utilization of the Silala waters under customary international law. It is not for the Court to address a possible difference of opinion regarding a future use of these waters that is entirely hypothetical (see paragraphs 44 and 48 above).

65. For these reasons, the Court finds that the Parties agree with respect to Chile's submission *(b)*. Accordingly, the Court concludes that the claim made by Chile in its final submission *(b)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

3. SUBMISSION *(C)*: CHILE'S ENTITLEMENT TO ITS CURRENT USE OF THE WATERS OF THE SILALA RIVER SYSTEM

66. In its submission *(c)*, Chile asks the Court to adjudge and declare that "[u]nder the standard of equitable and reasonable utilization, Chile is entitled to its current utilization of the waters of the Silala River". Chile claims that its past and present use of the Silala waters is consistent with the principle of equitable and reasonable utilization. Pointing to the absence of countervailing uses by Bolivia, Chile argues that, as the downstream riparian State, all its past and present use of the flow that crosses the boundary from Bolivia to Chile is equitable and reasonable vis-à-vis Bolivia.

67. Chile's submission *(c)* has remained unchanged throughout the proceedings. Chile asks the Court to confirm that the principle of equitable and reasonable use applies to all the waters of the Silala and that this principle does not leave room for a right to claim compensation for past or future uses of the Silala. In response to Bolivia's interpretation of Chile's submission *(c)* as claiming a right to maintain the "current rate and volume of water flow", Chile emphasizes that this interpretation represents a mischaracterization of its submission. Chile notes that it does not ask the Court to recognize an acquired right, an entitlement to maintain the status quo or a title to a certain amount of water, but rather that it seeks a declaration that its current use of the waters conforms with the principle of equitable and reasonable utilization, without prejudice to any of Bolivia's rights and the future use of the waters by both States. Chile also points out that Bolivia has "taken note" of Chile's indication that it "does not seek to obtain any prejudgment as to what future use of the Silala River may be equitable and reasonable and likewise does not seek in any way to freeze further development and use of the waters so far as concerns either State". Chile nevertheless maintains that the above- mentioned declaration that it seeks from the Court would ensure legal certainty in the relations between the Parties given the changes in Bolivia's position.

*

68. Bolivia's position with respect to Chile's submission *(c)* has evolved during the proceedings. In its Counter-Memorial, Bolivia asked the Court to adjudge and declare that "Bolivia and Chile are each entitled to the equitable and reasonable utilization of the naturally flowing Silala waters, in accordance with customary international law" and that "[t]he current use of the naturally- flowing Silala waters by Chile is without prejudice to Bolivia's right to an equitable and reasonable use of these waters". Bolivia emphasized that any use of the waters by Chile is limited

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

by Bolivia's exclusive rights over the artificial flow of Silala waters. Bolivia also stated that it understood Chile's submission *(c)* as requesting the Court to declare that Chile has a right to maintain the current rate and volume of water flow from Bolivia to Chile which should not be subject to future modification. In its view, such a position would be incompatible with Bolivia's equal right to its own equitable and reasonable share of the naturally flowing waters of the Silala, as well as its exclusive rights over the artificial flow of Silala waters.

69. During the oral proceedings, Bolivia acknowledged that the right to equitable and reasonable use applies to the Silala waters in their entirety (see paragraph 63 above). Bolivia now claims that Chile's past use of all the waters of the Silala should be taken into account to determine Bolivia's future right to an equitable and reasonable use of the waters. Bolivia further points to the ambiguous formulation of Chile's submission *(c)* and what it considers to be contradictory statements made by the representatives of Chile in the proceedings before the Court as to the correct interpretation to be given to this submission. According to Bolivia, it is thus unclear whether Chile is prepared to accept unconditionally the risks ensuing from a possible dismantling of the channels and installations (see paragraph 27 above), whatever the scale of the reduction caused in the Silala's surface flow. On this basis, Bolivia, in its final submissions, requests "[t]o the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that: . . . Chile's current use of the waters of the Silala is without prejudice to Bolivia's right to an equitable and reasonable use of these waters".

* *

70. The Court notes that, when these proceedings were instituted, Chile's claim to be entitled to its current use of the waters of the Silala was positively opposed by Bolivia as far as it concerned those parts of the flow which Bolivia describes as "artificially enhanced".

71. Considering the statements made by Bolivia during the oral proceedings, the Court also notes that the Parties agree that Chile has a right to the use of an equitable and reasonable share of the waters of the Silala irrespective of the "natural" or "artificial" character or origin of the water flow (see paragraph 69 above). Furthermore, Bolivia does not claim in these proceedings that Chile owes compensation to Bolivia for past uses of the waters of the Silala.

72. The Court observes that the formulation of submission *(c)* does not, by itself, clearly indicate whether Chile asks the Court only to declare that its current use of the waters of the Silala is in conformity with the principle of equitable and reasonable utilization, or whether Chile requests the Court to declare, in addition, that it has a right to receive the same rate of flow and volume of the waters in the future. In this respect, the Court takes note of several statements made by Chile during the later stages of the proceedings in which it emphasized that submission *(c)* only seeks a declaration to the effect that the present use of the waters of the Silala is in conformity with the principle of equitable and reasonable utilization and that its entitlement to any future use is without prejudice to that of Bolivia. Moreover, Chile has underlined, on several occasions, that its right to equitable and reasonable use would not per se be infringed by the reduction of the flow subsequent to a dismantling of the channels and installations.

73. The Court considers that the clarification brought about by these statements is not called into question by references, in Chile's written and oral pleadings, to the general duty of Bolivia not to breach its obligations under customary international law, should it decide to proceed to a dismantling of the channels. In the Court's view, these references do not qualify the substance of Chile's statements but simply recall the general duty of States to act in compliance with their obligations under international law.

74. Regarding Bolivia's contention that Chile's use is without prejudice to Bolivia's future uses of the Silala, the Court reaffirms that there is no opposition of views regarding a corresponding right of Bolivia to the equitable and reasonable use of the Silala waters, as Chile does not deny Bolivia's proposition in this regard (see paragraphs 61 and 64 above).

75. For these reasons, the Court finds that the Parties have, in the course of the proceedings, come to agree with respect to Chile's submission *(c)*. In this connection, the Court takes note of statements by Chile according to which it is no longer contested that it is entirely within Bolivia's sovereign powers to dismantle the channels and to restore the wetlands in its territory in conformity with international law.

76. Since the Parties agree regarding Chile's submission *(c)*, the Court concludes that the claim made by Chile in its final submission *(c)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

4. SUBMISSION *(D)*: BOLIVIA'S OBLIGATION TO PREVENT AND CONTROL HARM RESULTING FROM ITS ACTIVITIES IN THE VICINITY OF THE SILALA RIVER SYSTEM

77. In its submission *(d)*, Chile asks the Court to adjudge and declare that "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". Chile argues that "Bolivia is under an obligation to co-operate and prevent transboundary harm to the utilization of the waters of the Silala River system in Chile". It claims that "States sharing an international watercourse are under an obligation to take all appropriate measures to prevent the causing of significant harm to other watercourse States. This rule of international law is enshrined in Article 7 of the [1997 Convention]." Chile also emphasizes that it does

> "not ask the Court to specify precisely what measures Bolivia must take in order to give full effect to Article 7 of the [1997 Convention]. Rather, it asks the [C]ourt to reaffirm that Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from activities in the vicinity of the Silala River."

78. Chile's submission *(d)* has remained unchanged throughout the proceedings. During the oral proceedings, Chile confirmed its position that both Parties are bound by the obligation to prevent significant transboundary harm. In Chile's view, this obligation encompasses the duty to notify and exchange information, as well as the duty to conduct an environmental impact assessment.

*

79. Bolivia's position with respect to Chile's submission *(d)* has evolved in the course of the proceedings. In its Counter-Memorial, Bolivia maintained that the law of international watercourses, including its obligation to prevent significant transboundary harm under customary international law as reflected in Article 7 of the 1997 Convention, only applies to the naturally flowing waters of the Silala. During the oral proceedings, Bolivia recognized that the obligation not to cause significant transboundary harm applies to all the waters of the Silala irrespective of whether they flow naturally or are "artificially enhanced".

80. Bolivia maintains its position that the "no significant harm" principle applies only to significant environmental harms and not, as Chile alleges, "to 'prevent[ing] and control[ling] pollution and other forms of harm' without qualifications". Bolivia also stresses that both Parties have an obligation of conduct not to cause significant harm to the other riparian State. In its view, this obligation entails that a riparian State shall conduct an environmental impact assessment if it considers that there is a risk of significant harm. If the risk is confirmed, the State shall, according to Bolivia, notify the other Party.

81. On this basis, Bolivia now maintains that a dispute no longer exists in respect of submission *(d)*. In its final submission, Bolivia requests "[t]o the extent that the Court were to consider that there is still a dispute between the Parties, to adjudge and declare that: . . . Bolivia and Chile each have an obligation to take all appropriate measures to prevent the causing of significant transboundary harm in the Silala".

* *

82. The Court notes that when these proceedings were instituted, Bolivia positively opposed the claim contained in Chile's submission *(d)* with respect to the applicability of the obligation to prevent transboundary harm to the "artificially enhanced" flow of the Silala.

83. The Court observes that the Parties agree that they are bound by the customary obligation to prevent transboundary harm. Furthermore, the Parties now agree that this obligation applies to the Silala waters irrespective of whether they flow naturally or are "artificially enhanced". The Parties also agree that the obligation to prevent

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

transboundary harm is an obligation of conduct and not an obligation of result, and that it may require the notification of, and exchange of information with, other riparian States and the conduct of an environmental impact assessment.

84. It is less clear whether the Parties agree on the threshold for the application of the customary obligation to prevent transboundary harm. Bolivia insists that the obligation to take all appropriate measures to prevent transboundary harm only applies to the causing of "significant" harm. Certain statements by Chile might be understood as suggesting a lower threshold. For example, in its Application Chile argued that Bolivia is under an "obligation to co-operate and prevent transboundary harm". Moreover, Chile has repeatedly claimed that Bolivia is under an obligation "to prevent and control pollution and other forms of harm", including in its final submission *(d)*.

85. When assessing whether and to what extent the final submissions of the Parties continue to reflect the dispute between them, the Court may interpret those submissions, taking into account the Application as a whole and the arguments of the Parties before it (see paragraph 43 above; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 263, paras. 30-31). The Court notes that Chile has sometimes referred to the obligation to prevent transboundary harm, without specifying that such an obligation is limited to significant transboundary harm. However, Chile has also repeatedly used the term "significant harm" as the threshold for the application of the obligation of prevention, both in its written pleadings and during the oral proceedings. The Court further notes that neither in its written nor in its oral pleadings did Chile ask the Court to apply a lower threshold than that of "significant harm". The Court is of the view that Chile's varying terminology cannot be interpreted, in the absence of more specific indications to the contrary, as expressing a disagreement in substance with the threshold of "significant transboundary harm" put forward by Bolivia and repeatedly used by Chile itself, including with reference to Article 7 of the 1997 Convention.

86. For these reasons, the Court finds that the Parties have, in the course of the proceedings, come to agree regarding the substance of Chile's submission *(d)*. Accordingly, the Court concludes that the claim made by Chile in its final submission *(d)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

5. SUBMISSION *(E)*: BOLIVIA'S OBLIGATION TO NOTIFY AND CONSULT WITH RESPECT TO MEASURES THAT MAY HAVE AN ADVERSE EFFECT ON THE SILALA RIVER SYSTEM

87. In its submission *(e)*, Chile requests the Court to adjudge and declare that Bolivia has an obligation to co-operate 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 measures. It also requests the Court to adjudge and declare that Bolivia has so far breached the obligation to notify and consult Chile with respect to activities that may affect the waters of the Silala or the utilization thereof by Chile.

88. Bolivia, for its part, asserts that it has not breached any obligation owed to Chile with respect to the waters of the Silala because, under customary international law, the obligations to co-operate, notify and consult arise only in the case of activities that "may have a risk of significant transboundary harm when confirmed by an environmental impact assessment". It further contends that Chile has not substantiated its claim that Bolivia has breached its obligation to notify and consult in respect of activities that may have a significant adverse effect on the waters of the Silala, since none of the "very modest" activities on which Chile bases its claim gave rise to any risk of harm.

* *

89. The Court notes that there is a disagreement, in law and in fact, between the Parties regarding Chile's submission *(e)*. This disagreement concerns, first, the scope of the obligation to notify and consult in the customary international law governing the non-navigational uses of international watercourses and the threshold for the application of this obligation. Secondly, it relates to the question whether Bolivia has complied with this obligation when planning and carrying out certain activities.

90. In support of their positions with respect to the relevant rules of customary international law, both Parties refer to the 1997 Convention. They also refer to the draft articles on the law of the non-navigational uses of

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

international watercourses adopted by the International Law Commission (hereinafter the "ILC" or the "Commission") in 1994 (hereinafter the "ILC Draft Articles"), which served as the basis for the 1997 Convention, as well as to the commentaries of the ILC to those Draft Articles. The Court notes in this regard that both Parties consider that a number of provisions of the 1997 Convention reflect customary international law. They disagree, however, about whether this is true as regards certain other provisions, including those relating to procedural obligations, in particular the obligation to notify and consult.

91. Before examining the question of compliance with the obligation to notify and consult in the specific context of the present case, the Court will first recall the legal framework within which this obligation arises and the rules and principles of customary international law that guide the determination of the procedural obligations incumbent on the Parties to the present proceedings as riparian States of the Silala.

A. Applicable legal framework

92. The Court notes that the customary obligations relating to international watercourses are incumbent on the riparian States of the Silala only if the Silala is in fact an international watercourse. It recalls in this regard that, even though both Parties agree that the Silala is an international watercourse (see paragraph 59), Bolivia has not explicitly recognized that the definition of "international watercourse" set out in Article 2 of the 1997 Convention reflects customary international law (see paragraph 57), contrary to what Chile, for its part, asserts.

93. The Court considers that modifications that increase the surface flow of a watercourse have no bearing on its characterization as an international watercourse.

94. The Court notes in this regard that the experts appointed by each Party agree that the waters of the Silala, whether surface or groundwater, constitute a whole flowing from Bolivia into Chile and into a common terminus. There is no doubt that the Silala is an international watercourse and, as such, subject in its entirety to customary international law, as both Parties now agree.

95. The Court further emphasizes that the concept of an international watercourse in customary international law does not prevent the particular characteristics of each international watercourse being taken into consideration when applying customary principles. The particular characteristics of each watercourse, such as those which appear in the non-exhaustive list contained in Article 6 of the 1997 Convention, form part of the "relevant factors and circumstances" that must be taken into account in determining and assessing what constitutes equitable and reasonable use of an international watercourse under customary international law. As stated above (see paragraph 74), the Parties agree that under customary international law they are both equally entitled to the equitable and reasonable use of the Silala's waters.

96. According to the jurisprudence of the Court and that of its predecessor, an international watercourse constitutes a shared resource over which riparian States have a common right. As early as 1929, the Permanent Court of International Justice declared, with regard to navigation on the River Oder, that there is a community of interest in an international watercourse which provides "the basis of a common legal right" (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27). More recently, the Court applied this principle to the non-navigational uses of international watercourses and observed that it has been strengthened by the modern development of international law, as evidenced by the adoption of the 1997 Convention (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 56, para. 85).

97. Under customary international law, every riparian State has a basic right to an equitable and reasonable sharing of the resources of an international watercourse (see *ibid.*, p. 54, para. 78). This implies both a right and an obligation for all riparian States of international watercourses: every such State is both entitled to an equitable and reasonable use and share, and obliged not to exceed that entitlement by depriving other riparian States of their equivalent right to a reasonable use and share. This reflects "the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 74, para. 177). In the present case, under customary international law, the Parties are both entitled to an equitable and reasonable use of the waters of the

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

Silala as an international watercourse and obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party.

98. The Court further observes that the principle of equitable and reasonable use of an international watercourse must not be applied in an abstract or static way but by comparing the situations of the States concerned and their utilization of the watercourse at a given time.

99. The Court recalls that in general international law it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). "A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" in a transboundary context, and in particular as regards a shared resource (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 55-56, para. 101, citing *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 706, para. 104).

100. The Court has also emphasized that the above-mentioned obligations are accompanied and complemented by narrower and more specific procedural obligations, which facilitate the implementation of the substantive obligations incumbent on riparian States under customary international law (see *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 49, para. 77). As the Court has already had occasion to state, it is in fact only

> "by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations" *(ibid)*.

101. This is why the Court considers that the obligations to co-operate, notify and consult are an important complement to the substantive obligations of every riparian State. In the Court's view, "[t]hese obligations are all the more vital" when, as in the case of the Silala in the present proceedings, the shared resource at issue "can only be protected through close and continuous co-operation between the riparian States" (*ibid*., p. 51, para. 81).

102. The Court reaffirms that the Parties do not disagree about the customary nature of the above-mentioned substantive obligations or their application to the Silala. Their disagreement relates to the scope of the procedural obligations and their applicability in the circumstances of the present case. In particular, the Parties disagree about the threshold for the application of the obligation to notify and consult and whether Bolivia has breached this obligation.

B. Threshold for the application of the obligation to notify and consult under customary international law

103. According to Chile, the obligations relating to the exchange of information and prior notification laid down in Articles 11 and 12 of the 1997 Convention reflect customary international law and make more concrete the general obligation to co-operate set out in Article 8 of that Convention.

104. Chile argues that Article 11 of the 1997 Convention lays down a general obligation to provide information on planned measures which is not linked to a risk of harm, but which applies to any planned measure that may have an effect, whether adverse or beneficial, on the condition of an international watercourse.

105. As regards Article 12 of the Convention, Chile, relying on the commentary of the ILC on Article 12 of the Draft Articles, contends that the standard of "significant adverse effect", and not what it considers to be the more rigorous criterion of "significant harm" under Article 7, is the threshold for the application of the obligation of notification reflected in Article 12 of the 1997 Convention.

*

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

106. Bolivia, for its part, asserts that only Article 12 of the 1997 Convention reflects customary international law. It argues that there is nothing in the *travaux préparatoires* of Article 11 or in the commentaries of the ILC to support the contention that this Article has customary status, and it claims that Chile has also been unable to cite any State practice or *opinio juris* in support of its contention that Article 11 reflects customary international law.

107. Bolivia also rejects the contention that Article 11 imposes autonomous obligations, arguing that it is a "highly general provision", a "chapeau" to what follows.

108. As regards Article 12 of the Convention, Bolivia acknowledges the indication in the commentary of the ILC that the threshold established by the criterion of "significant adverse effect" is intended to be lower than that of "significant harm" under Article 7, but emphasizes that both obligations apply only when the activity in question may have a negative effect. Bolivia also recalls the Court's jurisprudence on the nature and scope of the obligation to notify and consult, arguing that, if the activity in question does not give rise to a risk of significant transboundary harm, the State concerned is not under an obligation to conduct an environmental impact assessment or to notify and consult the other riparian States.

* *

109. The Parties disagree about the interpretation to be given to Article 11 of the 1997 Convention and whether that provision reflects customary international law. Article 11 reads as follows: "Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse."

110. The Court recalls that the law applicable in the present case is customary international law. Therefore, the obligation to exchange information on planned measures contained in Article 11 of the 1997 Convention applies to the Parties only in so far as it reflects customary international law.

111. Unlike the commentaries to certain other provisions of the ILC Draft Articles, the commentary to Article 11 (which was to become Article 11 of the 1997 Convention) does not refer to any State practice or judicial authority that could suggest the customary nature of this provision. The Commission merely states that illustrations of instruments and decisions "which lay down a requirement similar to that contained in article 11" are provided in the commentary to Article 12 (ILC, Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries thereto, *Yearbook of the International Law Commission (YILC)*, 1994, Vol. II, Part Two, p. 111, paragraph 5 of the commentary to Article 11). Thus, the Commission did not appear to consider that Article 11 of the ILC Draft Articles reflected an obligation under customary international law. In the absence of any general practice or *opinio juris* to support this contention, the Court cannot conclude that Article 11 of the 1997 Convention reflects customary international law. There is therefore no need for the Court to address the interpretation of Article 11 that applies as between the State parties to the 1997 Convention.

112. In view of the foregoing, the Court cannot accept Chile's contention that Article 11 of the 1997 Convention reflects a general obligation in customary international law to exchange information with other riparian States about any planned measure that may have an effect, whether adverse or beneficial, on the condition of an international watercourse.

113. Turning to Article 12 of the 1997 Convention, the Court notes that, while both Parties consider that this provision reflects customary international law, they disagree about its interpretation. Article 12 reads as follows:

> "Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures."

114. The Court observes that the content of this Article corresponds to a large extent to its own jurisprudence on the procedural obligations incumbent on States under customary international law as regards transboundary harm, including in the context of the management of shared resources. Indeed, in its jurisprudence the Court has confirmed

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

the existence, in certain circumstances, of an obligation to notify and consult other riparian States concerned. It has emphasized that this customary obligation applies when "there is a risk of significant transboundary harm" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 707, para. 104). The Court recalls that, in that judgment, it specified the steps and the approach to be taken by a State planning to undertake an activity on or around a shared resource or generally capable of having a significant transboundary effect. The State in question

> "must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.
>
> . . . . . .
>
> If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 706-707, para. 104.)

115. The Court is aware of the differences between the formulations used in Article 12 of the 1997 Convention and those used in its own jurisprudence regarding the threshold for the application of the customary obligation to notify and consult, and on the duty to conduct a prior environmental impact assessment. In particular, the Convention refers to "planned measures which may have a significant adverse effect upon other watercourse States", whereas the Court has referred to "a risk of significant transboundary harm". The Court also notes that the ILC's commentary does not specify the degree of harm that meets the threshold for the application of the obligation of notification contained in Article 12 of the Draft Articles. The ILC simply states that "[t]he threshold established by this standard is intended to be lower than that of 'significant harm' under article 7. Thus a 'significant adverse effect' may not rise to the level of 'significant harm' within the meaning of article 7." (ILC, Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries thereto, *YILC*, 1994, Vol. II, Part Two, p. 111, paragraph 2 of the commentary to Article 12.)

116. The Court notes that even though the requirements of notification and consultation established in its jurisprudence and in Article 12 of the 1997 Convention are not worded in identical terms, both formulations suggest that the threshold for the application of the obligation to notify and consult is reached when the measures planned or carried out are capable of producing harmful effects of a certain magnitude.

117. The Court considers that Article 12 of the 1997 Convention does not reflect a rule of customary international law relating to international watercourses that is more rigorous than the general obligation to notify and consult contained in its own jurisprudence.

118. It therefore concludes that each riparian State is required, under customary international law, to notify and consult the other riparian State with regard to any planned activity that poses a risk of significant harm to that State.

C. Question of Bolivia's compliance with the customary obligation to notify and consult

119. Having found that customary international law imposes on each Party an obligation to notify and consult with regard to any planned activity that carries a risk of significant harm to the other Party, the Court will now ascertain whether Bolivia's conduct has been in accordance with customary international law, in view of Chile's claims in that regard.

* **

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

120. Chile maintains that Bolivia, in breach of the obligation incumbent on it, has consistently refused to provide Chile with the necessary information on certain measures planned or carried out with respect to the waters of the Silala.

121. In support of its claim that Bolivia has failed to respect the customary obligations relating to the exchange of information and prior notification, Chile cites the granting of a concession by Bolivia in 1999 to a private Bolivian company, DUCTEC, with the aim of commercializing water taken from the Silala. It contends that the Respondent left unanswered a diplomatic Note from Chile inviting Bolivia to enter into a bilateral dialogue to "agree[] on a cooperation scheme and equitable use" of the Silala's waters. Chile also refers to two diplomatic Notes by which it requested information from Bolivia on several projects in the Silala area announced in the press in 2012 by the Governor of the Department of Potosí, including the construction of a fish farm, a weir and a mineral water bottling plant. It asserts that, in response, Bolivia refused to transmit the information requested on the pretext that the waters of the Silala did not constitute an international watercourse. More recently, in 2017, Chile made a new request seeking information on the construction of a military post and on the building of ten houses situated close to the watercourse. According to Chile, Bolivia refused to provide the information requested, asserting that "the scarce . . . infrastructure" that existed at the site posed no danger of generating pollution or affecting the quality of the Silala's waters, first, because the ten houses were uninhabited, and, secondly, with respect to the military post, because appropriate mechanisms ensuring the preservation and conservation of the waters had been put in place.

122. Chile states that it has taken note of the Respondent's assertion that "none of Bolivia's very limited activities have ever given rise to a risk of a transboundary harm". It maintains, however, that the performance of the obligation to exchange information about planned measures is not linked to a risk of harm, but is an application of both the general obligation to co-operate and the requirement of due diligence in relation to environmental protection.

*

123. Bolivia does not contest Chile's description of the events or of the diplomatic exchanges between the Parties. Nevertheless, it claims that it has complied with all procedural obligations relating to the planned measures concerning the Silala, in accordance with customary international law. It contends that customary international law limits the obligation to notify and consult to situations where an environmental impact assessment confirms that there is a risk of significant transboundary harm. Bolivia asserts that the activities in question gave rise to no risk of significant harm and that, consequently, it had no obligation to notify or consult Chile.

124. Bolivia notes with respect to the projects referred to by Chile that none posed any risk of pollution or of any other form of harm. According to Bolivia, DUCTEC never implemented any plans to use the waters of the Silala; any ideas to build a small weir or a water bottling plant never materialized; the fish farm project was abandoned and the ten "small" houses were never inhabited. As regards the military post which it describes as "very modest", Bolivia claims to have implemented measures to prevent any contamination, as it had assured Chile that it would. Bolivia further notes that Chile has never claimed, let alone established, that the activities carried out by Bolivia have caused it any harm, much less significant harm.

* *

125. The Court will evaluate Bolivia's compliance with the procedural obligation to notify and consult in light of the foregoing conclusions on the content of that customary obligation and the threshold for its application. As established above, a riparian State is obliged to notify and consult the other riparian States about any planned measures that pose a risk of significant transboundary harm.

126. Consequently, the Court would only need to consider the question whether Bolivia has conducted an objective assessment of the circumstances and of the risk of significant transboundary harm in accordance with customary law if it were established that any of the activities undertaken by Bolivia in the vicinity of the Silala posed a risk of significant harm to Chile. This could be the case if, by their nature or by their magnitude, and in view of the context in which they are to be carried out, certain planned measures pose a risk of significant transboundary harm (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in*

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

Costa Rica along the San Juan River (Nicaragua v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 720-721, para. 155).

127. However, this cannot be said of the measures taken by the Respondent about which Chile complains. Chile has not demonstrated or even alleged any risk of harm, let alone significant harm, linked to the measures planned or carried out by Bolivia. The Court notes that Bolivia has provided a number of factual details about the planned measures, which have not been disputed by Chile. Thus, no steps were taken to implement the plans to allow the Bolivian company DUCTEC to use the waters. No action was taken in respect of the projects to build a fish farm, a weir and a mineral water bottling plant. As for the ten small houses that were built, Bolivia has asserted, without contradiction from Chile, that these have never been inhabited. Only the military post was in fact built and put into operation. Bolivia has stated in this regard that the post in question is modest and that it took all necessary measures to prevent the contamination of the Silala and its waters. Chile has not claimed otherwise, nor alleged that any of the measures planned or carried out were capable of causing the slightest risk of harm to Chile.

128. For these reasons, the Court finds that Bolivia has not breached the obligation to notify and consult incumbent on it under customary international law, and the claim made by Chile in its final submission *(e)* must therefore be rejected.

129. Notwithstanding the above conclusion, the Court takes note of Bolivia's willingness to continue to co-operate with Chile with a view to guaranteeing each Party an equitable and reasonable use of the Silala and its waters. The Court thus invites the Parties to bear in mind the need to conduct consultations on an ongoing basis in a spirit of co-operation, in order to ensure respect for their respective rights and the protection and preservation of the Silala and its environment.

IV. COUNTER-CLAIMS OF BOLIVIA

1. ADMISSIBILITY OF THE COUNTER-CLAIMS

130. In its Counter-Memorial, Bolivia made three counter-claims (see paragraph 26 above). The Court, in its Order of 15 November 2018, did not consider that it was required to rule definitively, at that stage of the proceedings, on the question of whether Bolivia's counter-claims met the conditions set forth in the Rules of Court and deferred the matter to a later stage (*Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Order of 15 November 2018, I.C.J. Reports 2018 (II)*, p. 705). Before considering the merits of the counter-claims, the Court will therefore determine whether they fulfil the conditions set forth in its Rules.

131. Article 80, paragraph 1, of its Rules provides that "[t]he Court may entertain a counter- claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party". The Court has previously characterized these two requirements as relating to "the admissibility of a counter-claim as such" and has explained that the term "admissibility" must be understood "to encompass both the jurisdictional requirement and the direct connection requirement" *(Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 208, para. 20).

132. Bolivia maintains that its counter-claims fulfil the requirements of Article 80, paragraph 1, of the Rules of Court. It contends that the counter-claims come within the jurisdiction of the Court and are connected with the principal claims in accordance with the Rules and the jurisprudence of the Court.

133. The Court recalls that Chile stated, in a letter to the Registry and then through its representative at a meeting between the President of the Court and the Agents of the Parties, that it did not intend to contest the admissibility of Bolivia's counter-claims (*Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Order of 15 November 2018, I.C.J. Reports 2018 (II)*, pp. 704-705).

134. The Court notes that Chile does not contest that the counter-claims come within the Court's jurisdiction. It also notes that Bolivia, like Chile, founds the Court's jurisdiction over the counter-claims on Article XXXI of the Pact of Bogotá. The Court observes that the counter-claims concern rights claimed by Bolivia under the customary

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

international law applicable to international watercourses and therefore fall within "[a]ny question of international law" in respect of which the Court has jurisdiction under Article XXXI of the Pact of Bogotá.

135. The Court further recalls that in accordance with its jurisprudence, it is for the Court,

> "in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and [that], as a general rule, the degree of connection between the claims must be assessed both in fact and in law" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, pp. 204-205, para. 37).

136. The Court considers that, in this case, the counter-claims are directly connected with the subject-matter of the principal claims, both in fact and in law. It is indeed clear from the Parties' submissions that their claims form part of the same factual complex. Similarly, the respective claims of both Parties concern the determination and application of customary rules in the legal relations between the two States with regard to the Silala. The Court is also of the view that Bolivia's counter-claims are not offered merely as defences to Chile's submissions but set out separate claims (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27).

137. The Court thus concludes that the requirements of Article 80, paragraph 1, of its Rules are met and that it may examine Bolivia's counter-claims on the merits.

2. First counter-claim: Bolivia's alleged sovereignty over the artificial channels and drainage mechanisms installed in its territory

138. In its first counter-claim, Bolivia requests the Court to adjudge and declare that it has sovereignty over the artificial channels and drainage mechanisms in the Silala located in its territory and that it has the right to decide whether and how to maintain them. It adds that this counter-claim should be uncontroversial, first, because such sovereignty is clearly recognized in international law and in the jurisprudence of the Court and, second, because Chile does not contest, in principle, that Bolivia possesses such sovereign rights.

139. Bolivia nonetheless states that Chile has left it unclear whether it unconditionally accepts Bolivia's sovereign right over the infrastructure of the Silala, which is why it has maintained this counter-claim. It points out in this respect that, contrary to its final submissions, Chile continues to suggest that Bolivia's sovereign rights over that infrastructure are subject to a number of conditions. According to Bolivia, Chile's conditions aim implicitly to guarantee to the Applicant an "acquired right" to its current use of the waters of the Silala. If Chile were to accept unconditionally Bolivia's sovereign right to maintain or dismantle the infrastructure on the Silala, the Court should then, in Bolivia's view, make a formal finding that there is no longer a dispute between the Parties in respect of the first counter-claim.

*

140. In response to this counter-claim of Bolivia, Chile asserts that it has always recognized Bolivia's sovereignty over the channels located in its territory and does not therefore contest Bolivia's right to dismantle them. In Chile's view, there is no dispute between the Parties in respect of these two points. Chile argues that even if the Court were to consider that a dispute existed at the time Bolivia filed its counter-claim, the exchanges of written pleadings between the Parties in the present case have deprived this counter-claim of its object.

141. In addition, Chile denies that it is claiming any "acquired right" over the waters of the Silala. In this regard, it states that its assertion that Bolivia's sovereign rights, in particular the right to dismantle the channels, must be exercised in accordance with the principles of customary international law applicable to international watercourses is not a condition imposed by Chile but a statement of law. If this counter-claim were to amount to Bolivia seeking the prerogative to be exempt from the international law by which it is bound in the event of the channels being dismantled, then it should, in Chile's view, be rejected.

* *

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

142. The Court has previously stated that, as is the case with principal claims, it "must establish the existence of a dispute between the parties with regard to the subject-matter of the counter-claims" *(Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017*, p. 311, para. 70). Given that the Parties' positions have changed considerably throughout the present proceedings, as already noted, the Court must satisfy itself that the first counter-claim has not become without object (see paragraph 42 above).

143. The Court observes in respect of this counter-claim that the Parties agree that the artificial channels and drainage mechanisms are located in territory under Bolivia's sovereignty. Both States also agree that, under international law, Bolivia has the sovereign right to decide what becomes of the infrastructure in its territory in the future, and whether to maintain or dismantle it.

144. In this regard, Bolivia contends that, in invoking the right to equitable and reasonable utilization in relation to this counter-claim, Chile seems to consider that the effect of dismantling infrastructure on the flow of the river should be regarded as a potential breach of its right to use the waters of the Silala. In Bolivia's view, this amounts to claiming an "acquired right", meaning that Chile's use of these waters, or any use it might make of them in the future, could be set against Bolivia's right to dismantle the artificial installations. The Court notes in this regard that Chile clearly stated in its written pleadings, and repeated in the oral proceedings, that any reduction in the transboundary surface flow resulting from the dismantling of channels in Bolivia would not be considered a violation of customary international law unless the obligations acknowledged by Bolivia were somehow engaged.

145. Moreover, Chile has accepted the following points presented by Bolivia: Bolivia's sovereignty over the channels and drainage mechanisms; Bolivia's sovereign right to maintain or dismantle those channels and drainage mechanisms; Bolivia's sovereign right to restore the wetlands; and the fact that these rights must be exercised in compliance with the customary obligations applicable with regard to significant transboundary harm. The Court concludes that in respect of these points there is no longer any disagreement between the Parties.

146. As noted above, the Parties agree that Bolivia's right to construct, maintain or dismantle the infrastructure in its territory must be exercised in accordance with the applicable rules of customary international law (see paragraph 75). In particular, Bolivia clearly stated during the oral proceedings that its sovereign right over this infrastructure, including the right to dismantle it, must be exercised in compliance with the customary obligations applicable with regard to significant transboundary harm. The Parties also agree that the rules applicable to the Silala include, in particular, the right to equitable and reasonable utilization by riparian States, the exercise of due diligence to avoid causing significant harm to other watercourse States, and compliance with the general obligation to cooperate as well as with all procedural obligations (see paragraphs 64, 85 and 102 above). It is possible that the Parties may, in the future, express divergent views on the implementation of these obligations in the event of infrastructure installed on the Silala being dismantled. This possibility, however, does not alter the fact that Chile does not contest the right which is the subject-matter of the first counter-claim, namely Bolivia's right to maintain or dismantle the channels located in its territory. The Court considers that Bolivia may rely on Chile's acceptance of Bolivia's right to dismantle the channels.

147. In light of the foregoing, the Court concludes that there is no disagreement between the Parties. In accordance with its judicial function, the Court may pronounce only on a dispute that continues to exist at the time of adjudication (see paragraph 42 above). Consequently, the Court finds that the counter-claim made by Bolivia in its final submission *(a)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

3. SECOND COUNTER-CLAIM: BOLIVIA'S ALLEGED SOVEREIGNTY OVER THE "ARTIFICIAL" FLOW OF SILALA WATERS ENGINEERED, ENHANCED OR PRODUCED IN ITS TERRITORY

148. In its second counter-claim as presented in its final submissions, Bolivia requests the Court to adjudge and declare that it has sovereignty over the artificial flow of Silala waters engineered, enhanced or produced in its territory, and that Chile has no acquired right to that artificial flow. It thus argues that Chile has for many years benefited, without paying any compensation, from an artificial flow generated by the infrastructure installed on the Silala by Bolivia, adding that Chile has no acquired right to the maintenance of that flow. Chile's right to the equitable and

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

reasonable utilization of the waters of the Silala does not create an obligation for Bolivia to maintain the infrastructure in its territory and the flows "generated" by it.

149. Bolivia maintains that Chile has acknowledged all the propositions underlying the second counter-claim. It points out that Chile has recognized Bolivia's sovereign right to maintain or dismantle the infrastructure located in its territory if it so wishes. According to Bolivia, Chile also agrees that dismantling that infrastructure could have an impact on the "enhanced" flow, which, unlike the "natural" surface flow and the groundwater, would disappear. Bolivia also recalls that Chile stated both that it was not claiming an acquired right to the flow of water generated by the channels and that a reduction in that flow as a result of the channels being dismantled would not in itself constitute a violation by Bolivia of its obligations under customary international law. For Bolivia, its second counter-claim is the logical consequence of these points of agreement with Chile. Bolivia states that in this counter-claim it is asserting its sovereign right to eliminate the "enhanced" surface flow, a right which stems directly from its right to dismantle the channels, without this giving rise to a violation of international law. Bolivia argues that there is no longer any real dispute between the Parties over this issue, since Chile has accepted all the propositions underlying the second counter-claim, which should therefore be upheld.

*

150. Responding to Bolivia's second counter-claim, Chile argues that, although this counter-claim has evolved considerably, or even completely changed, over the course of the present proceedings, it is still indefensible in international law. Chile states in this regard that the counter- claim continues to be based on a non-existent distinction in customary international law between the "natural flow" and "artificial flow" of an international watercourse and on the proposition that the "artificial flow" should be exempted from the law on international watercourses.

151. Chile also points out that Bolivia's second counter-claim is based on a misinterpretation of Chile's position as set out in its submission *(c)* such that Chile would be claiming an acquired right over the waters of the Silala. Chile contends that this interpretation is erroneous and that it is seeking no such right. It recalls that the Silala is an international watercourse and, as such, is subject in its entirety to customary international law. According to Chile, Bolivia cannot therefore claim a sovereign right over a portion of a shared international watercourse which would in any event eventually flow into Chile, save for minimal evaporation losses.

* *

152. The Court notes that the wording of this counter-claim and Bolivia's position thereon have changed considerably throughout the proceedings, in particular as a result of its evolving positions and submissions on the nature of the Silala. As mentioned above (see paragraph 53), Bolivia no longer contests the nature of the Silala as an international watercourse and now acknowledges that customary international law applies to the entirety of its waters. The Court further notes that Bolivia no longer claims, as it did in its written pleadings, that it has the right to determine the conditions and modalities for the delivery of the "artificially flowing" waters of the Silala and that any use of such waters by Chile is subject to Bolivia's consent. Bolivia now argues that Chile may continue to benefit in an equitable and reasonable manner from the flow resulting from the installation and channelizations of the Silala springs, so long as the flow continues. What Bolivia now seeks in this counter-claim is a declaration that Chile does not have an "acquired right" to the maintenance of the current situation, and that Chile's right to the equitable and reasonable utilization of the surface flow generated by the channels is not a "right for the future" that would allow it to oppose either the dismantling of those installations or any equitable and reasonable utilization of the waters that Bolivia may claim under customary international law.

153. The Court observes that the meaning ascribed by Bolivia to the term "sovereignty" is no different in substance from the "sovereign right" that Chile recognizes Bolivia to have over the infrastructure installed in Bolivian territory. Bolivia stated that when it refers to its "sovereignty" over the "enhanced flow", it means that its right over the channel works and its right to dismantle them, which Chile does not dispute, allow it to decide whether the flow generated by those works will be maintained or whether it will cease as a result of the works being dismantled. According to Bolivia, the right that it claims is not an autonomous one but rather stems from its recognized right

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

to maintain or dismantle all the installations in its territory. In this regard, the Court notes Chile's statement that Bolivia's right over the infrastructure was "wholly uncontroversial" and that Chile did not object to it.

154. The Court also observes that the second counter-claim, as presented in Bolivia's final submissions, rests on the premise that Chile is claiming an "acquired right" over the current flow of the Silala. As the Court noted earlier, Chile has clearly stated, first, that it is not claiming any such "acquired right" (see paragraph 67 above) and, second, that it recognizes that Bolivia has a sovereign right to dismantle the infrastructure and that any resulting reduction in the flow of the waters of the Silala into Chile would not in itself constitute a violation by Bolivia of its obligations under customary international law (see paragraphs 75 and 147 above). Consequently, the Court concludes that there is no longer any disagreement between the Parties on this point.

155. In light of the foregoing, the Court finds that, as a consequence of the convergence of views between the Parties on the second counter-claim made by Bolivia in its final submission *(b)*, this counter-claim no longer has any object, and that, therefore, the Court is not called upon to give a decision thereon.

4. THIRD COUNTER-CLAIM: THE ALLEGED NEED TO CONCLUDE AN AGREEMENT FOR ANY FUTURE DELIVERY TO CHILE OF THE "ENHANCED FLOW" OF THE SILALA

156. In its third counter-claim as presented in its final submissions, Bolivia requests the Court to adjudge and declare that any request addressed by Chile to Bolivia for the delivery of the enhanced flow of the Silala, and the conditions and modalities thereof, including the compensation to be paid for any such delivery, are subject to the conclusion of an agreement with Bolivia. Bolivia states that this counter-claim addresses the situation in which it decides to dismantle the channel works on the Silala, as is its right, and Chile indicates that it would prefer the works to remain in place so as to continue to receive the "enhanced" surface flow produced by those works. Bolivia argues that, in such a case, the conditions and modalities for keeping the channels in operation and maintaining the current flow, and the compensation due to Bolivia for doing so, would need to be the subject of a negotiated agreement between the two States.

objection to Bolivia dismantling the works on the Silala, but it points out that this position of Chile is new and that Chile might have an interest in the maintenance of the channels. Bolivia also claims that international law encourages the conclusion of agreements in such situations. It states that it is in this spirit that it advanced its third counter-claim, which is designed to meet the "particular" and "quite special" circumstances characterizing the waters in their upper reaches in its territory, as well as the interests and needs of both Parties.

*

158. Chile asserts that Bolivia's third counter-claim is premised on an erroneous legal basis. It argues that Bolivia continues to base its third counter-claim on alleged sovereignty over "artificial flows" that does not exist in international law. It states in this regard that Bolivia has no sovereignty over any part of the Silala River and cannot claim compensation from Chile for the use of waters that flow naturally into its territory.

159. Chile also considers that Bolivia's third counter-claim is based on a purely hypothetical future scenario which has no basis in actual fact. According to Chile, this counter-claim is dependent on a double hypothetical: that Bolivia communicates to Chile that it is going to dismantle the channels and that Chile requests Bolivia to retain the channels in place. Chile points out that this hypothetical scenario ignores the fact that it has repeated throughout the proceedings that it encourages Bolivia to dismantle the channels, that it considers this to be a matter for Bolivia alone and, lastly, that it has no doubt that dismantling the channels will not materially affect the Silala's flow.

* *

160. As already noted (see paragraph 48), it is not for the Court to pronounce on hypothetical situations. It may rule only in connection with concrete cases where there exists at the time of the adjudication an actual dispute between the parties.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

161. This is, however, not the case with Bolivia's third counter-claim, which does not concern an actual dispute between the Parties. Rather, it seeks an opinion from the Court on a future, hypothetical situation.

162. For these reasons, the counter-claim made by Bolivia in its final submission *(c)* must be rejected.

*

* *

163. For these reasons,

THE COURT,

(1) By fifteen votes to one,

Finds that the claim made by the Republic of Chile in its final submission *(a)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

(2) By fifteen votes to one,

Finds that the claim made by the Republic of Chile in its final submission *(b)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

(3) By fifteen votes to one,

Finds that the claim made by the Republic of Chile in its final submission *(c)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

(4) By fourteen votes to two,

Finds that the claim made by the Republic of Chile in its final submission *(d)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judges* Robinson, Charlesworth;

(5) Unanimously,

Rejects the claim made by the Republic of Chile in its final submission *(e)*;

(6) By fifteen votes to one,

Finds that the counter-claim made by the Plurinational State of Bolivia in its final submission *(a)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

(7) By fifteen votes to one,

Finds that the counter-claim made by the Plurinational State of Bolivia in its final submission *(b)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges* ad hoc Daudet, Simma;

AGAINST: *Judge* Charlesworth;

(8) Unanimously,

Rejects the counter-claim made by the Plurinational State of Bolivia in its final submission *(c)*.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this first day of December, two thousand and twenty-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Chile and the Government of the Plurinational State of Bolivia, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

Judges TOMKA and CHARLESWORTH append declarations to the Judgment of the Court; Judge *ad hoc* SIMMA appends a separate opinion to the Judgment of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

DECLARATION OF JUDGE TOMKA

Power of the Court to interpret the submissions of the parties — Ordinary meaning to be given to the terms of the submissions — Decisive weight of the final submissions.

1. Today's Judgment of the Court most likely comes as a surprise to the Parties, in particular the Applicant. In fact, it decides almost nothing. Four of the final submissions of Chile are found to no longer have any object, and the last one is rejected. Of the three counter-claims made by Bolivia, the first two are found to no longer have any object, and the last one is rejected.

2. This outcome has been made possible by the Court's recourse to and reliance on its pronouncement in *Nuclear Tests (Australia* v. *France)* that it "is entitled to interpret the submissions of the Parties, and in fact is bound to do so; this is one of the attributes of its judicial functions" (Judgment, para. 43, referring to *I.C.J. Reports 1974*, p. 262, para. 29). As is well known, the approach adopted in that case was criticized by several Members of the Court who "vigorously dissent[ed]" (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, *I.C.J. Reports 1974*, p. 312, para. 1). They argued that the 1974 Judgment's "basic premise fail[ed] to correspond to and even change[d] the nature and scope of . . . formal submissions as presented in the Application" (*ibid.*, para. 3).

3. I accept that the Court may be entitled to interpret the final submissions of a party, in particular when their true meaning is not sufficiently clear. The Court is also entitled to seek clarification from the party that has formulated them. However, the Court should avoid an interpretation that is at odds with the ordinary meaning of the words and legal concepts used in the final submissions. While counsel for a party may use various formulations to advance the interests of a party, the decisive weight shall be put on the final submissions read out by the agent and subsequently submitted to the Registry in written, duly signed form.

4. It remains to be seen what useful role, if any, this Judgment will play in the relations between Chile and Bolivia.

(Signed) Peter TOMKA.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

DECLARATION OF JUDGE CHARLESWORTH

Concurrence with the Court's findings in relation to two submissions — Disagreement with the Court's conclusion that the remaining claims and counter-claims no longer have any object — Complexity and uncertainty introduced by the Judgment in relation to the legal consequences of the disappearance of a dispute — Distinction between the disappearance of a claim's object and the convergence of the parties' positions.

Nuclear Tests *cases — Object of the claim achieved through a party's unilateral undertaking — Difference from the present case — No finding concerning the legally binding effect of the Parties' statements — Permissibility of a legally binding judgment in the absence of legal commitments by the parties.*

Lack of convergence of positions between the Parties — Duty to issue a declaratory judgment.

Permissibility of judgments recording an agreement arrived at after the Court's seisin — The role of a declaratory judgment in ensuring that the parties commit to their positions — Practical consequence of declaratory judgments in removing uncertainty from the parties' legal relations.

I. Introduction

1. As indicated by the title of the case, today's Judgment is meant to resolve a "dispute over the status and use of the waters of the Silala", the international watercourse shared between the Parties. The Court addresses five claims made by the Applicant and three counter-claims made by the Respondent and, in the Judgment's operative paragraph, it rejects one of the Applicant's claims and one of the Respondent's counter-claims (Judgment, para. 163 (5) and (8)). I concur with both these rejections.

2. The remaining claims and counter-claims concern several other important aspects of the Parties' relations as riparian States. I am in full agreement with the Court's reasoning in respect of the rights and obligations of States sharing an international watercourse. And yet, despite its thorough analysis, the Court neither upholds nor rejects any of the remaining claims and counter-claims. Instead, regarding each of them, the Court examines the Parties' pleadings and final submissions with a view to ascertaining whether the Parties "have come to agree in substance" (Judgment, para. 46). After affirming the Parties' convergence of positions, the Court concludes that each of these claims and counter-claims "no longer has any object", which in turn entails that the Court "is not called upon to give a decision thereon" (Judgment, para. 163). Rather than resolving the dispute brought before it, the Court has thus shifted its attention to the question — at issue between the Parties — as to whether that dispute persists.

3. To my regret, I cannot join the Court in its diversion to this "meta-dispute", nor in its method of approaching this question, nor in the answer at which it arrives. In my view, the Court's analysis introduces new uncertainties into the concept of a dispute (II). The concept of the convergence of positions finds no basis in the Court's jurisprudence (III), and it does not fit the facts of these proceedings well (IV). Finally, it seems to me that the Court's reasoning underestimates the contribution a declaratory judgment may make in this case (V).

II. Disappearing disputes

4. A central tenet of the Court's jurisprudence is that the exercise of the Court's jurisdiction rests on the existence of a dispute[1]. As a matter of principle, the elements on which the Court's jurisdiction depends must be fulfilled at the time of the institution of proceedings[2]. The existence of a dispute is no different[3]. This is illustrated in *Obligation to Prosecute or Extradite* and *Frontier Dispute (Burkina Faso/Niger)*, in which the Court had to ascertain whether a disagreement between the parties | if one had ever existed | had disappeared by the time that the Court was seised[4]. Unlike the present case, the question in those cases was not whether the parties' positions on a legal issue converged after the institution of proceedings, but rather whether they had converged beforehand. They were then standard cases where the existence of a dispute was ascertained with reference to the date of the institution of proceedings.

5. By contrast, the Court has rarely dealt with a dispute's disappearance in the course of the proceedings, or with the consequences of such disappearance. On a few occasions the Court has contemplated the possibility that a dispute might disappear in the course of the proceedings[5], but it has never identified the grounds for such disappearance nor

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

its legal consequences. Even in *Nuclear Tests* the decisive feature precluding a judgment on the merits was not the disappearance of the dispute as such, but rather the fact that the object of the claim had been achieved, as I explain below.

6. This Judgment expands the concept of the disappearance of a dispute and, in doing so, it separates the dispute requirement from all other jurisdictional elements. The fulfilment of all other preliminary requirements at the time of the institution of proceedings is, in principle, a necessary but also a sufficient condition for the establishment of the Court's jurisdiction. For example, lapse of the jurisdictional title after the institution of proceedings does not deprive the Court of jurisdiction over pending cases[6]. When it comes to the existence of a dispute, however, according to the Judgment, fulfilment of the requirement at the time of the institution of proceedings is a necessary but not a sufficient condition because the dispute must continue to exist at the time of adjudication (Judgment, para. 147; see also para. 41).

7. The Judgment does not explain why the existence of a dispute should differ from all other jurisdictional requirements in this respect. Nor does the Judgment indicate the precise legal effects of the disappearance of a dispute, in particular whether such disappearance deprives the Court of its jurisdiction, perhaps even retroactively, or whether it renders the application inadmissible. While this issue is without practical effect in the present case, the Court's pronouncement may be put to the test where the Court's jurisdiction has been affirmed through a binding judgment (for example, on preliminary objections), only to be later called into question owing to the dispute's disappearance in the meantime[7].

8. There is no doubt that the Court's function in contentious cases is "to decide . . . disputes"[8]. Appeal to this proposition, however, does not provide any helpful conclusions as to the Court's role in ascertaining the continued existence of a dispute. More importantly, to the extent that a dispute persists, albeit in a reduced form, adjudication does not run counter to the Court's function. Any risk of judicial overreach is sufficiently addressed through the application of other principles, notably the *non ultra petita* principle, according to which the Court is only entitled to decide on questions submitted to it[9].

9. In my view, the Court's analysis adds an unnecessary level of complexity and uncertainty to the jurisprudence on the concept of a dispute. There is also a certain inconsistency in the Court's appreciation of events taking place in the course of the proceedings, in so far as the existence of a dispute is concerned. Whereas the Court has lately been reluctant to accept that a dispute may crystallize through the exchanges between the parties in the course of the proceedings[10], it is prepared to accept that such exchanges may serve to shrink or extinguish a dispute.

10. The Court's entire analysis today is based on the premise that it is possible for "specific claims [to] have become without object as a consequence of a convergence of positions or agreement between the Parties, or for some other reason" (Judgment, para. 42). The Court's reasoning, in my view, leads to the merger of two quite distinct issues: the first concerns the circumstances under which a claim is deprived of its object, while the second concerns the legal effects of a convergence of positions between the parties to a dispute. I will examine these two issues separately in turn.

III. The disappearance of the object of a claim

11. The Judgment points out that the Court may refrain from rendering a judgment where an application has become without object (Judgment, para. 41). The jurisprudence cited by the Court, however, does not illuminate the grounds on which an application might lose its object; in particular, it provides no support for the proposition that the convergence of the parties' positions, or the shrinkage of a dispute, constitutes a ground that deprives an application of its object. Even less so does this jurisprudence indicate that the convergence of the parties' positions on a specific *claim* deprives that claim of its object.

12. The passages from *Border and Transborder Armed Actions*[11] and *Arrest Warrant*[12] cited in the Judgment affirm that events subsequent to the filing of the application may render that application without object. The events envisaged (explicitly or implicitly) in those cases did not however concern a convergence of the parties' positions with respect to the questions previously dividing them. The Judgment also relies on *Northern Cameroons*, in which the Court declined to adjudicate the application brought before it by Cameroon seeking a declaration that the

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

United Kingdom had failed to respect various terms of the Trusteeship Agreement for the Territory of the Cameroons under British Administration[13]. The Court took this course, however, not because the applicant's claim had become without object, but rather because any *judgment* that the Court might pronounce would be without object on account of the intervening termination of the Trusteeship Agreement[14]. In any event, that case did not involve a situation where the positions between the parties had converged.

13. This brings me to the *Nuclear Tests* Judgments, to which both Parties[15] and the Court (Judgment, paras. 41 and 43) turn in support of the proposition that the disappearance of a dispute precludes adjudication by the Court. On my reading, those cases are quite distinct from the situation here. In *Nuclear Tests*, the dispute brought before the Court by each applicant (Australia and New Zealand) essentially consisted of a single claim: a request for a declaration on the unlawfulness of atmospheric testing of nuclear weapons by the respondent (France)[16]. The Court's reasoning unfolded in three steps. First, the Court "ascertain[ed] the true object and purpose of the claim"; in the Court's view, the object of the claim was "to obtain a termination of those tests" by the respondent[17]. Second, the Court affirmed that the respondent had made a legally binding undertaking outside the Court to terminate its nuclear testing[18]. Indeed, a considerable part of the *Nuclear Tests* Judgments is devoted to an exposition of the indicators of a unilateral act's legally binding character and to an analysis of France's statements against that background[19]. It was only after that finding that the Court, at a third stage, concluded that the dispute between the parties had disappeared "because the object of the claim ha[d] been achieved by other means"[20]. The Court thus essentially held that any legally binding judgment that it might deliver in favour of the applicants would be redundant, because the respondent had already undertaken a legally binding obligation *erga omnes* to the same effect. In other words, the respondent's legally binding undertaking was a substitute for the legally binding judgment that the applicants sought to obtain[21]. The same underlying idea emerges from *Fisheries Jurisdiction*, where the Court indicated that a legally binding agreement outside of Court might render a judgment by the Court without object[22].

14. This case is quite different. First of all, it is common ground that the dispute concerns the status and use of the waters of the Silala. Unlike *Nuclear Tests*, there is no suggestion by the Court, or indeed by the Parties, that either Party pursues a different "true" object when advancing its claims or counter-claims. Second, and more importantly, there is no indication in the Judgment that the object of any claim or counter-claim has been achieved by other means, or specifically that an intervening act had a similar effect to that of France's unilateral undertakings in *Nuclear Tests*. Consequently, the Court's leap directly to the third step of the *Nuclear Tests* reasoning — namely to a finding that a claim (or counter-claim) has become without object — is puzzling.

15. It is true that the Judgment attaches great weight to the statements made by the Parties in the course of the proceedings. The Court correctly observes that it presumes the "good faith" of the parties in making statements before it (Judgment, para. 46). At various other places, the Court "takes note" of the fact that a Party has accepted the soundness of the other Party's argument (Judgment, paras. 58 and 75), and it states that one Party "may rely" on the position adopted by the other Party in the course of the proceedings (Judgment, para. 146). That a statement is made in good faith, however, does not necessarily imply that the State making it intends to be legally bound by it[23]. Besides, the Court stops short of explaining the legal effect of a Party's reliance in its counterpart's representations, or indeed of a subsequent shift in the Parties' positions. In doing so, the Judgment raises questions such as whether a Party would be precluded from reverting to the position that it has now abandoned[24], and whether this bar would operate in the context of judicial proceedings only, or whether it would extend to any bilateral negotiations between the Parties.

16. If anything, the *Nuclear Tests* Judgments illustrate that the Court should exercise great caution when ascertaining whether a claim has become without object by the time of the Court's judgment. Where the parties have committed to legally binding obligations (whether unilaterally or in concert) outside the Court, it may be unnecessary for the Court to discharge its function through a legally binding judgment, because the parties' undertakings offer the requisite legal security; this is effectively the situation in *Nuclear Tests*. In the absence of legally binding commitments, however, it is difficult to see why the exercise of the Court's jurisdiction runs counter to the Court's judicial function. Quite to the contrary, the Court held "that there [was] no incompatibility with its judicial function in making a pronouncement on the rights and duties of the Parties under existing international law" in *Fisheries Jurisdiction*, even though the parties had concluded an interim agreement while the case was pending[25]. In reaching this

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

conclusion, the Court emphasized the provisional and temporally limited character of the interim agreement, which did not provide a waiver of claims by either party in respect of matters in dispute[26].

IV. Ascertaining the convergence of positions between the Parties

17. While *Nuclear Tests* refer to the dispute having "disappeared", the reason for such "disappearance" was not the convergence of the parties' positions on issues that divided them at the time of the institution of proceedings. Rather, France's undertaking to cease atmospheric nuclear testing bypassed the need to rule on any potential divergence of those positions. In fact, in no case has the convergence of the parties' positions led to a conclusion that a dispute has disappeared, nor have such far-reaching conclusions been drawn from a disappearance.

18. The Court here adopts a rather impressionistic approach to ascertain whether the Parties are in agreement or not[27]. Invoking its power to interpret the submissions of the Parties, the Court ventures to establish why, despite their ostensible disagreement, the Parties in substance have come to agree on several questions previously dividing them. Yet it is one thing to interpret the Parties' final submissions, but it is quite another to overlook them entirely, as if they were abandoned in the course of the proceedings. The Court has cautioned that "[a]bandonment cannot be presumed or inferred; it must be declared expressly"[28]. Indeed, the oral proceedings revealed that there remains some ambiguity about the extent of the agreement between the Parties on particular issues: the concessions by each Party with respect to its counterpart's submissions tended to be carefully qualified. Despite the explanations given orally, none of the Parties' submissions was formally withdrawn or amended significantly.

19. Given that the Court has a "duty . . . to reply to the questions as stated in the final submissions of the parties"[29], in my view it should have done so here through a declaratory judgment, as it has done on multiple occasions in the past[30]. Declarations clarifying the legal situation between the parties can assist in stabilizing the legal relations between them. Unlike the situation in *Northern Cameroons*, such a judgment in the present case would have "practical consequence[s] in the sense that it c[ould] affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations"[31].

V. The consequences of a convergence of positions

20. Even if it is established that the Parties' positions have converged in the course of the proceedings, in my view it was necessary and appropriate for the Court to issue a declaratory judgment recording the Parties' agreement, as the Permanent Court did in similar situations. It is relatively rare, of course, that the parties should come to an agreement in the course of the proceedings but not seek to discontinue the case under Article 88 of the Rules of Court[32]. Within this atypical set of cases, however, judgments recording the parties' agreement seem not only unexceptional but also the most reasonable course of action. A case in point is *Société Commerciale de Belgique*, in which the Permanent Court noted, in the operative clause of its Judgment, the agreement that had been reached in the course of the proceedings[33]. The Court's predecessor has affirmed that such judgments were in line with the spirit of its Statute[34]. This suggests that it was not only within the Court's power but also its duty to issue such judgments, to the extent that they facilitated the direct and friendly settlement of disputes between the parties[35].

21. The same principles apply to this Court[36]. Of course, if the parties arrive at an agreement prior to the Court's seisin, then there exists no dispute at the time of the institution of proceedings (see paragraph 4 above). In such a case, it is reasonable for the Court to refrain from recording in a judgment the parties' antecedent agreement, as is illustrated in *Frontier Dispute (Burkina Faso/Niger)* (see Judgment, para. 46). Nonetheless, as the Court observed in that case, a situation in which the parties seek a judgment recording an agreement that had been reached prior to the Court's seisin is readily distinguishable from a situation where the parties come to an agreement during the proceedings[37]. In the Court's terms, it is at the very least "understandable" for the Court to note, "in the operative part of its Judgment, [an] agreement arrived at between the Parties during the proceedings, an agreement whose existence [is] bound to influence the settlement on the merits of the dispute originally brought before the Court"[38].

22. A judgment recording the points of agreement is in the interest of legal certainty between the parties because it ensures that the parties commit to their positions. By contrast, if a judgment identifies the parties' positions as they stand at present but refrains from drawing consequences therefrom with respect to the parties' respective rights and obligations, there remains a risk that the parties might change their positions in the future. This risk was anticipated in

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

Nuclear Tests, where the Court observed that "if the basis of this Judgment were to be affected", the applicants could request "an examination of the situation" underlying the case[39]. Leaving aside the question of whether the Pact of Bogotá or any other jurisdictional title between the Parties will remain in force in the future, the prospect of new proceedings for the resolution of questions that have already been put forward to the Court is in tension with the sound administration of justice.

23. States commonly assert rights for themselves or obligations for other States, which are equally commonly contested by those other States. In most cases both parties' positions in such situations are based on a reasonable appreciation of the law in good faith, even if both positions cannot be legally correct simultaneously. Where applicable jurisdictional requirements are fulfilled, a State finding itself in such a situation is able to seek judicial recourse before the Court and to have its dispute resolved by means of a legally binding judgment. In particular, a State claiming that it enjoys a right, or that its adversary bears an obligation, has an interest in having the claimed right or obligation definitively affirmed or rejected in a legally binding judgment by the Court possessing jurisdiction. Despite its careful elaboration of the customary law of international watercourses, the Court has not responded to this interest in the present case. In my view, the Court should have moored its sound analysis at its natural berth, the operative paragraph of the Judgment.

(Signed) Hilary CHARLESWORTH.

ENDNOTES

1 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 441, para. 45; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 269, para. 33.

2 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-80; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 115, para. 31.

3 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 271, para. 39; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment of 22 July 2022* (not yet reported), para. 64.

4 *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 442-443, para. 48; *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 71, para. 52; see also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 874, para. 138.

5 For example, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012 (I)*, p. 146, para. 112; *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 294-295, paras. 34-36; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 272, para. 40.

6 *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, pp. 122-123; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 18, para. 33.

7 Compare *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 94, para. 123.

8 Art. 38, para. 1, of the Statute; see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment of 22 July 2022* (not yet reported), para. 88.

9 See for example *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 19, para. 43

10 See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 272, para. 40; see also *ibid.*, declaration of President Abraham, pp. 279-280, paras. 4-8; compare *ibid.*, dissenting opinion of Judge Crawford, pp. 515-521, paras. 7-18.

11 *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66.

12 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 14-15, para. 32.

13 *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 15.

14 *Ibid.*, p. 38.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

15 CR 2022/7, p. 48, para. 35 (Forteau); CR 2022/13, p. 43, para. 10 (Pellet); CR 2022/9, p. 14, para. 17 (Boisson de Chazournes).

16 *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 460, para. 11; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 256, para. 11; note, in particular, that Australia's claim was interpreted as a single submission: *ibid.*, p. 260, para. 25.

17 *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 263, para. 30; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 467, para. 31.

18 *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 270, para. 52; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 475, para. 55.

19 *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 267-270, paras. 42-51; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 472-475, paras. 45-55.

20 *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 55; similarly in *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58.

21 See, to the same effect, *Frontier Dispute (Burkina Faso/ Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 577, para. 46.

22 *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 468, para. 88; the Court ultimately did not pronounce on this point.

23 Compare *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, paras. 43-44; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 472-473, paras. 46-47.

24 Compare *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018 (II)*, p. 558, para. 158.

25 *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 19, para. 40.

26 *Ibid.*, pp. 18-19, para. 38.

27 Compare *Southern Bluefin Tuna (Australia v. Japan; New Zealand* v. *Japan), Jurisdiction and Admissibility, Award of 4 August 2000*, United Nations, *Reports of International Arbitral Awards*, Vol. XXIII, pp. 37-38, paras. 45-46.

28 *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 26.

29 *Request for Interpretation of the Judgment of 20 November 1950 in* the Asylum Case (Colombia/Peru) *(Colombia/Peru), Judgment, I.C.J. Reports 1950*, p. 402.

30 See for example *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 53, para. 101, and *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Judgment, I.C.J. Reports 2020*, p. 338, para. 126 (1); see also *Certain German Interests in Polish Upper Silesia, Merits, Judgment, 1926, P.C.I.J. Series A, No 7*, pp. 18-19.

31 *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 34.

32 Examples of joint discontinuance owing to an agreement between the parties include *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Order of 10 September 2003, I.C.J. Reports 2003*, p. 149, and *Application for Revision of the Judgment of 23 May 2008 in the Case concerning* Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) *(Malaysia* v. *Singapore), Order of 29 May 2018, I.C.J. Reports 2018 (I)*, p. 284. I note that the Court does not lightly presume that a party, through some submission or argument, has discontinued the case: *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 294, para. 32; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 54, para. 24.

33 *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 178.

34 See *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 14. p. 13.

35 See *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*,

36 See *Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 33, para. 52; also *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 20, para. 35.

37 *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 72, para. 55.

38 *Ibid.*, para. 57.

39 *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; see also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case (New Zealand* v. *France), Order of 22 September 1995, I.C.J. Reports 1995*, pp. 305-306, para. 62.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

SEPARATE OPINION OF JUDGE *AD HOC* SIMMA

Existence of the dispute as a condition to the exercise of the Court's contentious jurisdiction — Question whether the dispute between the Parties continued to exist at the time of the decision — "Convergence of positions" not an agreement — Interpretation of the submissions of the Parties — Hollowed out dispute — The role of the Court in the pacific settlement of disputes.

1. I have voted with some reluctance in favour of the operative part of this Judgment. While I accept that the Court, being a court of justice, cannot exceed the inherent limitations incumbent upon it in the exercise of its judicial function, I wonder if justice is served when the Court renders a judgment of the kind it rendered today. Moreover, I am disappointed with the uncritical and somewhat impressionistic way in which the Court has ascertained whether certain points concerning the status and use of the waters of the Silala were still in dispute between the Parties at the time of the decision. These concerns have compelled me to append the present separate opinion.

2. It is a curiosity of this Judgment that it decides almost nothing. The Court has rendered a Judgment which is compact, almost "transactional" in form[1]. Of the five claims advanced by Chile and three counter-claims advanced by Bolivia, two are rejected (Judgment, paras. 128 and 162) and six are found to no longer have any object such that the Court is not called upon to give a decision thereon (*ibid.*, paras. 59, 65, 76, 86, 147 and 155). The reasons given in the Judgment are on the whole confined to recording the various shifts and changes in the Respondent's case made in the course of the proceedings. The operative part of the Judgment has little "operative" about it. With the exception of point 5, which concerns Chile's submission *(e)*, the operative part of the Judgment does not settle any of the points in dispute between the Parties (*ibid.*, para. 163 (5)).

3. Why did the Court render such a Judgment? How did the mountain give birth to the proverbial mouse? The answer lies in the disappearance of most of the points in dispute between the Parties during the proceedings. I wish to make three sets of observations in this regard.

I. THE DISAPPEARANCE OF CERTAIN POINTS IN DISPUTE

4. When in 2016 Chile instituted proceedings against Bolivia, the two neighbouring States had been embroiled in a dispute over the nature and use of the Silala waters for about twenty years. At the core of this dispute was a simple question: is the Silala River an international watercourse under customary international law? Chile affirmed that it was an international watercourse, and Bolivia denied this. For Bolivia, the Silala River was a national river whose waters had been diverted to Chile through channel works built at the beginning of the twentieth century. The Silala being a national river, it followed, in Bolivia's view, that Chile did not have a right to the equitable and reasonable use of the waters to which riparian States are entitled under customary international law. Chile's entitlement to an equitable and reasonable use of the waters thus turned on the nature of the Silala River under international law, which raised scientific and technical questions. By 1999, the nature of the Silala River had become a point of contention (Judgment, para. 34). The Parties' various efforts to find common ground over the years proved unfruitful. Finally, in 2016, the President of Bolivia denied that the Silala was an international river (*ibid.*, para. 37).

5. This statement appears to have prompted the Applicant to institute proceedings before the Court, asking, essentially, for a declaratory judgment as to the nature of the Silala River. This kind of judgment is designed to "ensure recognition of a situation at law, once and for all and with binding force as between the [p]arties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned"[2].

6. I do not find it necessary to dwell on the many ways the dispute has been altered by the Respondent's shifts and changes throughout the proceedings. The Court takes note of these shifts and changes with sobriety (Judgment, paras. 52, 53, 62, 68, 79 and 152). The basic point is that the Respondent admitted the soundness of the Applicant's case on the Silala and relinquished most of its claims. In their final submissions and in their oral arguments, both Parties therefore asked the Court to reject some or all of the other Party's submissions on the ground that they no longer had any object because the Parties agreed with respect to the subject-matter of these submissions.

7. Yet, the Parties were at pains to explain exactly what it is that they were agreed about.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

8. I agree that the existence of a dispute at the time of the decision is a condition for the Court to render a judgment on the merits and to pass upon the parties' submissions. As the Court emphasized in the case concerning *Nuclear Tests (Australia* v. *France)*, "[t]he dispute brought before [the Court] must . . . continue to exist at the time when the Court makes its decision"[3]. There must be an element of "actual" dispute.

9. The Judgment's test to decide whether a dispute has disappeared in the proceedings seems to me too low a bar. The Judgment asserts in paragraph 42 that the Court must "ascertain whether specific claims have become without object as a consequence of a *convergence of positions* or agreement between the Parties, or for some other reason" (emphasis added). I am not aware of any case where the Court has used the "convergence of positions" standard. To my mind, a finding that a point in dispute has disappeared during the proceedings calls for a high threshold because of the important repercussions it may have on the case. It may cause the Court to decide not to render a judgment or it may significantly narrow the decision to be rendered by the Court (as illustrated by the present Judgment). A "convergence of positions" is not an agreement. Parties before the Court may converge on the manner in which a problem arises but disagree on the solution of that problem. Parties whose views have converged may still wish to obtain from the Court a recognition and statement of the situation at law between them on the points which are still in dispute.

10. The Judgment concludes that the Parties agree on five claims, namely submissions *(a)*, *(b)*, *(c)* and *(d)* of Chile and Bolivia's counter-claim *(a)* (Judgment, paras. 59, 65, 76, 86 and 146-147). I agree. The Judgment also concludes that the Parties' positions have converged with regard to one submission, namely Bolivia's counter-claim *(b)* (*ibid.*, para. 155). I am more sceptical about this conclusion. This brings me to my second set of observations which touches on the Court's interpretation of Bolivia's counter-claim *(b)*.

II. THE INTERPRETATION OF THE PARTIES' SUBMISSIONS

11. The Court had to interpret the Parties' submissions to determine whether they reflected a dispute between them. The Judgment asserts that the Court "will take into account not only the submissions, but also, *inter alia*, the Application as well as all the arguments put forward by the Parties in the course of the written and oral proceedings" (Judgment, para. 43). Citing the case concerning *Certain German Interests in Polish Upper Silesia*, the Judgment also emphasizes that the Court has no power to "substitute itself for [the parties] and formulate new submissions simply on the basis of arguments and facts advanced"[4]. This is understood: the Court is always required to rule on the final submissions of the parties as formulated at the close of the oral proceedings[5].

12. I am not convinced that the Court faithfully followed the methodology thus stated when interpreting Bolivia's counter-claims, in particular counter-claim *(b)*.

13. For context: Bolivia's counter-claim *(b)*, as formulated in its Counter-Memorial and Rejoinder, asked the Court to adjudge and declare that "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" (Judgment, para. 26). This submission reflected Bolivia's new theory of its case (by then it had abandoned its diversion theory[6]) that the Silala waters are part of an "artificially enhanced watercourse". Bolivia referred to what it called the "artificial flow" of the Silala, explaining that international and domestic judicial decisions "recognize the legal relevance of the distinction between the existence of natural and artificial flows"[7]. It contended that its sovereignty over the waterworks located within its territory afforded it full sovereignty over the artificial flow of waters generated by the waterworks. The upshot of this view was that Chile could not use the "artificial flows" without Bolivia's consent. This was the theory underpinning counter-claim *(b)*.

14. Counter-claim *(b)* became untenable when, not a moment too soon during the oral proceedings, the Respondent acknowledged that Chile's right to make equitable and reasonable use of the waters of the Silala covers the entirety of the waters (Judgment, para. 63).

15. At this point, it may be thought that the Respondent would have abandoned its counter-claim. It did not. Instead, the Respondent reformulated counter-claim *(b)*, suggesting a strained interpretation which is inconsistent with that claim's very wording.

16. The counter-claim as reformulated by Bolivia at the end of the oral proceedings asks the Court to adjudge and declare that "Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

territory and Chile has no *acquired* right to that artificial flow" (emphasis added). The terms of the submission are clear, and the reader is justified in assuming that they mean what they say. The fig leaf added (the word "acquired") does not alchemize its purport. The origin of the submission must also be borne in mind. In the light of this, it escapes me how the Judgment interprets this submission as requesting the Court to adjudge and declare that Bolivia has the "sovereign right" to decide whether and how to maintain the channels and drainage mechanisms located in its territory (Judgment, para. 153)[8].

17. All the same, the Court adopts the Respondent's interpretation. Having adopted this interpretation, the Court is able to conclude that the positions of the Parties have converged on that claim and that, therefore, the Court is not called upon to give a decision thereon.

I note that the Court, in the end, rejects the Respondent's theory of sovereignty over the "artificial flow" in a brief yet illuminating passage (*ibid.*, para. 93). Rightly so. This theory is inconsistent with international and domestic decisions on the matter[9].

III. IMPLICATIONS BEYOND THIS CASE

18. This brings me to my third and final set of observations. States appearing before the Court have a legitimate interest in seeking declaratory judgments that may ensure recognition of a situation at law, once and for all and with binding force. In order to be binding, this recognition must be clothed in the operative part of the judgment, which alone is binding on the parties. I am troubled that the present Judgment might be read as sending the signal that any position may be held, however untenable, so long as this position is abandoned at the eleventh hour of the judicial proceedings. In this regard, I see a difference between a dispute that has disappeared because the parties genuinely have come to agree in the course of the proceedings, and a dispute that has been hollowed out by one party wishing to evade a declaratory judgment and the legal effects ensuing therefrom.

19. I am perplexed as to why the Judgment does not record the agreement of the Parties reached in the course of the proceedings. In the circumstances of this case, it would have been appropriate and helpful to the Parties. In the case concerning *Société Commerciale de Belgique*, the Court's predecessor, the Permanent Court of International Justice, stated in the operative clause that it "not[ed] the agreement between the Parties"[10]. The agreement in question was arrived at towards the end of the oral proceedings, as a consequence of declarations of the Greek Government (in fact, counsel speaking on behalf of the Agent who was present in the Court), declarations which Belgium treated as "changing the character of the dispute", leading it to withdraw part of its original submissions[11]. This situation is uncannily analogous to the one which presented itself here.

20. States do not institute proceedings before the World Court at the drop of a hat. The cases they bring to the Court are usually of considerable importance legally and politically and the volume of preparation and work involved is significant, sometimes enormous. Hundreds of professionals may be involved. Technical or scientific expertise may be mobilized. The Court owes it to the parties to render well-reasoned judgments which settle their disputes with binding force, and, where appropriate, offers them guidance on their rights and obligations. Reflecting on the Court's deliberative process, the then President of the Permanent Court of International Justice, Max Huber, once compared the Court's decisions to "ships which are intended to be launched on the high seas of international criticism"[12]. It is a pity that today the Court chose to launch an empty vessel.

(Signed) Bruno SIMMA.

ENDNOTES

1 This is not the first judgment giving me this impression; cf. my separate opinion in the case concerning the *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 697, para. 6.

2 *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20.

3 *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press

4 *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 35.

5 *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 68, para. 41.

6 The experts of the Parties agreed that the Silala River flows naturally from Bolivia to Chile due to the topographical gradient. See Counter-Memorial of Bolivia, Vol. 2, Ann. 17, Danish Hydraulic Institute (DHI), *Study of the Flows in the Silala Wetlands and Springs System*, 2018, p. 266, para. 10 (noting that "without canals, both surface and groundwater will cross the border"); Reply of Chile, H. S. Wheater and D. W. Peach, *Impacts of Channelization of the Silala River in Bolivia on the Hydrology of the Silala River Basin*, 2019, p. 43 (noting that Chile's and Bolivia's experts agree that "[t]he Silala River flows naturally from Bolivia to Chile").

7 CMB, p. 58, para. 81.

8 This interpretation also makes counter-claim *(b)* entirely redundant with counter-claim *(a)*, which asks the Court to adjudge and declare that "Bolivia has sovereignty over the artificial canals and drainage mechanisms in the Silala that are located in its territory [note the *lapalissade*!] and *has the right to decide whether and how to maintain them*", emphasis added.

9 From among the relevant jurisprudence, see *Aargau* v. *Zurich*, *Entscheidungen des Schweizerischen Bundesgerichts, Vol. IV (1878)*, p. 34 (where the Swiss Federal Court stated that "[w]ith regard to public waters, the cantons have no private ownership, but only sovereignty"); *Societe énergie électrique du littoral méditerranéen* v. *Compagnia imprese elettriche liguri*, 1939, Italian Court of Cassation, *Annual Digest and Reports of Public International Law Cases*, *Vol. 9 (1938-1940)*, p. 121 (where the Italian Court of Cassation stated that "[i]nternational law recognizes the right on the part of every riparian State to enjoy, as a participant of a *kind of partnership* created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation", emphasis added); *Report of the Krishna Water Disputes Tribunal*, Vol. I, p. 30 (where the Tribunal stated that "[n]o State has a proprietary interest in a particular volume of water of an Inter-State River on the basis of its contribution or irrigable area"); *Report of the Ravi-Beas Waters Tribunal*, p. 94 (where the Tribunal stated that "[t]here is nothing in law for anyone including the State to claim absolute proprietary rights in river waters"); *Mississippi* v. *Tennessee*, *United States Reports*, *Vol. 525 (2021)*, pp. 9-10 (where the Supreme Court of the United States stated that the fact that a State has full jurisdiction over the lands within its borders, including the beds of streams and other waters, "does not confer unfettered 'ownership or control' of flowing interstate waters themselves").

10 *Société Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 178.

11 As the Court notes in *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 72, para. 57.

12 Quoted in Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge: Cambridge University Press, 2005), p. 248.

https://doi.org/10.1017/ilm.2023.26 Published online by Cambridge University Press