

8-1-2023

Chile's Decision to Bring the Silala Case Before the International Court of Justice

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Recommended Citation

Fuentes, Ximena and Kranenberg, Johanna Klein (2023) "Chile's Decision to Bring the Silala Case Before the International Court of Justice," *Wyoming Law Review*. Vol. 23: No. 2, Article 13.
Available at: <https://scholarship.law.uwyo.edu/wlr/vol23/iss2/13>

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Acknowledgements

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WYOMING LAW REVIEW

VOLUME 23

2023

NUMBER 2

CHILE'S DECISION TO BRING THE *SILALA CASE* BEFORE THE INTERNATIONAL COURT OF JUSTICE

*Ximena Fuentes & Johanna Klein Kranenberg**

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I. THE SILALA RIVER AND ITS HISTORICAL USES

In the late 1990s, Bolivia for the first time denied the international nature of the Silala River and claimed full sovereignty over its waters.¹ This came as a surprise for Chile, considering Bolivia's longstanding acknowledgment of the international status of the Silala River system.

Given the Judgment of the International Court of Justice (ICJ) of 1 December 2022, it is now uncontroversial that the Silala is an international river, shared by Bolivia and Chile.² The Silala originates in two sets of springs in the Bolivian highlands within the Department of Potosi, at 4,323 meters altitude, just a few kilometers from the Chile-Bolivia international boundary.³ The waters from

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¹ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶¶ 32–34 (Dec. 1); Memorial of the Republic of Chile, Dispute Over Status and Use of Waters of Silala (Chile v. Bol.) ¶¶ 3.2–3.8 (July 3, 2017), <https://www.icj-cij.org/sites/default/files/case-related/162/162-20170703-WRI-01-00-EN.pdf> [<https://perma.cc/VD6X-53VQ>].

² Chile v. Bol., 2022 I.C.J. ¶ 59.

³ *Id.* ¶ 7; Written Statement of the Experts of the Republic of Chile, Dispute Over Status and

these springs flow through and maintain two Bolivian wetlands, the *Cajones* (the northern wetlands) and *Orientales* (the southern wetlands), after which the two streams join in a natural ravine, created over the course of thousands of years by the water's own erosive forces. This ravine, and the river running through it, crosses the international boundary at an altitude of 4,277 meters and continues its way downhill through Chilean territory.

The Silala River is a small river, running for about eight kilometers and the majority of its course is merely one meter wide.⁴ Its cross-boundary flow is approximately 160 liters per second (l/s).⁵ In Chile, groundwater springs continue to contribute a similar amount to the total flow.⁶ Despite its small dimensions, given its location in one of the driest areas in the world and the high natural quality of its waters, the Silala River has played a significant role in the development of the Atacama Region in Chile.

During the first decade of the 20th century, the private English railroad company, Ferrocarril de Antofagasta a Bolivia (FCAB), obtained concessions in both Chile (1906) and Bolivia (1908) to capture and commercialize Silala water within Chilean and Bolivian territory.⁷ FCAB operated the railroad between Antofagasta and La Paz, but also owned the rights to supply drinking water to the Chilean port of Antofagasta, which was dependent on the delivery of fresh water through pipelines from the Andean mountains. FCAB's 1906 Chilean concession of the water of the Silala was specifically tied to this purpose. FCAB also needed good quality water to operate its steam locomotives.

In the 1960s, the needs for and uses of the water of the Silala in Chilean territory began to change.⁸ Antofagasta developed alternative fresh water supplies and FCAB's steam locomotives started to be replaced by diesel engines. Since then, and as of today, the end users of the Silala in Chile are mainly mining companies. Even so, about 30% of the Silala water is still used as drinking water for the workers in the mines, while the remainder is used for industrial processes. Until 2010, some of the water of the Silala River was still used as drinking water by the population of the Municipalities of Baquedano and Sierra Gorda, in the Province of Antofagasta.⁹

Use of Waters of Silala (Chile v. Bol.), ¶ 2.2 (Jan. 14, 2022), <https://www.icj-cij.org/sites/default/files/case-related/162/162-20220114-OTH-01-00-EN.pdf> [<https://perma.cc/TX7B-ZBGR>].

⁴ Memorial of the Republic of Chile, *supra* note 1, ¶ 2.5.

⁵ Application Instituting Proceedings, Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), ¶ 10 (June 6, 2016), <https://www.icj-cij.org/sites/default/files/case-related/162/162-20160606-APP-01-00-EN.pdf> [<https://perma.cc/5ZKM-5G8X>]; Summary of DHI's Scientific Findings, Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), ¶ 29 (Oct. 1, 2022), <https://www.icj-cij.org/public/files/case-related/162/162-20220110-OTH-01-00-EN.pdf> [<https://perma.cc/HKK7-MSXX>].

⁶ Written Statement of the Experts of the Republic of Chile, *supra* note 3, ¶ 2.2.

⁷ Chile v. Bol., 2022 I.C.J. ¶ 29.

⁸ See *id.* ¶ 31; Memorial of the Republic of Chile, *supra* note 1, ¶¶ 2.19–2.31.

⁹ Julio Von Chrismar Escuti, *El Silala es un río y como tal debe ser considerado*, 93 REVISTA POLÍTICA Y ESTRATEGIA, 72, 79 (2004); see also Memorial of the Republic of Chile, *supra* note 1, ¶ 2.19.

Bolivian legislation at the time of the concessions recognized the important public role of the railways and gave priority to water concessions for railway uses.¹⁰ Even so, the 1908 Bolivian concession, issued by the Prefect of Potosí,¹¹ did not restrict the use of the water in any particular way.¹² Other than the 1908 concession to FCAB, which was terminated by Bolivia in 1997, there exist no historical uses of the waters of the Silala in Bolivian territory.¹³ The obvious reason for this is that there are no human settlements near its headwaters and transporting the water to other areas in Bolivia would necessarily require pumping the water uphill. This would involve high costs that, at least until now, the Bolivian authorities did not consider necessary or justified.

II. THE ORIGIN OF THE DISPUTE

During the large part of the 20th century, it was uncontroversial between the two countries that the Silala is an international watercourse.¹⁴ The international boundary in the area is a straight line, not a topographical accident.¹⁵ It cuts right through the river ravine, leaving the headwaters of the Silala in Bolivia and its outlet in Chile. The characteristic Y-shape of the Silala River in Bolivia, before crossing into Chile, appears on the official Map annexed to the 1904 Treaty of Peace and Amity between both countries.¹⁶ This Treaty definitively settled the boundary, as well as other outstanding issues, following the War of the Pacific and the 1884 Truce.¹⁷ Bolivian and Chilean cartography after the 1904 Treaty, as well as joint maps and other co-signed documents by the Joint Boundary Commission, equally reflected a common understanding of the Silala River as a shared watercourse.¹⁸

The relationship over the waters of the Silala started to change during the 1990s, when voices were raised in the Department of Potosí, suggesting that Chile had artificially diverted the waters of the Silala into its territory through the

¹⁰ Under the Water Regulations enacted by Bolivia in 1906, the railway water supply was ranked second on the list of preferences for the granting of concessions. *Ley de 26 de octubre de 1906 reglamento de aguas* [Law of October 26, 1906, Water Regulations], art. 204 (Bol.), <https://faolex.fao.org/docs/pdf/bol26682.pdf> [<https://perma.cc/2LCC-NRUY>].

¹¹ Administratively, Bolivia is divided into nine departments. Potosí is a department located in the southwest. At the time of the concession, the *Prefecturas* held the executive power of the department.

¹² See Deed of Bolivian Concession of the Waters of the Siloli (N° 48) to The Antofagasta (Chile) and Bolivia Railway Company Limited (Oct. 28, 1908).

¹³ Memorial of the Republic of Chile, *supra* note 1, ¶ 5.12.

¹⁴ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶¶ 30–31 (Dec. 1); Memorial of the Republic of Chile, *supra* note 1, ¶¶ 3.2–3.7.

¹⁵ See Memorial of the Republic of Chile, Dispute Over Status and Use of Waters of Silala (Chile v. Bol.) 181, 196, fig. 1-2 (July 3, 2017) (Expert Report 2 of Denis W. Peach & Howard S. Wheeler), <https://www.icj-cij.org/sites/default/files/case-related/162/162-20170703-WRI-01-00-EN.pdf> [<https://perma.cc/LP62-D688>].

¹⁶ See Memorial of the Republic of Chile, *supra* note 1, ¶ 3.3, 48, fig. 14 (citing Map Appended to the Treaty of Peace and Amity, Bol.-Chile (Oct. 20, 1904)).

¹⁷ See *id.* ¶ 4.25 (citing Treaty of Peace and Amity, Bol.-Chile (Oct. 20, 1904)).

¹⁸ See *id.* ¶¶ 4.24–4.35.

construction of small earth channels in the Bolivian wetlands.¹⁹ As Chile pointed out in the proceedings before the Court, and recognized by Bolivia during the proceedings, Chile did not build these channels—FCAB did under the 1908 Bolivian concession.²⁰ Moreover, the channels dated from 1928, long after FCAB had obtained its 1906 Chilean concession. Therefore, Chile could not have diverted the course of the river into Chile. Rather, these channels served a sanitary purpose: to protect the watercourse from the eggs of green flies that had been found hatching in the wetland vegetation. Most importantly, the channels are very shallow, only about 60 centimeters in depth. The channels did not in any way modify the topography of the terrain, nor the natural flow of the water from Bolivia towards Chile, as can be appreciated with the naked eye. Even so, there was an increasing belief in Potosí that Chile should compensate Bolivia for the use of the waters of the Silala in Chile, specifically for uses dating back to the beginning of the 20th century.²¹ This so-called “historical debt” theory would end up playing an important and unfortunate role in the controversy, making it difficult for both States to reach a common understanding or political agreement on the uses of the Silala River.

Early May 1996, there were allegations in the press that Chile had diverted the Silala waters. This was formally denied by the Bolivian Ministry of Foreign Affairs in a Press Communication, published in the Bolivian newspaper “El Diario.”²² In May 1997 the Prefect of Potosí revoked the 1908 Bolivian concession.²³ In public statements and Diplomatic Notes from September 1999 onwards, Bolivia claimed exclusive sovereignty over the use of the Silala River.²⁴ Chile consistently objected to these statements. In 2000, both States agreed to engage in joint technical studies on both sides of the boundary. Each national team would take its own measurements in the other State’s territory and exchange the results. In Chile, the technical team worked under the direction of the Directorate of State Borders and Boundaries (DIFROL).²⁵ Chile’s hope and expectation was that joint technical studies would move Bolivia towards accepting that the Silala River flows naturally from Bolivia into Chile. Chile used the data obtained to develop a profile of the topographical gradient, from the headwaters of the Silala to the confluence of the Silala with Quebrada Cabana in Chile, showing a continuous downhill slope of up to 4–5%

¹⁹ See *Chile v. Bol.*, 2022 I.C.J. ¶¶ 29–30; *infra* note 22 and accompanying text.

²⁰ See Written Statement of the Experts of the Republic of Chile, *supra* note 3, at 11–13; see also Summary of DHI’s Scientific Findings, *Chile v. Bol.* ¶ 21 (Oct. 1, 2022), <https://www.icj-cij.org/public/files/case-related/162/162-20220110-OTH-01-00-EN.pdf> [<https://perma.cc/HKK7-MSXX>].

²¹ Memorial of the Republic of Chile, *supra* note 1, ¶¶ 3.24–3.25, 3.29 (citing Minutes of the Twenty-Second Meeting of the Bolivia-Chile Political Consultation Mechanism (July 14, 2020)).

²² *Id.* annex 45 (Press Release from the Ministry of Foreign Affairs of Bolivia, in: *El Diario*, La Paz, 7 May 1996).

²³ See Memorial of the Republic of Chile, *supra* note 1, ¶ 2.24; *Chile v. Bol.*, 2022 I.C.J. ¶¶ 30–31 (noting the 1996–1997 timeline and that the concession was revoked on the grounds that its original object and purpose had disappeared and there was evidence of improper use).

²⁴ Memorial of the Republic of Chile, *supra* note 1, ¶¶ 3.8, 3.12, 3.30.

²⁵ See *id.* ¶ 3.17.

downstream of the wetlands once the river enters the ravine.²⁶ Chile presented this profile before the Court to prove the natural transboundary course of the river.

Apart from technical studies, Chile was also willing to make a political gesture towards Bolivia, going far beyond what is required by the principle of equitable and reasonable use in accordance with international law. Based on this principle, states have a right to the equitable and reasonable use of a shared watercourse in their own territory.²⁷ Where conflicting uses exist, the distribution of the water should be based upon the consideration of several relevant factors, such as social and economic needs, the population dependent on the watercourse, and existing and potential uses, among others.²⁸ It must be borne in mind that Bolivia has made no significant use of the waters the Silala, which is explained by the fact that there are no human settlements in the vicinity of the river and the high costs involved in any project to take the water to villages located at a higher altitude.²⁹ Even though the existing uses of the waters of the Silala in Chile and the absence of any water needs in Bolivia support the case that the balancing of the equitable factors favored Chile, the latter was willing to sign an agreement that would have allowed Bolivia to commercialize 50% of the cross-boundary flow in Chilean territory.³⁰ This pre-agreement, that was never signed, has often been misinterpreted as a commitment by Chile to pay for the waters of the Silala. This is incorrect. The pre-agreement represented an opportunity for Bolivia to find private customers in Chile that were willing to pay for delivery of its 50% share of the water. However, the pre-agreement fell through in 2010 due to objections from Potosí civil organizations that insisted on Chile's obligation to compensate what they considered its "historic debt."

In the years thereafter, the Silala controversy lost prominence on the bilateral agenda, particularly once Bolivia brought the *Obligation to Negotiate Sovereign Access to the Pacific Ocean* case before the ICJ in 2013.³¹ Bolivia's decision to engage the

²⁶ Written Statement of the Experts of the Republic of Chile, *supra* note 3, at 4 fig.1.

²⁷ Convention on the Law of the Non-Navigational Uses of International Watercourses, *opened for signature* May 21, 1997, 2999 U.N.T.S. 77, arts. 5, 6 [hereinafter UNWC].

²⁸ The application of the principle of equitable and reasonable utilization requires the consideration of all relevant factors and circumstances. As stated in Article 6 of the United Nations Convention on the Non-Navigational Uses of International Watercourses (1997), these relevant factors include natural factors such as geographical, hydrological, climatic, and ecological criteria, and also factors related to the water needs of the States concerned. Insofar as water is essential for human survival and the development of economic activities, it is clear that the most important criteria relate to the water needs of the states concerned. UNWC, *supra* note 27, art. 6.

²⁹ See *supra* note 13 and accompanying text.

³⁰ See Memorial of the Republic of Chile, *supra* note 1, ¶¶ 3.24–3.25 (citing Minutes of the Third Meeting of the Bolivia-Chile Working Group on the Silala Issue (June 10, 2008); Minutes of the Twenty-Second Meeting of the Bolivia-Chile Political Consultation Mechanism (July 14, 2010); Counter-Memorial of the Plurinational State of Bolivia, Dispute Over Status and Use of Waters of Silala (Chile v. Bol.) ¶ 36 (Sept. 3, 2018), <https://www.icj-cij.org/sites/default/files/case-related/162/162-20180903-WRI-01-00-EN.pdf> [<https://perma.cc/RE2U-CMBZ>]).

³¹ See Application Instituting Proceedings, *Obligation to Negotiate Access to Pacific Ocean* (Bol. v. Chile) (Apr. 24, 2013), <https://www.icj-cij.org/sites/default/files/case-related/153/153-20130424-APP-01-00-EN.pdf> [<https://perma.cc/DM7Q-G6EC>].

Court on this matter focused all political attention, both in Chile and Bolivia, on Bolivia's long-held desire to regain access to the sea.³²

In 2012, DIFROL requested a multidisciplinary study of the Silala basin from the Pontifical Catholic University of Chile, led by Professor José Muñoz.³³ Chile was therefore well prepared when, in March 2016, Bolivian President Evo Morales put the Silala River controversy back on the bilateral agenda.³⁴ While Bolivia's then political authorities would not hesitate to use the Silala controversy in the State's public agenda, it appeared Bolivia was in no hurry to bring a case on the issue before the ICJ.

Until then, Chile had been twice defendant, but never claimant, before the Court: in 2008, Peru brought the *Maritime Dispute* against Chile, and in 2013, Bolivia initiated the case on the *Obligation to Negotiate*.³⁵ Chile's past arbitrations with Argentina on boundary questions (the *Argentina-Chile Frontier* case of 1902, the *Palena* arbitration of 1966, the *Beagle Channel* arbitration of 1977, and the *Laguna del Desierto* arbitration of 1994) had all been brought by mutual agreement.³⁶ Going to the Court as the claimant was not a decision easily taken by Chile, considering the complex relationship with Bolivia. The *Obligation to Negotiate* case was still ongoing and there were some concerns that with two cases on the docket, the Court would prefer a draw between the two countries over a 2-0 victory for Chile. On the other hand, the Bolivian allegations concerning Chile's right to the equitable and reasonable use of its shared water resources were unacceptable to Chile.

The significance of shared watercourses in the relationship between Bolivia and Chile is illustrated by the fact that Bolivia severed diplomatic relations with Chile in 1962 because of another international watercourse, the Lauca River. The Lauca River rises in the extreme northeast of Chile and runs about 75 kilometers through Chilean territory before it crosses into Bolivia where, after another 150 kilometers, it empties into the Salt Lake Coipasa.³⁷ Different from the Silala, Chile is the upstream State of the Lauca River and Bolivia is the downstream State. Much

³² Bolivia claimed that Chile had committed itself, through a series of unilateral acts, diplomatic acts, and declarations, to reach an agreement with Bolivia that would restore Bolivia's sovereign access to the sea. This was denied by the Court in its Judgment of 1 October 2018. See *Obligation to Negotiate Access to Pacific Ocean (Bol. v. Chile)*, Judgment, 2018 I.C.J. 507 (Oct. 1).

³³ The Report was commissioned by the Government of Chile. INGENIERÍA DICTUC, CARACTERIZACIÓN DE RECURSOS HÍDRICOS EN LAS CUENCAS FRONTERIZAS DE LOS RÍOS LAUCA Y SILOLI (2013) (on file with author).

³⁴ See Memorial of the Republic of Chile, *supra* note 1, ¶¶ 3.29–3.32.

³⁵ See Application Instituting Proceedings, *Maritime Dispute (Peru v. Chile)* (Jan. 16, 2008), <https://www.icj-cij.org/sites/default/files/case-related/137/14385.pdf> [<https://perma.cc/5HVY-JJCW>]; Application Instituting Proceedings, *supra* note 31.

³⁶ *Cordillera of Andes Boundary (Arg. v. Chile)*, 9 R.I.A.A. 29 (Perm. Ct. Arb. 1902); *Argentine-Chile Frontier Case*, 16 R.I.A.A. 109 (Perm. Ct. Arb. 1966); *Beagle Channel (Arg. v. Chile)*, 21 R.I.A.A. 53 (Perm. Ct. Arb. 1977); *Frontier Line (Arg. v. Chile)*, 22 R.I.A.A. 3 (Perm. Ct. Arb. 1994).

³⁷ REPÚBLICA DE CHILE, MINISTERIO DE RELACIONES EXTERIORES, LA CUESTIÓN DEL RÍO LAUCA 1 (1963).

like the Silala, the Lauca River receives contributions from groundwater sources along its course, both in Chile and Bolivia. Its current cross-boundary flow is about 2,600 l/s, but when it reaches Coipasa, it may carry as much as 8,000 l/s to 16,000 l/s, depending on the season.

In 1949, Chile started construction of an intake and channel, to use part of the Lauca (about 700 l/s, less than 20% of the cross-boundary flow) for irrigation of the Azapa Valley, near the port city of Arica.³⁸ Following the implementation of the irrigation project, this previously desert area is now a fertile agricultural region. At the time, Bolivia protested the building of the channel and claimed a right of veto, as the downstream State, on its implementation. Chile's position was and is that Bolivia, as the downstream State, has the right to be informed of projects that may affect a shared watercourse and have its interests taken into account, but does not have a veto over Chile's equitable and reasonable use of the waters in its territory.³⁹ Upon inauguration of the channel in 1962, Bolivia severed diplomatic relations with Chile and asked the OEA to condemn Chile as an "aggressor" under Article 6 of the Río Treaty of 1947 (Inter-American Treaty of Reciprocal Assistance).⁴⁰ This claim was rejected by the member states. With a brief interruption between 1975 and 1978,⁴¹ diplomatic relations between the two countries have not been formally resumed, even though there exist extensive collaboration and communication mechanisms at the consular level.

III. THE DISPUTE BEFORE THE INTERNATIONAL COURT OF JUSTICE

Given this background, Chile had a clear interest in obtaining legal certainty from the Court, not only on the shared nature of the Silala (of which it was certain, based on the existing scientific studies), but more generally, on its right, whether as upstream or downstream State, to the equitable and reasonable use of its shared watercourses. It is for this reason that Chile decided not to wait for Bolivia to bring an action before the Court, and Chile presented its own Application to the Court, on 6 June 2016.⁴² Chile principally asked the Court to adjudge and declare that the Silala is an international watercourse, the use of which is governed by customary international law, and Chile is entitled to the equitable and reasonable use of its waters, including its current use. Chile also requested the Court to declare the obligation to prevent significant harm, as well as procedural obligations such as the obligation to cooperate and the timely notification of measures, apply to the Silala.

For Chile, the decision to engage the Court had a positive impact on the public debate with Bolivia concerning the Silala controversy. Once under the Court's jurisdiction, and with few exceptions, the Bolivian authorities refrained

³⁸ *Id.* at 54–55.

³⁹ *Id.* at 54–55, 66–71 (referring to Note 289 sent by Chile to Bolivia on March 10, 1954).

⁴⁰ *Id.* at 186.

⁴¹ Between 1975 and 1978 diplomatic relations between Chile and Bolivia were restored during the so-called Charaña Negotiations regarding a negotiated solution to put an end to the landlocked status of Bolivia, which in the end failed.

⁴² Application Instituting Proceedings, *supra* note 31.

from making further accusations against Chile and its alleged illegal use of the Silala and, in general, avoided referring to the case. There were protests in the Department of Potosí when, in June 2018, it seemed that Bolivia would not present a counterclaim, even though it had originally threatened to sue Chile.⁴³ Ultimately, Bolivia presented three counterclaims, together with its Counter Memorial, in August 2018.

In its Counter Memorial, Bolivia no longer denied the transboundary nature of the Silala.⁴⁴ This meant that Chile's first and long-sought objective to reach a common understanding on the shared nature of the Silala was finally obtained, simply by bringing the case before the Court. However, Bolivia prolonged the case by introducing an entirely new distinction between the Silala's "natural" and "artificial" flows.⁴⁵ Bolivia defined the "artificial" flow as the surplus of surface water, supposedly generated by the earth channels in Bolivia territory that would otherwise have reached Chile as groundwater flow. This "surplus" surface flow, so argued Bolivia, would be exempt from the regime of customary international law that governs the "natural" flow of the river, and therefore, Chile would have no right to it. Bolivia's second and third counterclaims mirrored this unprecedented defense by asking the Court to declare that Bolivia has sovereignty over the "artificial" flow of the Silala, and that any "delivery" of this flow to Chile, including the compensation to be paid for it, is subject to the conclusion of an agreement with Bolivia. The first counterclaim asked the Court to adjudge and declare that Bolivia has sovereignty over the channels in its own territory, which was never contested by Chile.⁴⁶

Following the presentation of Bolivia's Counter Memorial and counterclaims, Chile asked the Court to proceed immediately to the oral phase of the proceeding.⁴⁷ However, Bolivia requested an additional round of written presentations, which was granted by the Court, though limited to the counterclaims. This put the concept of "artificial" flow at the heart of the dispute, both with respect to the law and the facts. The remainder of the discussion centered on the following two questions: (1) does international law recognize the alleged difference between "artificial" and "natural" flow, with the legal consequences attached thereto by Bolivia, and (2) what is the real impact of the channels on the surface flow?

The first, legal question raised by Bolivia potentially upsets the established principle of equitable and reasonable use of shared watercourses in waterworks where the upstream state improves the efficiency of the flow to the downstream state.⁴⁸ Following Bolivia's logic, this would give the upstream state the right to

⁴³ *Controversia en Bolivia por declinación de presentar contrademanda hacia Chile*, NTN24 (June 25, 2018), <https://www.ntn24.com/noticias-actualidad/controversia-en-bolivia-por-declinacion-de-presentar-contrademanda-hacia-chile-91761> [<https://perma.cc/Q45T-W4CW>].

⁴⁴ See Counter-Memorial of the Plurinational State of Bolivia, *supra* note 30, ¶¶ 13–14.

⁴⁵ *Id.* ¶¶ 104–06.

⁴⁶ *Id.* ¶ 165(a).

⁴⁷ *Dispute Over Status and Use of Waters of Silala (Chile v. Bol.)*, Order, 2018 I.C.J. 703, 704 (Nov. 15).

⁴⁸ The United Nations Convention on the Non-Navigational Uses of International Watercourses takes note of this fact and Article 25 provides that Watercourse States shall cooperate,

charge the downstream state for the additional liters per second that happen to cross the boundary, even if the downstream state never asked for the improvements to be carried out. Fortunately, the Court established that “modifications that increase the surface flow of a watercourse have no bearing on its characterization as an international watercourse.”⁴⁹ The Court also referred, approvingly, to the parties’ agreement 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.”⁵⁰ This decision lays to rest any attempt to limit application of the principle of equitable and reasonable utilization to pristine, untouched watercourses that have not been subjected to human intervention.

The second, factual question resulted in a quite fascinating exchange between the experts of both parties, the Danish Hydrological Institute (DHI) for Bolivia and Howard Wheatler and Denis Peach for Chile, on the impact of the earth channels on the surface flow. The estimated percentages of “increased” surface flow varied from 33–40% (DHI’s first expert report), 11–33% (DHI’s second expert report), and 2–3% (Chile’s experts’ reports).⁵¹ The differences between these percentages can be traced back to the DHI modeling exercise, which was set up to compare different scenarios—with and without channels—by using different inflows and topographies for each scenario, making the models utterly incomparable. Therefore, the outcomes of the comparison are unreliable. Ultimately, and most importantly, all experts agreed that “the waters of the Silala, whether surface or groundwater, constitute a whole flowing from Bolivia into Chile and into a common terminus.”⁵² This led the Court to conclude that 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.”⁵³ Based on this agreement, the Court chose not to engage with the science in any further detail.

The Court ultimately found that the parties agreed on the most relevant issues and that therefore, it need not give a decision thereon.⁵⁴ The Court acknowledges

where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse. UNWC, *supra* note 27, art. 25. The flows of many transboundary rivers in the world have been regulated by means of hydraulic works, and it is clear that the principle of equitable and reasonable utilization continues to apply to these rivers. Indeed, in some cases the equitable and reasonable principle may require regulation of the flow in order to obtain a more efficient use of the waters. In this connection, it is interesting to note that among the factors to take into account when applying the equitable and reasonable utilization principle, the UN Convention mentions the “[c]onservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect.” UNWC, *supra* note 27, art. 6.

⁴⁹ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 93 (Dec. 1).

⁵⁰ *Id.* ¶ 64.

⁵¹ Counter-Memorial of the Plurinational State of Bolivia, *supra* note 30, ¶ 13 (citing a prior study and calculating 30–40% increased surface flows); Summary of DHI’s Scientific Findings, *supra* note 20, ¶ 54 (calculating 11–33% of increased surface flows); Written Statement of the Experts of the Republic of Chile, *supra* note 3, at 27 (calculating 2–3% of increased surface flows).

⁵² Chile v. Bol., 2022 I.C.J. ¶ 94.

⁵³ *Id.*

⁵⁴ *See generally id.*

on several occasions in its Judgment that Chile had maintained its position and submissions throughout the proceeding,⁵⁵ but that Bolivia's position and the wording of its submissions had changed considerably⁵⁶—allowing the parties to reach a common understanding of the Silala, its functioning, and its use.

IV. CONCLUDING PERSPECTIVES

Chile is content with this outcome of the dispute, which provides the legal certainty it has been aiming for ever since the international nature of the Silala River was called into question more than 25 years ago. Chile also takes comfort that the Silala Judgment reenforces the principle of equitable and reasonable use, applying equally to upstream and downstream states, and independently of any improvements or modifications that may optimize the flow of the Silala River or of other transboundary watercourses. In that sense, the Silala Judgment provides an opportunity for Chile and Bolivia to cooperate in the sustainable development of their shared water resources.

⁵⁵ *Id.* ¶¶ 51, 61, 67, 78.

⁵⁶ *Id.* ¶ 52.