

8-1-2023

The Silala Judgment and the Duty to Cooperate in Customary International Water Law

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Meshel, Tamar (2023) "The Silala Judgment and the Duty to Cooperate in Customary International Water Law," *Wyoming Law Review*. Vol. 23: No. 2, Article 14.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol23/iss2/14>

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Acknowledgements

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WYOMING LAW REVIEW

VOLUME 23

2023

NUMBER 2

THE *SILALA* JUDGMENT AND THE DUTY TO COOPERATE IN CUSTOMARY INTERNATIONAL WATER LAW

*Tamar Meshel**

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I. INTRODUCTION

In 2016, Chile instituted proceedings before the International Court of Justice (ICJ or Court) against Bolivia with regard to a dispute concerning the international “status” of the Silala River and the rights and obligations of Chile and Bolivia regarding the “use” of its waters.¹ The Silala rises in Bolivia a few kilometers

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

northeast of the Chile-Bolivia international boundary.² It then crosses into Chile and connects with other rivers to form a tributary of the Loa River.³

On December 1, 2022, the ICJ rendered its judgment in the case, in which it found that the parties' respective positions had "converged" during the proceedings,⁴ and that the Court was therefore not "called upon to give a decision" on most of the questions presented to it.⁵ The one and only issue the ICJ adjudicated was Chile's claim that Bolivia breached its duty to cooperate with Chile, specifically its obligations to exchange information and notify with regard to measures it was planning to undertake on or around the Silala.⁶ This Essay argues that the ICJ's decision concerning these obligations does not further the development of international cooperation between riparian states and may even hinder it.

In its claim that Bolivia had breached its duty to cooperate, Chile submitted:

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.⁷

Bolivia in turn responded:

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; . . . Bolivia has not breached

² Application Instituting Proceedings, Dispute Over Status and Use of Waters of Silala (Chile v. Bol.) ¶ 2 (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>].

³ B.M. Mulligan & G.E. Eckstein, *The Silala/Siloli Watershed: Dispute Over the Most Vulnerable Basin in South America*, 27 INT'L J. WATER RES. DEV. 595, 596–97 (2011).

⁴ Chile v. Bol., 2022 I.C.J. ¶ 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.").

⁵ *Id.* ¶¶ 59, 65, 76, 86, 147, 155. As for Bolivia's third counterclaim, in which it requested the Court to declare that "[a]ny 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," the Court found that this was a "hypothetical situation" which did not "concern an actual dispute between the Parties." The Court therefore rejected this counterclaim. *Id.* ¶¶ 26, 160–62.

⁶ *Id.* ¶ 87–128.

⁷ *Id.* ¶ 27.

any obligation owed to Chile with respect to the waters of the Silala.⁸

Given that there is no basin agreement in place to govern the Silala,⁹ and neither Bolivia nor Chile are parties to the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (UNWC or Convention),¹⁰ their rights and obligations with respect to the Silala are governed by customary international water law.¹¹ Under this body of law, the ICJ unanimously rejected Chile's claim.¹² The Court first held that Bolivia had no obligation to exchange information with Chile concerning its planned measures on the Silala.¹³ The Court then confirmed that Bolivia did have an obligation under customary international water law to notify Chile with respect to its planned measures.¹⁴ However, the ICJ found that this obligation would be triggered only if those planned measures posed a risk of "significant harm," rather than the lower threshold of a "significant adverse effect" suggested by Chile.¹⁵ Applying this higher threshold of "significant harm," the Court concluded that Bolivia had not breached its obligation to notify Chile concerning its planned activities on the Silala.¹⁶

Part II of this Essay introduces the duty to cooperate in international water law, including obligations with respect to planned measures. Part III presents Chile and Bolivia's arguments on the duty to cooperate regarding the Silala and the ICJ's findings, while Part IV discusses the implications of these findings for the Silala dispute as well as for international water law more generally. In doing so,

⁸ *Id.* This was Bolivia's final submission at the oral proceedings. Its written Counter-Memorial put forward a somewhat different argument, namely:

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; . . . 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.

Id. ¶ 26.

⁹ *Id.* ¶ 36 (noting that Chile and Bolivia attempted to reach a bilateral agreement concerning the Silala but that an agreement was never signed).

¹⁰ Convention on the Law of the Non-Navigational Uses of International Watercourses, *opened for signature* May 21, 1997, 2999 U.N.T.S. 77 [hereinafter UNWC]. The UNWC is considered to be the main international treaty governing the non-navigational uses of international watercourses. Another major treaty is the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *opened for signature* Mar. 17, 1992, 1936 U.N.T.S. 269. Bolivia and Chile are not parties to this Convention either.

¹¹ Also known as the body of international law governing the non-navigational uses of international watercourses. Customary international law is one of the formal sources of international law, as provided in Article 38(1)(b) of the Statute of the International Court of Justice (referring to "international custom, as evidence of a general practice accepted as law").

¹² *Chile v. Bol.*, 2022 I.C.J. ¶ 163.

¹³ *Id.* ¶ 112.

¹⁴ *Id.* ¶ 114.

¹⁵ *Id.* ¶ 118.

¹⁶ *Id.* ¶ 128.

Part IV examines the historical evolution of cooperative obligations surrounding planned measures, as well as state practice, and proposes an alternative approach to the ICJ's opinion concerning the duty to cooperate in this case. This alternative approach calls for an in-depth evaluation of the potential customary law status of the obligation to exchange information on planned measures and distinguishes the obligation to notify of planned measures from the obligation to prevent significant harm. This Essay concludes in Part V that the ICJ's decision regarding customary law obligations, in the context of planned measures, betrays the spirit of the duty to cooperate in international water law. It may also discourage cooperation between Chile and Bolivia on the Silala going forward, as well as between other riparian states sharing international watercourses. Even in its sole substantive decision in this case, the ICJ missed a rare opportunity to strengthen and promote cooperative riparian relations.¹⁷

II. THE DUTY TO COOPERATE IN INTERNATIONAL WATER LAW

The UNWC sets out three fundamental principles that are widely considered to reflect customary international water law.¹⁸ These principles are equitable and reasonable utilization, no significant harm, and the duty to cooperate. The equitable and reasonable utilization principle entitles each riparian state to an equitable and reasonable share of an international watercourse and obligates it to use the watercourse in a manner that is equitable and reasonable vis-à-vis other riparian states.¹⁹ The no

¹⁷ Other than the Silala dispute, only four cases concerning the non-navigational uses of international watercourses have come before the ICJ and its predecessor, the Permanent Court of International Justice. These cases are: *Diversion of Water from Meuse* (Neth. v. Belg.), Judgment, 1937 P.C.I.J. (ser. A/B) No. 70 (June 28); *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. 7 (Sept. 25); *Pulp Mills on River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20); *Certain Activities Carried Out by Nicaragua in Border Area* (Costa Rica v. Nicar.) joined with *Construction of Road in Costa Rica Along San Juan River* (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665 (Dec. 16).

¹⁸ See, e.g., STEPHEN C. MCCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES* 422, 430–31 (3d ed. 2019); Attila M. Tanzi, *The Inter-Relationship Between No Harm, Equitable and Reasonable Utilisation and Cooperation Under International Water Law*, 20 INT'L ENV'T AGREEMENTS 619, 620 (2020).

¹⁹ See, e.g., Muhammad Mizanur Rahaman, *Principles of International Water Law: Creating Effective Transboundary Water Resources Management*, 1 INT'L J. SUSTAINABLE SOC'Y 207, 210 (2009); Mohammed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, 18 COLO. J. INT'L ENV'T. L. & POL'Y 337, 342–43 (2007). The equitable and reasonable utilization principle is set out in Article 5 of the UNWC, titled "Equitable and reasonable utilization and participation," which provides:

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.
2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.

UNWC, *supra* note 10, art. 5.

significant harm principle prohibits states from using shared waters flowing through their territory in a way that causes harm to another riparian state.²⁰ Finally, the duty to cooperate is a well-established general principle of international law, and a key principle in the management of international watercourses.²¹ While some tend to label, as the ICJ has in the *Silala* Judgment,²² the equitable and reasonable utilization and no significant harm principles as “substantive” and the duty to cooperate as “procedural,” this distinction is counterproductive for two reasons.²³

First, the distinction between substantive and procedural principles in international water law is counterproductive because riparian relations depend on the so-called procedural duty to cooperate just as much, if not more, than they depend on the so-called substantive principles of equitable and reasonable utilization and no significant harm. Quite simply, neither one of these abstract “substantive” principles can be operationalized in the daily management of an

²⁰ The no significant harm principle has been recently endorsed as “particularly relevant” in the context of international watercourses by the International Law Commission in its 2019 Report. See, Int’l L. Comm’n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10 at 279 (2019). This principle is set out in Article 7 of the UNWC, titled “Obligation not to cause significant harm,” which provides:

1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

UNWC, *supra* note 10, art. 7.

²¹ See, e.g., Christina Leb, *One Step at a Time: International Law and the Duty to Cooperate in the Management of Shared Water Resources*, 40 WATER INT’L 21, 23 (2015); Patricia Wouters & Dan Tarlock, *The Third Wave of Normativity in Global Water Law: The Duty to Cooperate in the Peaceful Management of the World’s Water Resources: An Emerging Obligation erga omnes?*, 23 WATER L. 51, 54 (2013). The duty to cooperate is set out in Article 8 of the UNWC, titled “General obligation to cooperate,” which provides:

1. Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.
2. In determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.

UNWC, *supra* note 10, art. 8.

²² Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 100 (Dec. 1).

²³ As noted by Judge Donoghue, it is not “useful to draw distinctions between ‘procedural’ and ‘substantive’ obligations.” Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.) joined with Construction of Road in Costa Rica Along San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, 782, ¶ 9 (Dec. 16) (separate opinion by Donoghue, J.). On “substantive” and “procedural” obligations in international environmental law, see JUTTA BRUNNÉE, PROCEDURE AND SUBSTANCE IN INTERNATIONAL ENVIRONMENTAL LAW 99–114 (2020).

international watercourse or applied to the resolution of a dispute concerning such a watercourse without the practical obligations arising under the duty to cooperate.²⁴ In other words, without cooperation—exchanging information, notifying, and engaging in consultation with other states—a riparian state will not be able to determine whether a particular use of an international watercourse is “equitable and reasonable” or risks causing “significant harm.”

Second, the distinction between substantive and procedural principles in international water law is counterproductive because it falsely suggests that riparian states could comply with the former without complying with the latter. In reality, a holistic approach to these three fundamental principles of international water law, which views them as integrated and interconnected, is crucial for their effective implementation in the management of international watercourses and in the resolution of disputes.²⁵ This necessary integration is evident from the explicit references to cooperative obligations in the formulation of the equitable and reasonable utilization and no significant harm principles in the UNWC. The principle of equitable and reasonable utilization, set out in Article 5 of the UNWC, expressly incorporates “the duty to cooperate in the protection and development” of an international watercourse set out in subsequent articles of the Convention.²⁶ The principle of no significant harm, set out in Article 7, expressly requires a state that has caused significant harm to enter into “consultation” with the affected state, including discussions of “compensation.”²⁷ Moreover, even where no “significant harm” has been caused, there is support for the obligation to enter into discussions to prevent such harm in both the general practice of states as well as in international decisions.²⁸

It is no surprise, therefore, that the duty to cooperate has developed in lockstep with the equitable and reasonable utilization and no significant harm principles.²⁹ Cooperative obligations were part and parcel of the development of international water law and were included in all of the major international instruments, including the Institute of International Law’s (IIL) 1911 Madrid Declaration,³⁰

²⁴ McCaffrey, *supra* note 18, at 463, 493–94.

²⁵ See, e.g., Attila M. Tanzi, *Substantialising the Procedural Obligations of International Water Law Between Compensatory and Distributive Justice*, in *A BRIDGE OVER TROUBLED WATERS: DISPUTE RESOLUTION IN THE LAW OF INTERNATIONAL WATERCOURSES AND THE LAW OF THE SEA* 351 (Hélène Ruiz Fabri et al. eds., 2020); Owen McIntyre, *The World Court’s Ongoing Contribution to International Water Law: The Pulp Mills Case Between Argentina and Uruguay*, 4 *WATER ALTS.* 124, 143 (2011).

²⁶ UNWC, *supra* note 10, art. 5.

²⁷ *Id.* art. 7.

²⁸ McCaffrey, *supra* note 18, at 494 nn.151–52.

²⁹ For a discussion of this evolution, see Tamar Meshel, *Unmasking the Substance Behind the Process: Why the Duty to Cooperate in International Water Law is Really a Substantive Principle*, 47 *DENV. J. INT’L L. & POL’Y* 29, 33–36 (2018).

³⁰ Inst. Int’l L., *International Regulation Regarding the Use of International Watercourses for Purposes Other than Navigation – Declaration of Madrid, 20 April 1911*, 24 *ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL* 365 (1911). The 1911 Madrid Declaration recommended that “the interested States appoint permanent joint commissions, which shall render decisions, or at least shall give their opinion, when, from the building of new establishments or the making of alterations

the International Law Association's (ILA) 1966 Helsinki Rules,³¹ the IIL's 1979 Athens Resolution,³² and the ILA's 1982 Montreal Rules on Water Pollution in an International Drainage Basin.³³ Furthermore, the duty to cooperate was an integral part of the development of the Draft Articles on the Law of the Non-Navigational Uses of International Watercourses (Draft Articles) by the International Law Commission's (ILC), which formed the basis for the UNWC.³⁴ Indeed, the duty to cooperate was featured and discussed in almost every report of the ILC Special Rapporteur on the law of the non-navigational uses of international watercourses in the years leading up to the conclusion of the Draft Articles.³⁵ Finally, in addition to the UNWC, the duty to cooperate has been included in the 1992 United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes,³⁶ the 2004 Berlin

in existing establishments, serious consequences might result in that part of the street situated in the territory of the other States." *Id.* art. II(7).

³¹ Int'l L. Ass'n Rep. of the Fifty-Second Conf., *Helsinki Rules on the Uses of Water of International Rivers*, 484, art. XXIX (Aug. 1966).

³² Inst. Int'l L., *The Pollution of Rivers and Lakes and International Law*, 58 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 104, art. VII (1979).

³³ Int'l L. Ass'n Rep. of the Sixtieth Conf., *Rules on the Water Pollution in an International Drainage Basin*, 535, art. 4 (1982) ("In order to give effect to the provisions of these Articles, states shall cooperate with the other states concerned."), art. 5 (providing that states promptly notify and share information regarding any activities or changes in circumstances along a watercourse that may create or involve a significant threat of water pollution in the territories of other watercourse states) (1982).

³⁴ *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses*, [1994] 2 Y.B. Int'l L. Comm'n 89, 90, 92–95, U.N. Doc. A/CN.4/SER.A/1994/Add.1 [hereinafter *Draft Articles*].

³⁵ See, e.g., Stephen M. Schwebel (Special Rapporteur), *First Rep. on the Law of the Non-Navigational Uses of International Watercourses*, ¶¶ 80, 100, 112, 133, U.N. Doc. A/CN.4/320 (May 21, 1979) [hereinafter Schwebel, *First Rep.* (1979)]; Stephen M. Schwebel (Special Rapporteur), *Second Rep. on the Law of the Non-Navigational Uses of International Watercourses*, ¶¶ 153–55, U.N. Doc. A/CN.4/332 (Apr. 24 & May 22, 1980) [hereinafter Schwebel, *Second Rep.* (1980)]; Stephen M. Schwebel (Special Rapporteur), *Third Rep. on the Law of the Non-Navigational Uses of International Watercourses*, ¶¶ 79–85, U.N. Doc. A/CN.4/348 (Dec. 11, 1981); J. Evensen (Special Rapporteur), *First Rep. on the Law of the Non-Navigational Uses of International Watercourses*, ¶¶ 102–51, U.N. Doc. A/CN.4/367 (Apr. 19, 1983); Jens Evensen (Special Rapporteur), *Second Rep. on the Law of the Non-Navigational Uses of International Watercourses*, ¶¶ 59–80, U.N. Doc. A/CN.4/381 (Apr. 24, 1984); Stephen C. McCaffrey (Special Rapporteur), *Second Rep. on the Law of the Non-Navigational Uses of International Watercourses*, ¶¶ 74, 177, U.N. Doc. A/CN.4/399 (Mar. 19, May 12, & May 21, 1986); Stephen C. McCaffrey (Special Rapporteur), *Third Rep. on the Law of the Non-Navigational Uses of International Watercourses*, ¶¶ 39–91, U.N. Doc. A/CN.4/406 (Mar. 30, Apr. 6, & Apr. 8, 1987) [hereinafter McCaffrey, *Third Rep.* (1987)]; Stephen C. McCaffrey (Special Rapporteur), *Fourth Rep. on the Law of the Non-Navigational Uses of International Watercourses*, ¶¶ 11–27, U.N. Doc. A/CN.4/412 (Mar. 3, May 3, & May 9, 1988).

³⁶ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *opened for signature* Mar. 17, 1992, 1936 U.N.T.S. 269, art. 9.

Rules of the ILA,³⁷ the 2008 ILC Draft Articles on the Law of Transboundary Aquifers,³⁸ and various bilateral and regional water agreements.³⁹

Some of the obligations arising under the duty to cooperate apply in the daily management of international watercourses and are not triggered by a particular event. These include, for instance, regular exchange of data and information and consultations regarding the management of an international watercourse, which may involve the establishment of a joint management mechanism.⁴⁰ An equally, if not more, important aspect of the duty to cooperate concerns planned measures on international watercourses. Since planned measures are likely to involve a new use of shared waters, a modification of an existing use, or an activity that may impact the quantity or quality of the waters, such measures are particularly apt to give rise to disagreement and cause disputes. Indeed, one of Chile's claims against Bolivia in the Silala dispute (and, as noted above, the only claim that was actually decided by the Court), concerned Bolivia's planned measures on and around the Silala.

Given their importance, Part III of the UNWC is dedicated to planned measures. The first two articles in this Part of the Convention are Articles 11 and 12. Article 11, titled "Information concerning planned measures," provides that "[w]atercourse 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."⁴¹ Article 12, titled "Notification concerning planned measures with possible adverse effects," provides that

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.⁴²

The rest of the articles in Part III set out procedures for notification under Article 12 (Articles 13–16), procedures for consultations and negotiations concerning planned measures (Article 17), procedures in the absence of notification (Article

³⁷ Int'l L. Ass'n Rep. of the Seventy-First Conf., *The Berlin Rules on Water Resources*, 337, art. 11 (2004).

³⁸ *Draft Articles on the Law of Transboundary Aquifers*, [2008] 2 Y.B. Int'l L. Comm'n, 19, 20, U.N. Doc. A/CN.4/SER.A./2008/Add.1.

³⁹ See, e.g., Agreement on the Nile River Basin Cooperative Framework art. 3(1) (general principles-cooperation), art. 7 (regular exchange of data and information), *opened for signature* May 14, 2010 [hereinafter CFA], <https://nilebasin.org/images/docs/CFA%20-%20English%20%20FrenchVersion.pdf> [<https://perma.cc/9E3S-TRAB>]; The Indus Water Treaty 1960 art. VI (exchange of data), art. VII (future co-operation), art. VIII (permanent Indus commission), Sept. 19, 1960, 419 U.N.T.S. 125 [hereinafter Indus Waters Treaty].

⁴⁰ UNWC, *supra* note 10, arts. 9(1), 24(1).

⁴¹ *Id.* art. 11.

⁴² *Id.* art. 12.

18), and procedures to govern the urgent implementation of planned measures (Article 19).⁴³

III. THE DUTY TO COOPERATE IN THE SILALA DISPUTE

Chile and Bolivia disputed three issues relating to the duty to cooperate in the context of Bolivia's planned measures on the Silala. First, they disputed the customary law status of the obligation to "exchange information" on planned measures under Article 11 of the UNWC.⁴⁴ Second, they disagreed over the threshold for triggering the obligation to "timely notif[y]" of planned measures and to conduct an environmental impact assessment under Article 12 of the UNWC.⁴⁵ Finally, they disputed whether Bolivia had complied with these obligations when planning certain activities on the Silala.⁴⁶

Before the ICJ turned to resolve these questions, it first recognized that the Silala is an "international watercourse" as defined in the UNWC,⁴⁷ and therefore that it is subject in its entirety to customary international water law.⁴⁸ The Court further noted that "modifications that increase the surface flow of a watercourse have no bearing on its characterization as an international watercourse."⁴⁹ The ICJ therefore effectively rejected Bolivia's argument that it "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," and that "customary international law on the use of transboundary watercourses applies 'only to the rate and volume of Silala water that flows naturally across the Bolivian-Chilean border.'"⁵⁰

The ICJ then reiterated the fundamental "substantive" principles of customary international water law applicable to the Silala—that each riparian state is "entitled to an equitable and reasonable use" of the waters of an international watercourse and is "obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm" to other riparian states.⁵¹ The Court then noted the "narrower and more specific procedural obligations"

⁴³ *Id.* arts. 13–19.

⁴⁴ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 109 (Dec. 1).

⁴⁵ *Id.* ¶ 113.

⁴⁶ *Id.* ¶ 119.

⁴⁷ *Id.* ¶ 94 (citing UNWC, *supra* note 10, art. 2 (defining a "watercourse" as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus," and an "international watercourse" as "a watercourse, parts of which are situated in different States")). The Court noted 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." *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* ¶ 93.

⁵⁰ Rejoinder of the Plurinational State of Bolivia, Dispute Over Status and Use of Waters of Silala (Chile v. Bol.) ¶ 70 (May 15, 2019), <https://www.icj-cij.org/sites/default/files/case-related/162/162-20190515-WRI-01-00-EN.pdf> [<https://perma.cc/7D65-XGQ3>].

⁵¹ Chile v. Bol., 2022 I.C.J. ¶¶ 97, 99–100 (citing Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20)).

that “facilitate the implementation” of these “substantive” obligations, namely the obligations to “co-operate, notify and consult.”⁵²

A. The Customary Law Status of the Obligation to Exchange Information on Planned Measures

Chile argued that Article 11 of the UNWC constitutes 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.”⁵³ Therefore, according to Chile, Bolivia was obligated to provide Chile with information on its planned projects in the Silala area—including the construction of a fish farm, a weir, a mineral water bottling plant, a military post, and ten houses situated close to the watercourse—regardless of their effect on the Silala.⁵⁴ Bolivia, in turn, argued that there was no state practice or *opinio juris*—that is, “a belief that this [state] practice is rendered obligatory by the existence of a rule of law requiring it”⁵⁵—which are necessary for Article 11 to have customary law status.⁵⁶ Bolivia also rejected Chile’s suggestion that Article 11 imposes independent obligations concerning information exchange, arguing that it is a “highly general provision” and merely an introduction to subsequent provisions.⁵⁷

Without much analysis, the ICJ agreed with Bolivia that there was no general state practice or *opinio juris* to support the contention that Article 11 has customary law status.⁵⁸ Accordingly, the Court held that there is no “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.”⁵⁹ Therefore, Bolivia was not obligated to exchange information with Chile about all planned measures concerning the Silala, regardless of their effect.

⁵² *Id.* ¶ 100 (citing *Arg. v. Uru.* 2010 I.C.J. ¶¶ 77, 101).

⁵³ *Id.* ¶ 104.

⁵⁴ *Id.* ¶ 121.

⁵⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 207 (June 27) (explaining that “for a new customary rule to be formed, not only must the acts concerned ‘amount to a settled practice’, but they must be accompanied by the *opinio juris sive necessitatis*,” which means that the state practice must evidence “a belief that this practice is rendered obligatory by the existence of a rule of law requiring it” (quoting *North Sea Continental Shelf (Den. v. Neth.)* Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20))). Some scholars have criticized this “rulebook” approach to customary international law. *See, e.g.*, Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487, 1490–91 (2020).

⁵⁶ *Chile v. Bol.*, 2022 I.C.J. ¶ 106.

⁵⁷ *Id.* ¶ 107.

⁵⁸ *Id.* ¶ 111.

⁵⁹ *Id.* ¶ 112.

B. The Threshold for Triggering the Obligation to Timely Notify of Planned Measures

Chile argued that Article 12's obligations to notify and conduct an environmental impact assessment are triggered whenever a "significant adverse effect" may result from a planned measure, rather than the more rigorous standard of "significant harm."⁶⁰ Bolivia in turn argued that if an activity does not give rise to "a risk of significant transboundary harm," a riparian state is not under an obligation to notify other riparian states nor to conduct an environmental impact assessment.⁶¹

The ICJ again accepted Bolivia's argument. The Court referred to its previous jurisprudence holding that the obligations to conduct an environmental impact assessment and to notify of planned measures are triggered only when there is "a risk of significant transboundary harm."⁶² Specifically, the Court had previously held:

[A] State 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.⁶³

The ICJ acknowledged that this formulation of the obligations to conduct an environmental impact assessment and to notify departs from the language of Article 12 of the UNWC. In particular, Article 12 refers to "planned measures which may have a significant *adverse effect* upon other watercourse States," whereas the Court had previously referred to "a risk of significant transboundary *harm*."⁶⁴ Nonetheless, the Court concluded that "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."⁶⁵ Apparently perceiving no measurable difference between "adverse effect" and "significant harm," the Court found that Article 12 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

⁶⁰ *Id.* ¶ 105.

⁶¹ *Id.* ¶ 108.

⁶² *Id.* ¶ 114 (citing *Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.)* joined with *Construction of Road in Costa Rica Along San Juan River (Nicar. v. Costa Rica)*, Judgment, 2015 I.C.J. 665 ¶ 104 (Dec. 16)).

⁶³ *Costa Rica v. Nicar. & Nicar. v. Costa Rica*, 2015 I.C.J. ¶ 104.

⁶⁴ *Chile v. Bol.*, 2022 I.C.J. ¶ 115 (emphasis added).

⁶⁵ *Id.* ¶ 116.

own jurisprudence.”⁶⁶ Therefore, the Court concluded that riparian states are only required to “notify and consult” where a planned measure poses “a risk of significant harm” to other riparian states.⁶⁷

C. Bolivia’s Compliance with the Obligation to Timely Notify of Planned Measures

Finding that the only “procedural” obligations imposed on Bolivia under customary international water law are the obligations to notify and consult with regard to planned activities that carried a risk of significant harm, the ICJ proceeded to determine whether Bolivia had complied with these obligations.

Chile argued that Bolivia had “consistently refused to provide Chile with the necessary information on certain measures planned or carried out with respect to the waters of the Silala.”⁶⁸ Specifically, Chile claimed that Bolivia had failed to respond to diplomatic notes from Chile inviting Bolivia to enter into a bilateral dialogue on the use of the Silala’s waters and requesting information on the projects in the Silala area announced by Bolivia.⁶⁹

In response, Bolivia claimed that customary international law limits its obligations to notify and consult to situations where “an environmental impact assessment confirms that there is a risk of significant transboundary harm.”⁷⁰ According to Bolivia, the activities in question did not give rise to such a risk and, therefore, it had no obligation to notify or consult Chile.⁷¹ Specifically, Bolivia submitted that the plans to build a weir, a water bottling plant, and a fish farm never materialized, the ten houses were never inhabited, and it had implemented measures to prevent any contamination of the waters as a result of the military post.⁷²

Given its conclusion that a riparian state is only obliged to notify and consult regarding planned measures that pose a risk of significant transboundary harm, the Court noted that it would only need to consider whether Bolivia had “conducted an objective assessment” of the risk of significant transboundary harm if any of Bolivia’s activities around the Silala “posed a risk of significant harm to Chile.”⁷³ This could be the case, according to the Court, “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” to Chile.⁷⁴ However, the

⁶⁶ *Id.* ¶ 117.

⁶⁷ *Id.* ¶ 118. Article 12 of the UNWC does not mention an obligation to consult concerning planned measures. This obligation appears only in Article 11, discussed above, and in Article 17, titled “Consultations and negotiations concerning planned measures.” UNWC, *supra* note 10, arts. 11, 17.

⁶⁸ Chile v. Bol., 2022 I.C.J. ¶ 120.

⁶⁹ *Id.* ¶ 121.

⁷⁰ *Id.* ¶ 123.

⁷¹ *Id.*

⁷² *Id.* ¶ 124.

⁷³ *Id.* ¶ 126.

⁷⁴ *Id.* (citing Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.) joined with Construction of Road in Costa Rica Along San Juan River (Nicar. v. Costa Rica),

Court found that the measures taken by Bolivia were not capable of causing “the slightest risk of harm to Chile . . . let alone significant harm.”⁷⁵ Accordingly, the Court concluded that Bolivia had not breached its obligations to notify and consult under customary international water law and rejected Chile’s claim.⁷⁶

IV. IMPLICATIONS OF THE SILALA JUDGMENT FOR THE DUTY TO COOPERATE IN CUSTOMARY INTERNATIONAL WATER LAW

The ICJ’s findings regarding the duty to cooperate in customary international water law carry significant implications. Even today, 26 years after its conclusion, the UNWC only has 37 state parties.⁷⁷ While many riparian states have entered into bilateral or regional water agreements, other states, and particularly those that are engulfed in protracted water disputes such as Chile and Bolivia and Egypt and Ethiopia, have not. Therefore, states’ cooperative obligations under customary international water law are extremely important. Indeed, the ICJ emphasized in the *Silala* Judgment that the obligations to cooperate, notify, and consult were “vital,” particularly where the shared water resource at issue “can only be protected through close and continuous co-operation between the riparian States.”⁷⁸ However, instead of reinforcing and promoting these vital cooperative obligations in customary international water law, the Court weakened their practical effect. It did so in two ways. First, by holding that the obligation to exchange information on any planned measure contained in Article 11 of the UNWC does not have customary status. Second, the Court set the threshold for triggering the obligation to timely notify of planned measures under Article 12 of the UNWC at “significant harm” rather than the lower “significant adverse effect.”

A. The Customary Law Status of the Obligation to Exchange Information on Planned Measures

The ICJ first declared, with little analysis, that the obligation to exchange information on any planned measure contained in Article 11 of the UNWC does not have customary international law status. However, given the importance of information exchange to achieving cooperation among riparian states, it would have been beneficial for the Court to engage in a more transparent and detailed analysis of customary international law in this regard.

To reiterate, Article 11 of the UNWC, titled “Information concerning planned measures,” provides that “[w]atercourse 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.”⁷⁹ Article 11 thus sets out a general obligation to exchange information and consult whenever a

Judgment, 2015 I.C.J. 665, ¶ 155 (Dec. 16)).

⁷⁵ *Id.* ¶ 127.

⁷⁶ *Id.* ¶ 128.

⁷⁷ UNWC, *supra* note 10 (entered into force Aug. 17, 2014).

⁷⁸ Chile v. Bol., 2022 I.C.J. ¶ 101.

⁷⁹ UNWC, *supra* note 10, art. 11.

new measure is planned on an international watercourse. The Article, by its plain wording, is not limited to “adverse” or “harmful” planned measures, but rather applies to all “possible effects” of such measures. In its commentary on Article 11 of the Draft Articles, the ILC clarified:

The expression “possible effects” includes all potential effects of planned measures, whether adverse or beneficial. Article 11 thus goes beyond article 12 and subsequent articles, which concern planned measures that may have a significant adverse effect upon other watercourse States. Indeed, watercourse States have an interest in being informed of possible positive as well as negative effects of planned measures. In addition, requiring the exchange of information and consultation with regard to all possible effects avoids problems inherent in unilateral assessments of the actual nature of such effects.⁸⁰

As the ICJ noted in its ruling, the ILC commentary on Article 11 also stated that illustrations of instruments and decisions “which lay down a requirement similar to that contained in article 11” were provided in the commentary to Article 12.⁸¹ On the basis of this statement, the Court concluded that “the Commission did not appear to consider that Article 11 of the ILC Draft Articles reflected an obligation under customary international law.”⁸²

However, earlier ILC documents as well as other international water law instruments suggest otherwise. For instance, in his Second Report in 1980, Special Rapporteur Schwebel noted that the precursor article to Articles 11 and 12, titled “Collection and exchange of information,” applied not only to all “existing” uses but also to all “planned” uses.⁸³ That article reflected a recognition of the importance of information exchange on *any* planned measures as a general obligation, because

it is not possible to make plans for the use of fresh water or to forecast, for example, the effects of the construction of works in the watercourse upon water conditions in system States without a considerable amount of hydrologic data. As a general rule, planning in one system State requires planning in other system States, and this, in turn, may react upon the planning in the first State. Without adequate information from all the States concerned, the planning can become guesswork.⁸⁴

⁸⁰ *Draft Articles*, *supra* note 34, art. 11 cmt. 3.

⁸¹ *Chile v. Bol.*, 2022 I.C.J. ¶ 111.

⁸² *Id.*

⁸³ Schwebel, *Second Rep.* (1980), *supra* note 35, art. 6 (flush language).

⁸⁴ *Id.* ¶ 136.

An early example of the acceptance of a general obligation to exchange information on planned measures regardless of their effect is the 1960 Indus Water Treaty, which provides as follows:

If either Party plans to construct any engineering work which would cause interference with the waters of any of the Rivers and which, in its opinion, would affect the other Party materially, it shall notify the other Party of its plans and shall supply such data relating to the work as may be available and as would enable the other Party to inform itself of the nature, magnitude and effect of the work. *If a work would cause interference with the waters of any of the Rivers but would not, in the opinion of the Party planning it, affect the other Party materially, nevertheless the Party planning the work shall, on request, supply the other Party with such data regarding the nature, magnitude and effect, if any, of the work as may be available.*⁸⁵

Another early example is the 1972 Statute of the Senegal River, which “requires that States parties receive the prior approval of other contracting States before undertaking any project which might *appreciably affect* the characteristics of the regime of the river.”⁸⁶ A more recent example is the 2010 Agreement on the Nile River Basin Cooperative Framework, which sets out a “general principle” that the Nile Basin States “exchange information on planned measures through the Nile River Basin Commission”⁸⁷ as well as an obligation to “exchange information through the Nile River Basin Commission” on all planned measures.⁸⁸

Therefore, there is some evidence that Article 11’s general obligation to exchange information on all planned measures may have had customary status under international water law at the time the UNWC was drafted or may have gained such status subsequently. As the ICJ has previously noted, customary international law comprises of rules “whose presence . . . can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas.”⁸⁹ The Silala dispute provided the first opportunity for the Court to undertake such an analysis with respect to the general obligation to exchange information regarding measures planned on international watercourses. Even if the Court would have ultimately reached the same conclusion—that this obligation has not gained customary law status—at least this conclusion would

⁸⁵ Indus Waters Treaty, *supra* note 39, art. VII(2) (emphasis added).

⁸⁶ McCaffrey, *Third Rep.* (1987), *supra* note 35, ¶ 68 (emphasis added).

⁸⁷ CFA, *supra* note 39, art. 3(8).

⁸⁸ *Id.* art. 8(1).

⁸⁹ Delimitation of Maritime Boundary in Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246, ¶ 111 (Oct. 12).

have followed a transparent and detailed analysis of state practice and *opinio juris* rather than presented as a summary dismissal.⁹⁰

Moreover, even absent “sufficiently extensive and convincing practice” and *opinio juris*, a general obligation to exchange information concerning measures planned on international watercourses could arguably fall within the “limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community,” the existence of which does not require proof of these elements.⁹¹ Given the customary status of the “fundamental norm” of cooperation in international water law, the “formulation” of this norm should be “apparent from an examination of the realities of international legal relations.”⁹² These realities, as evident from interstate water disputes such as those concerning the Silala and the Nile, are that exchange of information on planned measures is necessary for states to cooperate effectively, implement the principles of equitable and reasonable utilization and no significant harm, and prevent disputes.⁹³

Indeed, even effects that are not per se or immediately “adverse” or “harmful” may ultimately result in negative externalities for other riparian states.⁹⁴ At the same time, impacts that were considered neutral at the planning stage may also result in *positive* externalities for other riparian states.⁹⁵ Both negative and positive externalities could affect states’ assessments of what would be equitable and reasonable utilization in the circumstances and how significant harm may

⁹⁰ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 111 (Dec. 1) (noting, without any analysis, that “[i]n 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”). Indeed, the ICJ has been criticized for “only rarely engag[ing] in examining practice and *opinio juris* in order to ascertain the existence of customary international rules.” Tullio Treves, *Customary International Law*, in 2 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 942, ¶ 21 (2006).

⁹¹ Can./U.S., 1984 I.C.J. ¶ 111; see Treves, *supra* note 90, ¶ 19.

⁹² Can./U.S., 1984 I.C.J. ¶ 111.

⁹³ CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 131 (James Crawford & John S. Bell eds., 2013) (“In stipulating that information shall be exchanged on all potential effects—adverse as well as beneficial—the obligation follows the imperatives of sound water resources management.”).

⁹⁴ An “externality” is “a cost or benefit that the voluntary actions of one or more people imposes or confers on a third party or parties without their consent.” ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 45 (1988). A negative externality “results when the activity of one person . . . imposes a cost on someone else.” William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKCL. REV. 709, 710 n.6 (2006) (quoting JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 43 (2d ed. 2000)). Not all negative externalities are necessarily immediate. For instance, harm can be “intertemporal—that is, it can travel across generations, from present to future.” LEB, *supra* note 93, at 130. Negative externalities are also not always foreseeable. For instance, reducing the use of a particular watercourse may have “surprising negative externalities . . . since water previously ‘wasted’ does in some cases support habitat or downstream water users.” Carolyn Brickey et al., *How to Take Climate Change into Account: A Guidance Document for Judges Adjudicating Water Disputes*, 40 ENV’T L. REP. 11215, 11221 (2010).

⁹⁵ For instance, a new technology or method for using shared waters in a more efficient way, implemented by riparian State A, will result in State A needing less of the shared waters. This results in a positive externality for riparian State B, which could negotiate to use more of the available shared waters if it so requires.

be prevented. Indeed, the equitable and reasonable utilization principle requires states to take into account all “effects of the use or uses of the watercourses in one watercourse State on other watercourse States,” as well as the “availability of alternatives, of comparable value, to a particular planned or existing use.”⁹⁶ Therefore, lack of information on measures planned by a riparian state may impact the “equitable balance of uses” between all riparian states.⁹⁷ Lack of communication and consultation on *all* planned measures could also result in the planning state itself being unaware of the potential unintended consequences of such measures. These information gaps may lead the planning state to over-produce a negative externality or under-produce a positive externality,⁹⁸ resulting in both inefficient and inequitable water relations.

In any event, it would have been beneficial for the ICJ to undertake a detailed analysis of the possible customary status of the obligation to exchange information on planned measures given the Court’s next conclusion—that the threshold of Article 12’s obligation to notify of planned measures is “significant harm” rather than “adverse effect.” This interpretation of Article 12 makes Article 11’s general obligation to exchange information on *any* planned measure all the more important.

B. The Threshold for Triggering the Obligation to Timely Notify of Planned Measures

The ICJ held that the obligation to timely notify of planned measures contained in Article 12 of the UNWC requires a showing of a risk of “significant harm” rather than of an “adverse effect.”⁹⁹ However, this interpretation of Article 12 betrays its language and its evolution in the ILC Draft Article. It also conflates it with Article 7 of the UNWC, which sets out the obligation not to cause significant harm.

To reiterate, Article 12 of the UNWC requires that a state must provide timely notification concerning any planned measure “which may have a significant adverse effect” on another riparian state, so that the riparian state has an opportunity to evaluate the possible effects of the measure.¹⁰⁰ The ICJ confirmed that, unlike Article 11, Article 12 does reflect customary international water law.¹⁰¹ However, the Court refused to follow the language of Article 12 regarding the threshold required to trigger it.¹⁰² The Court acknowledged that according to the ILC commentary on Article 12 of the Draft Articles, the threshold standard for triggering the obligation to notify is “intended to be lower” than that required under Article 7’s obligation to cause no significant harm—“a ‘significant adverse effect’ may not rise to the level

⁹⁶ UNWC, *supra* note 10, art. 6(1)(d), (g).

⁹⁷ McCaffrey, *supra* note 18, at 536.

⁹⁸ JACK HIRSHLEIFER, PRICE THEORY AND APPLICATION 454 (5th ed. 1991) (“Direct externalities, beneficial or harmful, lead the Invisible Hand astray. In the interests of efficiency, an agent generating a harmful externality ought to reduce output short of the profit-maximizing level. If the externality is beneficial, output should be expanded beyond the profit-maximizing amount.”).

⁹⁹ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 118 (Dec. 1).

¹⁰⁰ UNWC, *supra* note 10, art. 12; *see supra* note 42 and accompanying text.

¹⁰¹ Chile v. Bol., 2022 I.C.J. ¶ 114.

¹⁰² *Id.*

of ‘significant harm.’”¹⁰³ Nonetheless, the Court found that “significant harm” and “significant adverse effect” essentially meant the same thing—measures that were “capable of producing harmful effects of a certain magnitude.”¹⁰⁴

Again, earlier documents of the ILC suggest otherwise. In previous iterations of Article 12, the term “appreciable harm,” rather than “adverse effect,” was used to trigger the obligation to notify.¹⁰⁵ However, the term “appreciable harm” was also used at that point in the precursor to Article 7, which required states not to cause appreciable harm. Some of the ILC members pointed out that the obligation to notify of planned measures that may cause appreciable harm would therefore require the planning state “to admit in advance that [it] planned to commit an internationally wrongful act,” namely the violation of Article 7.¹⁰⁶ The Special Rapporteur explained, however, that there was a difference between the meaning of “harm” in Article 7 and in Article 12. Under Article 7, the standard of “appreciable harm” was a *legal* standard.¹⁰⁷ Under that standard, even if a state has caused “appreciable harm” this would only constitute a wrongful act if that harm was inconsistent with the other riparian states’ equitable utilization of the watercourse. In contrast, under Article 12 the standard of “appreciable harm” was a *factual* standard that was “designed . . . to allow a notified State to determine whether a project would result in its being deprived of its equitable share of the uses and benefits of the international watercourse.”¹⁰⁸ In order to avoid confusion, the term “appreciable harm” in Article 12 was replaced with “appreciable adverse effect,” because the expression “‘adverse effect’ . . . did not have the same connotation as ‘harm.’”¹⁰⁹ In the Draft Articles, Article 7 ultimately referred to “significant harm,” while Article 12 referred to “significant adverse effect.”

It is therefore clear from the evolution of Articles 7 and 12 of the UNWC that the term “harm” in Article 7 is not meant to be equivalent to the term “adverse effect” in Article 12, neither in degree nor in kind. The “adverse effect” threshold for giving notice of planned measures is a *factual* concept, while the “harm” threshold for the obligation not to cause significant harm is a *legal* concept.¹¹⁰ Therefore, a planned measure need not risk causing “significant harm” in the sense of exceeding a state’s equitable share of the waters in order to trigger the obligation to notify. It need only

¹⁰³ *Draft Articles*, *supra* note 34, art. 11 cmt. 2. Article 7 of the UNWC concerns the obligation not to cause significant harm. UNWC, *supra* note 10, art. 7.

¹⁰⁴ Chile v. Bol., 2022 I.C.J. ¶ 116.

¹⁰⁵ Int’l L. Comm’n, Rep. on the Work of Its Thirty-Ninth Session, U.N. Doc. A/42/10, ¶ 78 (1987).

¹⁰⁶ *Id.* ¶ 103.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* ¶ 104 (“[W]hile the criterion for giving notice would be that the proposed new use would have an ‘appreciable adverse effect’, the test for whether the new use could lawfully be implemented would be whether it would deprive the notified State of its equitable share of the uses and benefits of the international watercourse.”). See also McCaffrey, *supra* note 18, at 534 (noting that the threshold of “adverse effect” in Article 12 requires notification “even before there is an indication that legally significant harm may result from the proposed use”).

risk causing an “adverse effect,” which would then require notification in order to determine whether it may result in legal harm (*i.e.*, deprivation of equitable share). The ICJ in the *Silala* Judgment effectively eliminated this important distinction.

The ICJ’s conclusion that the obligation to notify regarding planned measures under Article 12 is only triggered where there is a risk of “significant harm” also fails to distinguish between Articles 7 and 12 in another way. The ICJ relied on its previous decision in *Certain Activities*, where it held that only where 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.”¹¹¹ The Court reached this conclusion in *Certain Activities* in the context of a state’s “obligation to exercise *due diligence in preventing significant transboundary environmental harm*”¹¹²—in other words, the obligation not to cause significant harm under Article 7 of the UNWC. This obligation is one of due diligence rather than result,¹¹³ and therefore requires states to notify and consult with affected states regarding “such matters as whether and to what extent harm has occurred.”¹¹⁴ These duties to notify and consult *as part of* the due diligence requirements of Article 7 are indeed triggered only if there is a risk of “significant harm.” In contrast, the separate obligation to notify under Article 12 does *not* arise from the due diligence requirement of the obligation not to cause significant harm. Rather, it should be independently triggered whenever there is a risk of an “adverse effect” arising from a planned measure.¹¹⁵ Moreover, the determination of whether a risk of “adverse effect” exists in connection with a planned measure should ideally be made on the basis of an environmental impact assessment. Therefore, the requirement to conduct such an assessment in the context of Article 12’s obligation to notify of planned measures should be triggered “where there is a risk that the proposed [measure] may have a significant adverse impact in a transboundary context,” as the Court already held in *Pulp Mills*.¹¹⁶ This is also the standard adopted in other water law instruments.¹¹⁷

In sum, a better approach to Article 11 of the UNWC would have been for the ICJ to undertake a careful examination to determine whether the obligation to

¹¹¹ *Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.)* joined with *Construction of Road in Costa Rica Along San Juan River (Nicar. v. Costa Rica)*, Judgment, 2015 I.C.J. 665, ¶ 104 (Dec. 16) (emphasis added).

¹¹² *Id.* (emphasis added).

¹¹³ “Watercourse States shall, in utilizing an international watercourse in their territories, *take all appropriate measures* to prevent the causing of significant harm to other watercourse States.” UNWC, *supra* note 10, art. 7 (emphasis added). The ICJ has defined this due diligence obligation as requiring a state “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.” *Pulp Mills on River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20).

¹¹⁴ McCaffrey, *supra* note 18, at 493.

¹¹⁵ *Id.* at 534.

¹¹⁶ *Arg. v. Uru.*, 2010 I.C.J. ¶ 204.

¹¹⁷ *See, e.g.*, CFA, *supra* note 39, art. 9(1) (“For planned measures that may have significant adverse environmental impacts, Nile Basin States shall, at an early stage, undertake a comprehensive assessment of those impacts with regard to their own territories and the territories of other Nile

exchange information regarding all planned measures could be considered as having customary law status, either based on state practice and *opinio juris* or because it is a norm for ensuring the co-existence and vital co-operation of states in the context of international watercourses. A better approach to Article 12 would have been for the Court to distinguish between the threshold and content of Article 7 and Article 12. Article 7 requires states to act diligently to prevent “significant harm”—a legal concept—including by notifying and consulting potentially affected states regarding the risk of such harm. Article 12 requires states to notify potentially affected states regarding the risk of “adverse effects”—a factual concept—of a planned measure. The obligation to notify under Article 12 in turn requires an environmental impact assessment to evaluate the risk of adverse effects resulting from a planned measure. In the *Silala* dispute, this approach would impose an obligation on Bolivia (as well as on Chile) under customary international water law to exchange information regarding *any* planned measure involving the *Silala*, as well as an obligation to conduct an environmental impact assessment and notify regarding any planned measure that may have an adverse effect on the *Silala*. These obligations would be independent of Bolivia’s (and Chile’s) obligations to act diligently so as not to cause significant harm and to use the *Silala* in an equitable and reasonable way.

V. CONCLUSION

There is no doubt that the general duty to cooperate is a principle of customary international water law and part of the “community of interest” of an international watercourse.¹¹⁸ This customary duty to cooperate is integral to the maintenance of peaceful riparian relations, to the achievement of environmental protection, and to the realization of the principles of equitable and reasonable utilization and no significant harm. However, “[a]n injunction to co-operate is inadequate unless coupled with norms that establish the nature and scope of the requirement.”¹¹⁹ In other words, there is little benefit in declaring a strong customary duty to cooperate that is empty of content. Yet this is effectively what the ICJ did in the *Silala* Judgment.

The Court diluted the content of the duty to cooperate under customary international water law by holding that it does not include an obligation to exchange information regarding all planned measures and by declining to distinguish between due diligence obligations designed to prevent legal “significant harm” and cooperative obligations designed to identify factual “adverse effects” of planned measures. As a result, the ICJ weakened the duty to cooperate in customary international water law, as well as under the UNWC. Time will tell whether Bolivia and Chile will take up the Court’s invitation to “conduct consultations on an ongoing basis in a

Basin States.”); Indus Waters Treaty, *supra* note 39, art. IV(10) (“Each Party declares its intention to prevent, as far as practicable, undue pollution of the waters of the Rivers which might affect adversely uses . . .”).

¹¹⁸ Territorial Jurisdiction of the International Commission of River Oder, Judgment No. 16, 1929, P.C.I.J., (ser. A) No. 23, at 27 (citing Gabčíkovo-Nagymaros Project (Hung./Slovak.), Judgment, 1997 I.C.J. 7, ¶ 85 (Sept. 25)).

¹¹⁹ Schwebel, *First Rep.* (1979), *supra* note 35, ¶ 80.

spirit of co-operation, in order to ensure respect for their respective rights and the protection and preservation of the Silala and its environment.”¹²⁰ Extended in the context of its decision on the Silala, this invitation rings hollow.

¹²⁰ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 129 (Dec. 1)