SEPARATE OPINION OF JUDGE *AD HOC* SIMMA

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

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

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

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

I. THE DISAPPEARANCE OF CERTAIN POINTS IN DISPUTE

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

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

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

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

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

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

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

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

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

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

II. THE INTERPRETATION OF THE PARTIES' SUBMISSIONS

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

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

13. For context: Bolivia's counter-claim *(b)*, as formulated in its Counter-Memorial and Rejoinder, asked the Court to adjudge and declare that "Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no right to that artificial flow" (Judgment, para. 26). This submission reflected Bolivia's new theory of its case (by then it had abandoned its diversion theory[6]) that the Silala waters are part of an "artificially enhanced watercourse". Bolivia referred to what it called the "artificial flow" of the Silala, explaining that international and domestic judicial decisions "recognize the legal relevance of the distinction between the existence of natural and artificial flows"[7]. It contended that its sovereignty over the waterworks located within its territory afforded it full sovereignty over the artificial flow of waters generated by the waterworks. The upshot of this view was that Chile could not use the "artificial flows" without Bolivia's consent. This was the theory underpinning counter-claim *(b)*.

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

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

16. The counter-claim as reformulated by Bolivia at the end of the oral proceedings asks the Court to adjudge and declare that "Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no *acquired* right to that artificial flow" (emphasis added). The terms of the submission are clear, and the reader is justified in assuming that they mean what they say. The fig leaf added (the word "acquired") does not alchemize its purport. The origin of the submission must also be borne in mind. In the light of this, it escapes me

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

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

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

[7] CMB, p. 58, para. 81.

how the Judgment interprets this submission as requesting the Court to adjudge and declare that Bolivia has the "sovereign right" to decide whether and how to maintain the channels and drainage mechanisms located in its territory (Judgment, para. 153)[8].

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

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

III. IMPLICATIONS BEYOND THIS CASE

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

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

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

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

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

treated as "changing the character of the dispute", leading it to withdraw part of its original submissions[11]. This situation is uncannily analogous to the one which presented itself here.

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

(Signed) Bruno SIMMA.

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

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