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A Dam Over Troubled Waters? The Obligation to Negotiate In Good Faith in Annex "C" of the Treaty of Itaipu

Rene Figueredo Corrales

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A DAM OVER TROUBLED WATERS? THE OBLIGATION TO NEGOTIATE IN GOOD FAITH IN ANNEX “C” OF THE TREATY OF ITAIPÚ

RENÉ FIGUEREDO CORRALES*

I. INTRODUCTION.....	38
II. THE TREATY OF ITAIPÚ	40
A. HISTORICAL BACKGROUND	40
1. Unilateral Brazilian Projects over the Paraná River and Continued Disagreements over the Border	41
2. Brazilian Invasion of the Disputed Area and Diplomatic Crisis.....	44
3. The 1966 Act of Iguazu	47
4. Adoption and Signing of the Treaty of Itaipú.....	50
B. STRUCTURE OF THE TREATY OF ITAIPÚ	53
C. ANNEX “C” OF THE TREATY OF ITAIPÚ AND THE COST OF THE ELECTRICAL SERVICES	54
III. THE OBLIGATION TO NEGOTIATE IN ANNEX “C” OF THE TREATY OF ITAIPÚ	59
A. THE BRAZILIAN INTERPRETATION	59
B. THE RULES OF TREATY INTERPRETATION.....	63
1. The General Rule of Interpretation.....	64
i. In Good Faith.....	64
ii. Ordinary Meaning of the Terms	65
iii. Context.....	66

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iv. Object and Purpose	67
2. Supplementary Means of Interpretation	68
3. Interpretation of Treaties Authenticated in Two or More Languages	70
C. INTERPRETATION OF PARAGRAPH VI OF ANNEX “C” OF THE TREATY OF ITAIPÚ IN THE LIGHT OF THE RULES OF TREATY INTERPRETATION	71
1. The General Rule of Interpretation.....	72
i. Ordinary Meaning of the Terms	72
a. “Revisar” and “Rever”	72
b. “Plazo” and “Prazo”	73
ii. Context.....	73
a. Treaty Text and the Joint Declaration as Context.....	73
b. The Wording of Paragraph VI of Annex “C”	75
iii. Object and Purpose	75
iv. Outcome.....	76
2. Supplementary Means of Interpretation	77
i. The Circumstances in which the Treaty was Concluded.....	77
ii. Non-Authenticated Language Texts of the Treaty.....	78
iii. Outcome.....	79
D. NEGOTIATIONS IN GOOD FAITH IN INTERNATIONAL LAW: THE <i>GABČÍKOVO-NAGYMAROS CASE</i>	79
E. IMPLICATIONS.....	84
IV. CONCLUDING REMARKS	86

I. INTRODUCTION

The year 2023 marked the fiftieth anniversary of the entry into force of the Treaty of Itaipú (“the Treaty”).¹ According to paragraph VI of

1. See Treaty Concerning the Hydroelectric Utilization of the Water Resources of the Paraná River Owned in Condominium by the Two Countries, From and Including the Salto Grande de Sete Quedas or Salto del Guairá, to the mouth of the Iguassu River, Braz.-Para., April 26, 1973, 923 U.N.T.S. 57 [hereinafter Treaty of Itaipú]; Camilo Pereira Carneiro Filho & Tomaz Espósito Neto, *Historical relations between Brazil and Paraguay: negotiations and quarrels behind Itaipú Dam*, 13 CONJUNTURA AUSTRAL J. OF THE GLOB. S. 77, 80–81 (describing historical events such as the Triple Alliance treaty, which led up to the Treaty of Itaipú); see generally

the Treaty, its provisions are to be reviewed after fifty years have elapsed from the date the Treaty entered into force.² In October 2021, João Francisco Ferreira, the former Brazilian representative of the Itaipú binational entity, stated in a press conference what seemed to be a new interpretation of the review provision contained in Annex “C” of the Treaty of Itaipú. He noted that there is no obligation to negotiate Annex “C” if an agreement is not reached between the two states.³ Moreover, according to Ferreira, reviewing Annex “C” can take place from 2023 onwards, and while there is a widespread understanding that this measure is obligatory, it is not so.⁴

Based on this new Brazilian position, the purpose of this research paper is to tackle the following question:

Does Annex “C” of the Treaty of Itaipú establish an independent obligation to negotiate between the parties or is a new agreement in addition to the relevant provision of Annex “C” required?

In this regard, the overarching purpose of this research paper is to put forward the argument that, under Annex “C” of the Treaty of Itaipú, both parties have an independent obligation to negotiate in good faith without the requirement of further consent. This claim will be substantiated by, first, framing the research question in the context of the Treaty of Itaipú in general, including its more recent historical background,⁵ its structure,⁶ and the relevance of Annex “C” of the Treaty.⁷ Second, in specifically addressing the obligation to negotiate in Annex “C” of the Treaty of Itaipú, Brazil’s position will be examined in detail.⁸ Then, in order to determine whether paragraph VI

THOMAS L. WHIGHAM, *THE PARAGUAYAN WAR: CAUSES AND EARLY CONDUCT* xiii-xiv (2d ed. 2018) (discussing the impact of the Triple Alliance War on Paraguay’s political, economic, and social institutions).

2. See Treaty of Itaipú, *supra* note 1, Annex C.

3. *Director brasileño de Itaipú dijo que debemos esperar el 2023 y no adelantar la revisión del Anexo C*, ECONOMÍA (Oct. 29, 2021) <https://economia.com.py/director-brasileno-de-itaipu-dijo-que-debemos-esperar-el-2023-y-no-adelantar-la-revision-del-anexo-c/?amp>.

4. *Id.*

5. See *infra* Section II.A.

6. See *infra* Section II.B.

7. See *infra* Section II.C.

8. See *infra* Section III.A.

of Annex “C” of the Treaty of Itaipú requires further agreement between the parties to review the provisions therein, a systemic assessment of the relevant provisions of the Treaty, including Annex “C”, in light of the treaty rules of interpretation, as codified in the Vienna Convention on the Law of Treaties, will be conducted.⁹ Third, due to its relevance to this study, the *Gabčíkovo–Nagymaros* case before the International Court of Justice will be briefly examined, with special regard to the element of the *pacta sunt servanda* principle and the concept of good faith in the obligation to negotiate.¹⁰ Finally, after having determined that paragraph VI of Annex “C” of the Treaty is a standalone provision and that it is to be complied with in good faith by Paraguay and Brazil, the implications of an eventual dispute arising from Brazil’s position will be discussed.¹¹

II. THE TREATY OF ITAIPÚ

A. HISTORICAL BACKGROUND

Understanding the Treaty of Itaipú means also understanding its history. Although it was adopted only fifty years ago, the Treaty of Itaipú is the consequence of a long-standing (still) unresolved boundary demarcation dispute between Paraguay and Brazil dating back to the 1870s, in the aftermath of the Paraguayan War.¹² This dispute reached its highest peak in the mid-1960s, when Brazil sent a military detachment to occupy part of the contested territory, provoking Paraguay’s outrage.¹³ As a result of this impasse, Paraguay and Brazil came to a settlement that was reflected in the Final Act of Foz do Iguazu (“Act of Iguazu”) in 1966, a diplomatic document that

9. See *infra* Sections III.B. and III.C.

10. See *infra* Section III.D.

11. See *infra* Section III.E.

12. The Paraguayan War (or *Guerra Guasu*, *guerra* meaning “war” in Spanish and *guasu* meaning “great” in Guaraní) was fought between Paraguay and the alliance of Argentina, the Empire of Brazil and Uruguay from 1864 to 1870. It has been regarded as the deadliest war in Latin American history. See generally WHIGHAM, *supra* note 1 (detailing the history of the Paraguayan War and the wide-ranging political effects it has on Brazil and Paraguay especially).

13. Jacob Blanc, *Itaipú’s Forgotten History: The 1965 Brazil – Paraguay Border Crisis and the New Geopolitics of the Southern Cone*, 50 J. LATIN AM. STUD. 383, 395 (2017).

was the immediate predecessor of the Treaty of Itaipú.¹⁴ Subsequently, negotiations for a treaty were held, and the Treaty of Itaipú was concluded and signed in 1973.¹⁵ For the purposes of this research paper, the most recent events that took place prior to the adoption of the Treaty of Itaipú are addressed below.

1. *Unilateral Brazilian Projects over the Paraná River and Continued Disagreements over the Border*

In February 1962, through an article published in the *Jornal do Brasil*, the Embassy of Paraguay in Rio de Janeiro learned that the Brazilian Minister of Mining and Energy had announced the appointment of a renowned specialist to prepare a preliminary report on the integral use of the Guairá Waterfalls.¹⁶ The Guairá Waterfalls, once the largest waterfall in the world, were located in an area on the border between Paraguay and Brazil that had not yet been demarcated. It turned out that, unbeknownst to Paraguay, Brazil had already started to conduct studies since the mid-1950s on the use of the falls.¹⁷

This raised the alarm in Asunción, which prompted a diplomatic protest against the government of Brazil.¹⁸ An exchange of several diplomatic notes between the two states followed. On March 12, 1962, Raúl Peña, Ambassador of Paraguay to Brazil, sent a letter to Francisco Clementino de San Tiago Dantas, Minister of Foreign Affairs of Brazil, expressing, *inter alia*, that “[t]he dominion that the Republics of Paraguay and the United States of Brazil have over . . . the [Guairá Waterfalls] as a whole will only be delimited once the demarcation of boundaries and characterization of borders operations carried out by the [Paraguay-Brazil Mixed Commission] have been completed and approved” and that “[Paraguay] considers that, before said demarcation of boundaries and characterization of borders is concluded, [neither Brazil nor Paraguay] could unilaterally propose to

14. *Id.* at 404.

15. See Treaty of Itaipú, *supra* note 1, Annex C.

16. EFRAÍM CARDOZO, *LOS DERECHOS DEL PARAGUAY SOBRE LOS SALTOS DE GUAIRÁ* 176 (1965); see Blanc, *supra* note 13, at 390 (describing the progression of Brazil’s interest in hydroelectric development).

17. CARDOZO, *supra* note 16, at 176; ENZO DEBERNARDI, *APUNTES PARA LA HISTORIA POLÍTICA DE ITAIPÚ* 48 (1996).

18. CARDOZO, *supra* note 16, at 178.

take full advantage of the hydraulic energy of the Guairá Waterfalls.”¹⁹

On September 19, 1962, Alfonso Arínos de Mello Franco, the newly appointed Minister of Foreign Affairs of Brazil, sent a response letter to the Paraguayan ambassador in Rio de Janeiro. After arguing that Brazil's possession over the Guairá Waterfalls as a whole was “definitely recognized and established” based on the work of the Paraguay-Brazil Mixed Commission during 1872-1874, the letter expressed that:

[Brazil] did not see why, to exercise possession rights that were fully secured and have been maintained for almost a century, would need to wait the conclusion of the work of the current Mixed Commission . . . The terminal point of the dry line and, therefore, of [the remaining twenty kilometers close to the area of the Guairá Waterfalls], is already fixed on the right bank of the Paraná River, in front of the fifth and most important of the Seven Falls, according to the maps approved by the [1872-1874 Mixed Commission].²⁰

Additionally, the Brazilian foreign minister noted that:

Regarding the use of the Waterfall of the Seven Falls, *located entirely on the territory of Brazil*, I wish to inform Your Excellency that the Brazilian government will be willing to examine in due time the possibility of involving the Republic of Paraguay in the utilization of the energy resources and any other resources to be exploited in the aforementioned Waterfall, if so requested by the Paraguayan authorities (emphasis added).²¹

On June 12, 1963, in a new response from Paraguay, the Ministry of Foreign Affairs instructed the Paraguayan embassy in Rio de Janeiro to reaffirm its position that, based on the 1872 Treaty of Limits, the Guairá Waterfalls did not belong to either country, but are a natural border and part of the international Paraná River that serves as a boundary between Paraguay and Brazil.²² It further added that the Guairá Waterfalls “are not only not located on the territory of Brazil . . . but [Paraguay] has territorial sovereignty rights over its western bank, and consequently, river sovereignty rights, and

19. *Id.* at 176–77.

20. *Id.* at 177–78.

21. *Id.* at 178–79.

22. *Id.* at 179.

condominium rights over waters . . . “and, finally, that “. . . the mere enunciation of any project of exclusive use by Brazil, by infringing on Paraguay’s rights, is considerably harmful to the relations between our Peoples and Government.”²³

In September 1963, a delegation headed by Antônio Ferreira de Oliveira Brito, Brazilian Minister of Mining and Energy, visited Paraguay with the objective of informing the Paraguayan government of Brazil’s purposes with respect to the hydroelectric exploitation studies, with the participation of Paraguay, and assuring that Brazil had not carried out any project to exploit the waters of the Guairá Waterfalls, stressing that it could not do so unilaterally because they were common waters.²⁴ As a result of this visit, the Brazilian foreign ministry then announced that Paraguay and Brazil agreed that studies would be conducted for the preparation of a preliminary project for the use of the energy potential of the Guairá Waterfalls.²⁵ In January 1964, Alfredo Stroessner and João Goulart, the Presidents of Paraguay and Brazil, respectively, met to discuss the exploitation of the Guairá Waterfalls.²⁶ In that meeting, they agreed to have a Paraguayan-Brazilian Mixed Commission established “as soon as possible” to study questions related to the construction and operation of “the great work to be carried out jointly by the two states, which will be the most important of all those of its kind.”²⁷

On March 20, 1965, Paraguayan President, Alfredo Stroessner, visited the area of the border to survey and measure its geopolitical potential.²⁸ He instructed the local population to convene in order to

23. *Id.* at 179–80.

24. *Id.* at 219; DEBERNARDI, *supra* note 17, at 50–51.

25. See CARDOZO, *supra* note 16, at 219; DEBERNARDI, *supra* note 17, at 50–51, 55 (showing antecedents to the formation of the Treaty of Itaipú).

26. See Andrew Nickson, *Brazil & Paraguay: A Protectorate in the Making*, 10 MURAL INTERNACIONAL 2, 5 (2019) (Braz.) (describing that after the January 19, 1964 meeting, a joint committee would be established to investigate the exploitation of the hydroelectric potential of the falls); see also DEBERNARDI, *supra* note 17, at 64 (highlighting key negotiations and discussions that led to the creation of the Treaty of Itaipú).

27. DEBERNARDI, *supra* note 17, at 59.

28. See Blanc, *supra* note 13, at 393 (describing the geopolitical survey and the instructions to local Paraguayans of Brazil’s rights in the region).

inform them of Paraguay's borders and rights in that region.²⁹ The next day, a group of Paraguayan citizens led by Major Emilio Guerrero Meza gathered close to the Paraná River. There, they raised the Paraguayan flag, they sang the Paraguayan national anthem, and they delivered a brief speech asserting that they were on national territory.³⁰ All of this was witnessed by Brazilian citizens who lived nearby, and later gave testimony to Brazilian authorities.³¹ This gathering was the genesis of what would eventually lead to Operation Sagarana, a secret plan formulated by the Brazilian government to militarily occupy the border region.³²

2. *Brazilian Invasion of the Disputed Area and Diplomatic Crisis*

On June 17, 1965, with government authorization, a Brazilian military detachment was deployed across the Paraná River, in the exact same location where the Paraguayan gathering had taken place, within the twenty-kilometer nondemarcated area between marker 341/IV and the Guairá Waterfalls.³³ Paraguay, on the one hand, regarded the Brazilian incursion as an "act of aggression" and a violation of territorial sovereignty.³⁴ On the other hand, Brazil considered that area to be within its territory and saw Paraguay's previous actions as the real invasion.³⁵

29. *See id.* (stating that Stroessner left instructions to assemble the local population to inform them of Paraguay's borders and rights in that region).

30. *See id.* (describing the ceremony that nearly one hundred Paraguayans participated in, which involved a declaration from one speaker that Paraguay would reclaim this territory).

31. *See id.* at 393–94 (explaining that Brazilians gave the film negatives of the event as well as official testimony at the nearest military office).

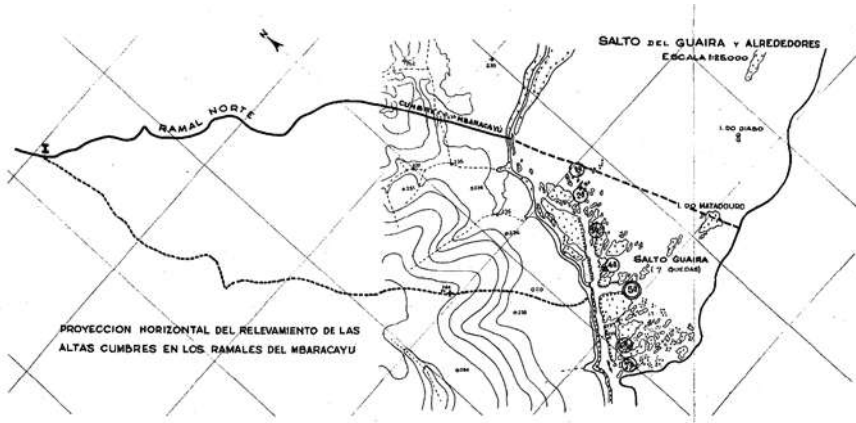
32. *See id.* at 393 (detailing that Operation Sagarana also intended to curb Paraguay's influence in the area).

33. *See id.* at 395 (describing that a detachment crossed the Paraná River and set up camp just south of a small outpost known as Porto Coronel Renato).

34. *See id.* (indicating Paraguay's displeasure with Brazil's detachment in Paraguayan territory).

35. *See id.* at 406 (explaining that Brazil viewed Paraguay's actions in March as the true invasion).

Figure 1. Map of the disputed boundaries and the Guairá Waterfalls.



Source: EFRAÍM CARDOZO, *LOS DERECHOS DEL PARAGUAY SOBRE LOS SALTOS DEL GUAIRÁ* (1965), “Horizontal Projection of the Survey of the High Peaks of the Mbaracayú Mountains Branches.”

As word of these events was received in Asunción, Paraguayan authorities started to apply diplomatic pressure in different ways for the withdrawal of the troops.³⁶ On September 1, 1965, the President of Brazil, Humberto Castelo Branco, sent a letter to Stroessner, expressing that “the tiny Brazilian military contingent installed . . . cannot represent any inconvenience or harm to the friendly country and that its presence, not even remotely, can denote pressure, coercion or retaliation by the Brazilian government.”³⁷ From this point on, the Paraguayan and Brazilian foreign ministries would exchange several communications.³⁸ A few weeks later, on September 25, 1965, the Paraguayan foreign ministry responded with a letter to the Brazilian ambassador in Asunción, underscoring the urgent need to conclude the pending border demarcation works in the last twenty kilometers before the Guairá Waterfalls and requesting the withdrawal of the Brazilian

36. See *id.* at 395–96 (detailing that Chancellor Raul Sapena Pastor and General Stroessner of Paraguay met routinely with Brazilian ambassador Jaime Souza Gomes and other Brazilian colleagues to make appeals).

37. See *id.* at 396 (quoting Brazil’s response to Paraguay’s allegation of violating territorial sovereignty).

38. See *id.* (detailing the back-and-forth exchange between the foreign ministries).

troops as “it does no service to the very cordial and very good relations between the United States of Brazil and the Republic of Paraguay.”³⁹

But Brazil was unresponsive,⁴⁰ and instead it started developing the occupied area by building roads and facilities.⁴¹ On October 21, 1965, a delegation of Paraguayan officials commissioned by the Paraguayan foreign ministry arrived to the Brazilian military detachment to verify the military occupation and the permanent facilities.⁴² Soon after, they were apprehended by Brazilian soldiers for several hours.⁴³ Consequently, on October 22, 1965, the Paraguayan foreign ministry sent a letter to the Brazilian ambassador in Asunción, expressing its disappointment in Brazil’s actions, informing that it had commissioned a delegation of Paraguayan officials to travel to the nondemarcated area for verification, and presenting “the most formal protest of the Government of the Republic of Paraguay for the perpetration of the . . . facts and for the military occupation by Brazil of a place located in the only area where the boundary markers have not yet been placed in compliance with the Treaty of Limits of 1872.”⁴⁴

The news of the escalation of the dispute and the events of October 21 would soon reach the world—Argentina, Uruguay and even the United Nations were proposed as potential mediators. On November 24, 1965, U.S. Secretary of State Dean Rusk visited Asunción and met with Stroessner.⁴⁵ The Paraguayan president requested Rusk use his influence with the Brazilian government to have them negotiate with Paraguay for the withdrawal of the Brazilian military detachment and to give Paraguay “more attention at the top and more favorable

39. DEBERNARDI, *supra* note 17, at 54.

40. *See id.* at 78–89 (giving a comprehensive account of the negotiations); *see also* Blanc, *supra* note 13, at 396 (describing Paraguayan Chancellor Sapena Pastor’s letter to Brazilian Ambassador Souza Gomes, which reflects disappointment in how unresponsive Brazil has been).

41. *See* Blanc, *supra* note 13, at 396 (noting that Paraguay received reports that Brazil was constructing barracks, roads, and even an airstrip on the lands adjacent to Porto Renato).

42. *See id.* (stating that Sapena Pastor had commissioned a group of Paraguayan authorities to travel to the ‘un-demarcated zone’ to report back personally to him).

43. *See id.* at 397 (describing how a truck came and detained the Paraguayan group).

44. *Id.* at 396–97; *see also* DEBERNARDI, *supra* note 17, at 55 (contextualizing Brazil and Paraguay’s evolving relationship before Itaipú).

45. Blanc, *supra* note 13, at 398.

treatment in general.”⁴⁶ That same day, Stroessner met with Golbery do Couto e Silva, a high-ranking Brazilian military officer who had been sent to Asunción at the personal request of Humberto Castelo Branco, because he and Stroessner knew each other well.⁴⁷

The next year, in February 1966, after verifying a “new incident,”⁴⁸ the Paraguayan foreign ministry sent a letter to the Brazilian ambassador in Asunción to protest against the construction of new roads and the presence of a now larger garrison of Brazilian effectives in the contested area close to the Guairá Waterfalls.⁴⁹ These actions by Brazil indicated that Operation Sagarana was in an advanced stage.⁵⁰ On March 25, 1966, the Brazilian ambassador sent a response letter dismissing the existence of a boundary dispute between Brazil and Paraguay but affirming that it was open to start discussions on the integral use of the hydraulic resources of the Paraná River, in particular, the practical use of the Waterfall of the Seven Falls not only for its energy potential, but also for agriculture and navigation, “in a way that this great river . . . will be [between the two countries] a link of union. . . .”⁵¹ As the months went by, the impasse between Paraguay and Brazil became completely insurmountable.

3. *The 1966 Act of Iguazu*

As mentioned by Juracy Magalhães, the Brazilian foreign minister at that time,⁵² Paraguay refused any proposition that favored the Brazilian interests.⁵³ For this reason, he proposed that Raúl Sapena Pastor, the Paraguayan foreign minister, hold a bilateral meeting at the

46. *Id.* at 398–99.

47. *Id.* at 399, n. 66.

48. DEBERNARDI, *supra* note 17, at 59 (specifying events that heightened tensions between Paraguay and Brazil).

49. *See* Blanc, *supra* note 13, at 401 (describing the presence of a battalion of 600 men).

50. *See id.* at 402 (detailing the early stages of Operation Sagarana).

51. DEBERNARDI, *supra* note 17, at 59–60.

52. *See* Maria A. Gwynn, *Adapting Watercourse Agreements to Developments in International Law: The Case of the Itaipú Treaty*, 4.1 INT’L WATER L. 3, 17 (2019) (giving a timeline of when Juracy Magalhães was appointed).

53. *See id.* at 17–18 (describing Paraguay’s hard stance against any proposition that benefitted Brazil).

border of the two countries.⁵⁴ Between June 21 and 22, 1966, delegations from Paraguay and Brazil headed by their foreign ministers met alternately in Puerto Presidente Stroessner (Paraguay) and Foz do Iguacu (Brazil) to conduct intense negotiations.⁵⁵ During the first day's talks, at a point where the positions of the two countries were practically impossible to reconcile, Sapena Pastor insisted on the border question and that the 1872 Treaty of Limits had to be revised.⁵⁶ Thirty years later, Magalhães commented on his response to Sapena Pastor:

There was a moment when we came close to breaking off our discussions, when the Paraguayan foreign minister insinuated, in the name of a supposed spirit of justice, that that [1872 Treaty of Limits] had to be revised. Then, telling him that I knew enough about international law to know that a treaty between two countries can only be revised by another treaty or by a war, I told him that Brazil was not in a position to accept a new treaty and asked him if Paraguay was in a position to promote a war.⁵⁷

Visibly surprised and frightened, Sapena Pastor asked if that was a threat to Paraguay, to which Magalhães replied that he only wanted the discussion to have a realistic basis.⁵⁸ Given that tensions were running high, both parties agreed to adjourn the meeting and reconvene the next day. On June 22, 1966, Sapena Pastor and Magalhães signed the final document.⁵⁹ Known as the Act of Iguacu, it is a short diplomatic piece consisting of eight paragraphs. The main provisions are paragraphs III, IV and VII, which established the following:

... [The United States of Brazil and Paraguay reached the following

54. DEBERNARDI, *supra* note 17, at 67–68 (describing the events that lead to this important bilateral meeting).

55. See Blanc, *supra* note 13, at 404–05 (discussing the meeting of representatives from either country and the signatures of each delegation leading to the Act of Iguacu).

56. *Id.* (noting Chancellor Sapena Pastor's stance on a governmental reassessment of the Treaty of 1872).

57. Gwynn, *supra* note 52, at 18 (quoting Magalhães' view of the meeting with Sapena Pastor and the perceived threat).

58. See Blanc, *supra* note 13, at 405 (describing the intense interaction between Sapena Pastor and Magalhães).

59. See *id.* (detailing the two chancellors' signing of the document).

conclusions:]

...

III — THEY PROCLAIMED the disposition of their respective governments to proceed, by common agreement, to the study and survey of the economic possibilities, in particular the hydraulic resources belonging in condominium to the two countries, of the [Guairá Waterfalls];

IV — THEY AGREED to establish, as of now, that the electric energy eventually produced by the slopes of the Paraná River, from and including the [Guairá Waterfalls] to the mouth of the Iguazu River, will be divided in equal parts between the two countries, being recognized to each one of them the right of preference for the acquisition of this same energy at a fair price, which will be opportunely fixed by specialists of the two countries, of any quantity.

...

VII — CONCERNING the work of the Mixed Commission on the Limits and Characterization of the Brazil-Paraguay Border, the two Ministers of Foreign Affairs agreed that such work shall continue on the date deemed convenient by both Governments.⁶⁰

Therefore, both states recognized that the exploration of the potential resources of the Paraná River would be conducted jointly and that these were to be shared on a fifty-fifty basis.⁶¹ The same applied to the eventual production of hydroelectric energy, which was recognized as a “right of preference” for each country to acquire the unused portion of the other country’s energy.⁶² Additionally, Paraguay and Brazil exchanged letters regarding the interpretation question of the borders—both countries maintained their positions on this issue, and Brazil, “desiring to contribute to a total easing of the tensions that have been damaging the friendly relations between [Brazil and

60. Final Act, Braz.-Para., art. III, IV, VII, June 22, 1966, Federal Official Gazette, Aug. 8, 1966, 9.061/62 [hereinafter Act of Iguazu].

61. *See id.*, art. III, IV (“the electric energy eventually produced by the unevenness of the river Paraná . . . will be divided in equal parts between the two countries”).

62. *Id.*, art. IV (“each of them having the right of first refusal for the acquisition of the same energy at a fair price”).

Paraguay] . . . ,” agreed to transfer the military detachment.⁶³

Despite Brazil’s perceived commitment in the Act, it would take considerable time until it removed the military detachment from the border area, apparently through further political bargaining.⁶⁴ Eventually, the great Guairá Waterfalls would be submerged in 1982 with the construction of the Itaipú Dam, and the remaining part of the nondemarcated territory of the Mbaracajú Mountains area would be declared as a binational ecological reserve, part of the Itaipú Dam complex.⁶⁵ Although these actions made the border issue provisionally “non-irritating,” to this day the demarcation of that area remains unresolved.⁶⁶ Hence, the Act of Iguazu transformed a conflict in what would become a crucial binational project on the management of the shared waters of the Paraná River.

4. *Adoption and Signing of the Treaty of Itaipú*

Studies on the exploitation of the hydroelectric potential of the Guairá Waterfall had been conducted mainly since the 1950s, long before the Act of Iguazu was concluded.⁶⁷ In 1967, a Paraguayan-Brazilian Mixed Technical Commission was established with the objective of jointly studying the possibilities and the most convenient locations for a binational hydroelectric development in the area of the Guairá Waterfalls.⁶⁸ In 1972, the Mixed Technical Commission delivered its Preliminary Report on the exploitation of the potential hydroelectric energy of the Paraná River.⁶⁹ Between 1972 and 1973,

63. See Blanc, *supra* note 13, at 406 (stating that “[t]he final text also included a single memorandum”); DEBERNARDI, *supra* note 17, at 72 (reporting it as a “set of notes”).

64. See Blanc, *supra* note 13, at 407 (“In his analysis of the Paraná borderlands, Andrew Nickson writes: ‘In exchange for the withdrawal of Brazilian troops from the Falls, agreed in the Act of Iguazu, the Paraguayan Government removed existing restrictions on Brazilian colonization.’”).

65. See DEBERNARDI, *supra* note 17, at 73 (providing a history of the first studies surrounding the Guairá Waterfalls).

66. *Id.*

67. *Id.* at 78–89 (pointing to earlier works from Paraguayan scholars dating between the 1910s and the 1920s).

68. See Treaty of Itaipú, *supra* note 1, at 92–93, 96.

69. See DEBERNARDI, *supra* note 17, at 90–105 (discussing developments in negotiations surrounding the treaty on exploiting the Paraná River throughout the early to mid-1970s).

the initial contacts regarding the negotiations of a treaty on the exploitation of the Paraná River and the construction of a dam took place between Paraguay and Brazil. In Brasília, in 1973, the two states signed and adopted the commonly known Treaty of Itaipú, which was later ratified by the two states.⁷⁰

It is also worth noting that, on the same day the Treaty of Itaipú was signed, the Presidents of Paraguay and Brazil signed a Joint Declaration on the Paraguayan president's visit to Brasília.⁷¹ Among the various points in the Joint Statement there is the following:

[The Presidents of the Republic of Paraguay and the Federative Republic of Brazil]

IX - Consider as highly positive the dynamism of the relations between Paraguay and Brazil and express their satisfaction for the signature today, by their respective Ministers of Foreign Affairs, of the [Treaty of Itaipú], which opens, within the most frank, broad and loyal collaboration between the two countries, *real perspectives for the socio-economic transformation of the region and for the development of Paraguay and Brazil* (emphasis added).⁷²

Parallel to these developments, the realization of projects on international watercourses, such as the Paraná River, can affect several countries. For instance, Brazil is an upstream state, and Paraguay and Argentina are downstream states.⁷³ In this regard, Brazil adopted the Harmon Doctrine and retained the position of the “significant harm” thesis, meaning it was up to the state using the water in its jurisdiction to determine whether significant damage was being done in regard to

70. Itaipú (“The singing stone” in Guaraní) is the name given to the binational exploitation project. It was named after a small isle near the location of the project. See Treaty of Itaipú, *supra* note 1 (concerning the Hydroelectric Utilization of the Water Resources of the Parana River Owned in Condominium by the Two Countries, from and including the Salto Grande de Sete Quedas or Salto del Guaira, to the mouth of the Iguassu River); DEBERNARDI, *supra* note 17, at 121–186 (noting a comprehensive account of the negotiations).

71. Joint Statement by the Presidents of the Republic of Paraguay and the Federative Republic of Brazil (Apr. 26, 1973) (on file with the Ministry of Foreign Affairs of Paraguay).

72. *Id.*

73. See Gwynn, *supra* note 52, at 20 (“In the case of Parana River, Brazil is an upstream nation, and Paraguay and Argentina are downstream nations.”).

the other country sharing the sovereignty over the international watercourse.⁷⁴ Argentina instead held that for any project concerning international watercourses affecting downstream states, there should be “prior consultations.”⁷⁵

On this point, under the legal regime of the 1969 Treaty of the River Plate Basin, an “intermediate thesis” between the two aforementioned positions was sought at the IV Meeting of Foreign Ministers of the countries of the River Plate Basin and approved in the 1971 Declaration of Asunción on the utilization of international rivers (“Declaration of Asunción”).⁷⁶ This declaration introduced the distinction between contiguous and successive international rivers. It established that “[i]n contiguous international rivers, sovereignty being shared, any utilization of their waters must be preceded by a bilateral agreement between the riparian [states]” and that “[i]n successive international rivers, where sovereignty is not shared, each State [sic] may use the waters for its own needs, provided that it does not cause significant harm to another State [sic] of the Basin.”⁷⁷ In short, the declaration accepts the principle of prior consultation with respect to contiguous rivers, but applies the doctrine of significant harm to successive rivers.⁷⁸ The declaration would eventually facilitate the development of the Paraguayan-Brazilian project.

74. See *id.* (identifying Brazil’s decision to adopt the Harmon Doctrine and the position Brazil took concerning its sovereignty over water in its jurisdiction).

75. See *id.* (describing Argentina’s contrary position and demand for prior consultations).

76. See Declaration of Asunción on the Use of International Rivers, June 3, 1971, reprinted in [1974] 2 Y.B. Int’l L. Comm’n 324, U.N. Doc. A/CN.4/274 [hereinafter Declaration of Asunción] (outlining the agreement of the foreign ministers).

77. *Id.* (enumerating the formal agreements and responsibilities concerning contiguous and successive international rivers).

78. See LUIS MARÍA RAMÍREZ BOETTNER, MEMORIAS: SESENTA Y SEIS AÑOS DE VIDA INTERNACIONAL 92–93 (2004) (Para.) (stating that it was Raúl Sapena Pastor, Minister of Foreign Affairs of Paraguay, who proposed the intermediate thesis); see also MÁRIO GIBSON BARBOZA, NA DIPLOMACIA, O TRAÇO DA VIDA 142–146 (4th ed. 2020) (arguing that it was Luis María de Pablo Pardo, Minister of Foreign Affairs of Argentina); Gwynn, *supra* note 52, at 24 (highlighting the distinction between contiguous and successive international rivers that the Declaration of Asunción established).

B. STRUCTURE OF THE TREATY OF ITAIPÚ

The Treaty of Itaipú comprises twenty-five articles and three additional instruments, known as “annexes.” The preamble of the Treaty refers, *inter alia*, to Paraguay and Brazil’s “common interest in the hydroelectric utilization of the water resources of the Paraná River owned in condominium by the two countries . . . ,”⁷⁹ and to several international instruments, such as the 1966 Act of Iguazu, the 1969 Treaty of the River Plate Basin, and the 1971 Declaration of Asunción.⁸⁰ Article I establishes the overarching object of the Treaty, that is, the joint utilization for hydroelectric purposes of the water resources of the Paraná River “owned in condominium by the two countries. . . .”⁸¹ To achieve this, the Treaty provides for the creation of the Itaipú binational entity, jointly constituted by Administración Nacional de Electricidad (ANDE) and Centrais Elétricas Brasileiras S.A. (Eletrobrás), Paraguay and Brazil’s majority state-owned electric utility companies, respectively.⁸² The bodies and functioning of the Itaipú binational entity are governed by the relevant provisions of the Treaty and its Statute, contained in Annex “A.”⁸³

Additionally, the Treaty provides that the two states shall acquire, jointly or separately, the total amount of the energy produced by the Itaipú binational entity, including the right to acquire the unused portion of the other party’s energy.⁸⁴ This provision was an important change with respect to the 1966 Act of Iguazu, which recognized a “right of preference” to acquire the unused portion of energy and was not restricted exclusively to the two states.⁸⁵

The main text of the Treaty also includes provisions regarding the seat and governing bodies of the Itaipú binational entity (Article IV),

79. Treaty of Itaipú, *supra* note 1.

80. *See id.*

81. *Id.* art. I.

82. *See id.* art III.

83. *See id.* Annex A.

84. *See id.* art. XIII.

85. *See* GLOBAL INFRASTRUCTURE HUB, CASE STUDY: ITAIPU HYDROELECTRIC DAM 108 (2020) (“The 1966 Act of Iguazu proclaimed that Brazil and Paraguay would commonly explore the hydroelectric potential of the resources common to the two countries, and . . . the electricity generated would be evenly shared but could be sold from one of the two parties to the other at a fixed price decided by the countries, and not at ‘cost price’ as requested by Paraguay.”).

the authorization of the two states to the Itaipú binational entity to exploit the water resources of the Paraná River (Article V), the status of the border question with respect to the Itaipú Dam facilities (Article VII), the establishment of the Itaipú binational entity's capital and the financing of the construction works (Articles VIII, IX, and X), labor hiring and tax exemption (Articles XI and XII), the competent binational jurisdictions (Articles XIX and XXI), and the dispute settlement mechanism (Article XXI).⁸⁶ Also, the three annexes are an integral part of the Treaty. Annex "A," as noted above, contains the Statute of the Itaipú binational entity; Annex "B" contains provisions on the general description of the facilities for the production of energy and the auxiliary works; and Annex "C" contains provisions on the financial bases of Itaipú and the conditions for the provision of energy to Paraguay and Brazil.⁸⁷ The last one will be addressed below.

C. ANNEX "C" OF THE TREATY OF ITAIPÚ AND THE COST OF THE ELECTRICAL SERVICES

Annex "C" of the Treaty of Itaipú is a short, but important, instrument that spells out certain provisions of the Treaty, Articles XIII and XV in particular. It details the conditions for the provision of energy and the cost of the energy.⁸⁸ In this regard, the Itaipú binational entity follows a "zero-sum" model, because its revenues or income must exactly equal the cost of the energy provided to Paraguay and Brazil.⁸⁹

Each state has the right to half of the energy produced by the Itaipú Dam and must agree to 20-year contracts with the Itaipú on the portions of energy to be used during that period and each year within that period.⁹⁰ Annex "C" also provides that where one state, through its designated electric utility company, decides not to use part of its corresponding portion of energy, it can then authorize the Itaipú binational entity to cede that unused portion to the other party.⁹¹ The cost of the energy produced by the Itaipú binational entity

86. See Treaty of Itaipú, *supra* note 1, arts. IV–XII, XIX, XXI.

87. See *id.* art. VI.

88. See *id.* arts. XII, XV.

89. See *id.* Annex C, para. IV.I.

90. See *id.* Annex C, para. II.2.

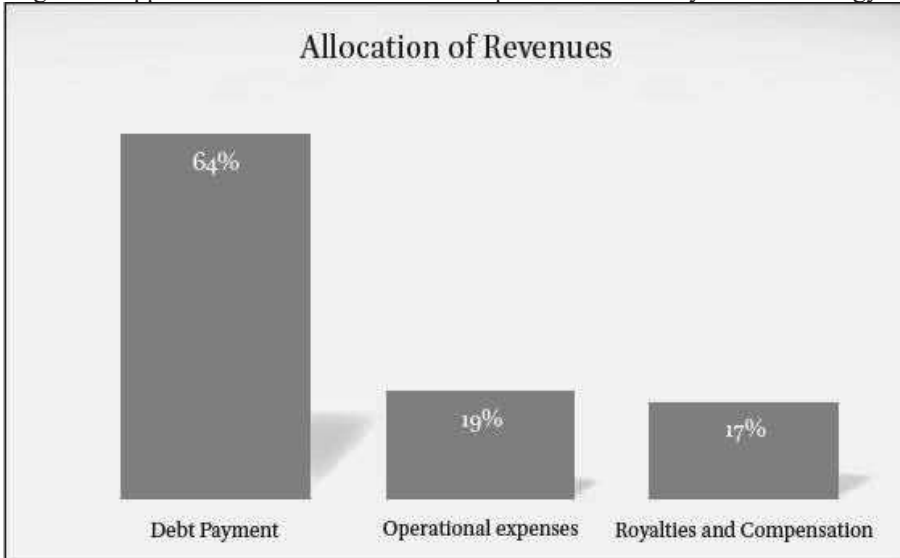
91. See *id.* Annex C, para. II.5.

(colloquially known as the “tariff”) consists of several components, which were originally reflected in paragraph III:

- i. The amount needed for the payment of 12 percent per annum return on the capital contributed by Paraguay and Brazil to constitute the Itaipú binational entity, which was US\$100 million;
- ii. The amount needed for the payment of the finance charges on the loans obtained by the Itaipú binational entity;
- iii. The amount needed for the payment of the amortization of the aforementioned loans;
- iv. The amount needed for the payment of “royalties” to Paraguay and Brazil, calculated at US\$650/GWh generated. These are revenues earned by the two states in concept of the use of the water resources of the Paraná River by the Itaipú Dam;
- v. The amount needed for the payment of administrative expenses to ANDE and Eletrobrás, calculated at US\$50/GWh;
- vi. The amount needed to cover operating expenses;
- vii. The amount of the balance, whether positive or negative, of the operating account for the preceding financial year; and
- viii. The amount needed for the payment of compensation to one state at US\$300/GWh generated and ceded to the other state.⁹²

92. Pursuant to Note No. 4 of January 28, 1986, this component was excluded from the “tariff,” being its payment the exclusive responsibility of the party that uses that energy. Treaty of Itaipú, *supra* note 1, Annex C, para. III.

Figure 2. Approximate distribution of the Itaipú binational entity's cost of energy.



Source: María Antonia Gwynn, *Adapting Watercourse Agreements to Developments in International Law: The Case of the Itaipu Treaty* (2019).

As illustrated in Figure 2, the debt was the largest component of the cost of the energy provided by the Itaipú binational entity to Paraguay and Brazil.⁹³ On this point, Annex “C” contains a review clause independent from the text of the Treaty of Itaipú. Because it was estimated that the entire debt would be serviced by 2023,⁹⁴ paragraph VI of Annex “C” provides that:

The provisions of this annex shall be reviewed after 50 [sic] years, have elapsed from the entry into force of the Treaty, due regard being given, *inter alia*, to the degree of amortization of the debts contracted by ITAIPU [sic] for the construction of the utilization scheme and the relation between

93. See “Itaipu cancela deuda por construcción y se convierte en una central Hidroeléctrica totalmente amortizada”, ITAIPÚ BINACIONAL, <https://www.itaipu.gov.py/es/sala-de-prensa/noticia/itaipu-cancela-deuda-por-construccion-y-se-convierte-en-una-central-hidroelec> (announcing the end of the nearly 50-year financial commitment made by Paraguay and Brazil for the construction of the Itaipú Dam).

94. See DEBERNARDI, *supra* note 17, at 179 (discussing the backdrop of the fifty-year period designated before opening up the treaty to review again).

the power values contracted for by the entities of the two countries.⁹⁵

On this matter, it has been widely considered—and reported—that review of Annex “C” is set to take place in 2023, based on the text of the above provision.⁹⁶ However, due to the importance of the subject, the potential review of Annex “C” has generated a great deal of debate about what is going to happen in 2023 and beyond.⁹⁷ In Paraguay, government officials, specialists in the field, and members of civil society have shared their views on what should be done with the tariff on the energy generated by the Itaipú Dam.⁹⁸ Brazil, for its part, had expressed its interest in the reduction of the tariff.⁹⁹

95. Treaty of Itaipú, *supra* note 1, Annex C, para. VI.

96. See DEBERNARDI, *supra* note 17, at 179 (elaborating on the estimation that the review of Annex C will take place in 2023); see also “El tratado se puede revisar en cualquier momento, pero el Anexo C, en el 2023”, aclara el canciller, LA NACIÓN (Jul. 23, 2021), <https://www.lanacion.com.py/politica/2021/07/23/el-tratado-se-puede-revisar-en-cualquier-momento-pero-el-anexo-c-en-el-2023-aclara-el-canciller> (discussing the likelihood of a 2023 review of Annex C and noting that it is long overdue); *Nicanor llevó Propuesta a Abdo sobre Itaipú y hablan de renegociar tratado*, ABC COLOR (Feb. 3, 2021), <https://www.abc.com.py/nacionales/2021/02/03/nicanor-llevo-propuesta-a-abdo-sobre-itaipu-y-hablan-de-renegociar-tratado> (underscoring the importance of reviewing Annex C to finally resolve the matter and highlighting other considerations).

97. See César Barreto Otazú, *El Anexo C de Itaipú*, ULTIMAHORA (Feb. 7, 2021), <https://www.ultimahora.com/el-anexo-c-itaipu-n2926384.html> (pointing out the controversial undertones surrounding a potential 2023 review of Annex C in both political and technical sectors).

98. See CHRISTINE FOLCH, *HYDROPOLITICS: THE ITAIPU DAM, SOVEREIGNTY, AND THE ENGINEERING OF MODERN SOUTH AMERICA 201–03* (2019) (discussing the renegotiation of the treaty, financial arrangements, a newfound debt, and the uncertainties regarding tariffs that lie in store); see also *Itaipú, causa nacional*, DEMOS, <http://www.demos.org.py/itaip-causa-nacional-paraguay> (highlighting disparities in the energy wealth produced by Itaipú and how those proceeds were distributed); Otazú, *supra* note 97 (reiterating tensions in the political and technical spheres surrounding the renegotiation of Annex C).

99. See *Director paraguayo de Itaipú confirma que Brasil quiere bajar la tarifa, pero dice Que “Nada está cerrado”*, ABC COLOR (Oct. 28, 2021), <https://www.abc.com.py/nacionales/2021/10/28/director-paraguayo-de-itaipu-confirma-que-brasil-quiere-bajar-la-tarifa-pero-dice-que-nada-esta-cerrado/> (emphasizing that the Brazilian government’s intent to lower the tariff “is not a secret”); G1 PR, *Itaipu deve reduzir tarifa da energia em 2022, diz diretor-geral brasileiro*, GLOBO, (May 5, 2021), <https://g1.globo.com/pr/oeste-sudoeste/noticia/2021/05/05/itaipu-deve-reduzir-tarifa-da-energia-em-2022-diz-diretor-geral-brasileiro.ghtml> (quoting the Brazilian director general stating: “We are going to work together with the federal

Essentially, if the situation remains as is, the natural effect of debt service is the disappearance of the debt component and, consequently, the tariff will go down. It has been argued that in this scenario, Brazil, a country that has gone through an industrialization process, will then be favored by a lower electrical services tariff.¹⁰⁰ This way, energy distributors in Brazil will pay less for the energy produced and, consequently, these savings can be reflected in the price the final consumers pay, such as industries and individual customers.¹⁰¹ In addition, Brazil consumes circa eighty-five percent of the energy produced by the Itaipú Dam, while Paraguay consumes only fifteen percent.¹⁰² It has also been proposed that after debt service, the amount of the debt—around two billion U.S. dollars—could be redistributed to a new component, or within existing components of the tariff, such as the royalties or the compensation, which would greatly benefit Paraguay since only Brazil has been acquiring Paraguay's unused portion of energy for the past fifty years.¹⁰³

These discussions have been going on for many years but have grown in intensity recently.¹⁰⁴ The year 2023 had always been seen as *the year in which review of Annex "C" should take place.*¹⁰⁵ However,

government so that, next year, we can have a significant reduction in the Itaipú tariff").

100. See G1 PR, *supra* note 99 (noting that distributors will pay less for energy produced which would in turn benefit industry and consumers); see also William G. Tyler, *Brazilian Industrialization and Industrial Policies: A Survey*, 4 WORLD DEV. 863, 863–67 (1976) (highlighting Brazil's post-war industrial expansion and its impacts on the country's growth).

101. See G1 PR, *supra* note 99.

102. See Otazú, *supra* note 97 (providing Brazil's and Paraguay's energy consumption percentages); see also GLOBAL INFRASTRUCTURE HUB, *supra* note 85, at 108 (providing Brazil's and Paraguay's energy consumption percentages).

103. See Otazú, *supra* note 97 (noting the unequal energy distribution between Brazil and Paraguay despite having "equal rights to the dam's production"); see also GLOBAL INFRASTRUCTURE HUB, *supra* note 85, at 108 (proposing a plan to compensate for the unequal energy distribution).

104. See GLOBAL INFRASTRUCTURE HUB, *supra* note 85, at 108 (noting Brazil and Paraguay's history of conflict over borders and hydroelectric power and the review of the Treaty of Itaipu in 2023).

105. See *Brasil advierte que no está obligado a renegociar Anexo C en 2023*, ULTIMAHORA (Oct. 27, 2021), <https://www.ultimahora.com/brasil-advierte-que-no-esta-obligado-renegociar-anexo-c-2023-n2968679.html> (highlighting the Brazilian General Director's comment that "the ideal [year to review the treaty] will be in 2023").

the expectation that 2023 will include a review of Annex “C” has recently weakened, as will be explained below.

III. THE OBLIGATION TO NEGOTIATE IN ANNEX “C” OF THE TREATY OF ITAIPÚ

A. THE BRAZILIAN INTERPRETATION

On October 26th, 2021, João Francisco Ferreira, the former Brazilian representative of the Itaipú binational entity, stated in a press conference that there is no obligation to negotiate [Annex “C” of the Treaty of Itaipú] if an agreement is not reached between the two countries.¹⁰⁶ Ferreira underscored that the Treaty of Itaipú provided that Annex “C” is to be renegotiated at least fifty years after its entry into force in 2023, not exactly fifty years later.¹⁰⁷ In particular, he stated that “[r]evueing [Annex “C”] may take place as early as [after the period of fifty years from the entry into force of the treaty has elapsed] and there is a widespread understanding that this measure is obligatory, when in fact it is not.”¹⁰⁸ This understanding will be referred to as the “Brazilian interpretation.”

Based on these statements, the Brazilian interpretation holds that (i) the review of Annex “C” may take place from 2023 and onwards; (ii) both Paraguay and Brazil must agree to the formal start of the review process; and, therefore, (iii) it is not mandatory per se. Considering that the debt had been estimated to be serviced by 2023, this new

106. See *id.*; see Camila Maia, *Negociação do tratado de Itaipu acontecerá a partir de 2023, diz diretor-geral do lado brasileiro*, MEGAWHAT (Oct. 26, 2021), <https://megawhat.energy/noticias/geracao-hidrica/144453/negociacao-do-tratado-de-itaipu-acontecera-partir-de-2023-diz-diretor-geral-do-lado-brasileiro>; see also Maurício Godoi, *Itaipú: Negociações do Anexo C só em 2023, afirma diretor geral*, CANAL ENERGIA (Oct. 26, 2021), <https://www.canalenergia.com.br/noticias/53191693/itaipu-negociacoes-do-anexo-c-so-em-2023-afirma-diretor-geral> (noting that the terms of the agreement between the two countries is not binding under the treaty that created the Itaipú binational entity).

107. See Maia, *supra* note 106 (noting the General Director’s comment that the treaty renegotiation could happen anytime “from 2023 onward”).

108. *Brasil advierte que no está obligado a renegociar Anexo C en 2023*, *supra* note 105; Godoi, *supra* note 106; see *Sala de Imprensa*, ITAIPU BINACIONAL, <https://www.itaipu.gov.br/sala-de-imprensa> (Braz.) (illustrating that, notably, the Press Room section of the Itaipú Dam’s website, Brazilian side, does not refer to this press conference).

interpretation is not incidental. Instead, it must be read in connection with Brazil's intention of keeping the cost of the energy produced by the Itaipú Dam deliberately low, as noted earlier.

At the time of writing this research paper, an impasse had already occurred. Since the end of 2021, Brazil had already announced that the tariff should already start to be reduced because part of the debt would be serviced during 2022.¹⁰⁹ In this regard, until 2021, the agreed yearly fixed tariff was of US\$22.60 kW/month.¹¹⁰ Paraguay sought to keep the same tariff for 2022, while Brazil intended to reduce it to US\$18.95 kW/month.¹¹¹ Between the end of 2021 and nearly the third quarter of 2022, the Governing Council, the Itaipú binational entity's highest body, met several times to establish the tariff for 2022 without success.¹¹² Due to this lack of clarity on the part of the Council, Brazil's National Electric Energy Agency (Aneel) applied a "provisional tariff" of US\$18.97 kW/month for the energy produced by the Itaipú Dam.¹¹³

In early 2022, Brazil appointed Anatalício Ridsen Junior as General Director, replacing Ferreira. Before his appointment, Ridsen Junior was the executive financial director of the Itaipú binational entity. Similar to the position of the Brazilian authorities, and contrary to the Paraguayan position, Ridsen Junior was a strong advocate of lowering the energy tariff as soon as possible.¹¹⁴

109. See Maia, *supra* note 106 (emphasizing that the tariff should be lower since it will no longer include the payment of the debt).

110. See *Paraguay mantiene postura sobre tarifa en Itaipú y binacional lleva con normalidad sus actividades*, AGENCIA DE INFORMACIÓN PARAGUAYA (Mar. 29, 2022), <https://www.ip.gov.py/ip/paraguay-mantiene-postura-de-conservar-tarifa-en-itaipu-y-binacional-lleva-con-normalidad-sus-actividades/> (noting the agreed yearly fixed tariff rate).

111. See *id.* (noting the agreed yearly fixed tariff rate and Brazil's proposed reduction rate).

112. Leticia Fucuchima, *Exclusive: Brazil, Paraguay to Resume Talks on Itaipu Energy Sale Conditions*, REUTERS (Aug. 12, 2022), <https://www.reuters.com/business/energy/exclusive-brazil-paraguay-resume-talks-itaipu-energy-sale-conditions-2022-08-12/>.

113. See Sueli Montenegro, *Itaipu terá Tarifa de repasse provisória de US\$24,73*, CANAL ENERGIA (Dec. 23, 2021), <https://www.canalenergia.com.br/noticias/53197862/itaipu-tera-tarifa-de-repasse-provisoria-de-us-2473> (noting the provisional tariff fee rate).

114. See *Brasil anunció a su nuevo director general de Itaipú*, LA NACIÓN (Jan.

Eventually, the Governing Council of the Itaipú binational entity reached an agreement for the 2022 tariff at US\$20.75 kW/month. Although the tariff sought by Paraguay was not reached, an “intermediate” tariff was achieved.¹¹⁵ This “intermediate” tariff would provide Paraguay with additional revenue of US\$220 million to be used to strengthen the electricity system of the National Electricity Administration (ANDE), as well as social investment projects.¹¹⁶ Yet, this new tariff represented an 8.2% reduction in the price of energy.¹¹⁷ To some extent, the 2022 agreement laid the groundwork for tariff negotiations for 2023.¹¹⁸

In January 2023, the newly elected President of Brazil, Luiz Inácio Lula da Silva, appointed Enio Verri as the new Brazilian General Director of the Itaipú binational entity, replacing Anatalício Ridsen Junior.¹¹⁹ Shortly after, and following the announcement of the debt

26, 2022) <https://www.lanacion.com.py/politica/2022/01/26/brasil-anuncio-a-su-nuevo-director-general-de-itaipu/> (noting that Admiral Anatalício Ridsen, Itaipú’s current financial director, is one of the strongest supporters of Brazil’s position to lower the tariff as soon as possible).

115. See *Paraguay y Brasil acuerdan tarifa intermedia para venta de energía de Itaipú*, AGENCIA IP (August 9, 2022) <https://www.ip.gov.py/ip/paraguay-y-brasil-acuerdan-tarifa-intermedia-para-venta-de-energia-de-itaipu/> (describing agreed rate as “intermediate” value between Paraguay’s US\$22.6 kW/month and Brazil’s US\$18.95 kW/month).

116. See *Con la tarifa acordada para el 2022, Itaipú asegura inversiones en obras de alto impacto para el país*, ITAIPU BINACIONAL (Aug. 15, 2022), <https://www.itaipu.gov.br/es/sala-de-prensa/noticia/con-la-tarifa-acordada-para-el-2022-itaipu-asegura-inversiones-en-obras-de-al> (anticipating US\$140 million for ANDE and USD 80 million for social investment projects including family farming projects); *Paraguay y Brasil acuerdan tarifa intermedia para venta de energía de Itaipú*, *supra* note 115 (noting that Brazil’s position was to reduce the tariff because of the debt service, and that such reduction would imply less revenues for the Itaipú binational entity).

117. Paola Talavera, *La nueva tarifa de Itaipú y sus efectos económicos*, MARKETDATA (Aug. 13, 2022), <https://marketdata.com.py/educacion/economia-facil/la-nueva-tarifa-de-itaipu-y-sus-efectos-economicos-84841/> (noting that this is the first rate reduction in 13 years).

118. See *Itaipú. ¿Qué acordamos para el 2022? ¿Cuales son los desafíos de las próximas negociaciones?*, DENDE DESARROLLO EN DEMOCRACIA, (Aug. 17, 2022), <https://dende.org.py/itaipu/> (explaining that the budgetary basis for the tariff rate is negotiated the year before in context of then-current situation).

119. *El economista Enio Verri asume como nuevo director general brasileño de Itaipú*, ITAIPU BINACIONAL (Mar. 11, 2023), <https://www.itaipu.gov.py/es/sala-de-prensa/noticia/el-economista-enio-verri-asume-como-nuevo-director-general->

service,¹²⁰ the tariff for 2023 was established at US\$16.71 kW/month.¹²¹ Once again, an “intermediate” tariff was reached, with a 19.5% reduction of the 2022 tariff, where Paraguay insisted on maintaining the price at US\$20.75 kW/month, while Brazil aimed to lower it to US\$12.67 kW/month.¹²²

In August 2023, on the inauguration of the newly elected President of Paraguay, Santiago Peña, Verri stated that the negotiation of Annex “C” of the Treaty of Itaipú could take four to five years.¹²³ In October 2023, following the fiftieth anniversary of the entry into force of the Treaty earlier in August, Paraguay announced that the first meeting for the review process of Annex “C” of the Treaty of Itaipú would take place at the end of the month in Brasília.¹²⁴ But, just a few days later, it was announced that the meeting was postponed to a new, indefinite date.¹²⁵ Therefore, this situation strongly suggests that it is in Brazil’s interest to continue gradually reducing the tariff and maintaining the status quo with respect to the review of Annex “C” of the Treaty of Itaipú.

Bearing in mind the main argument of this research paper, it is

brasileno-de-itaip.

120. See “*Itaipu cancela deuda por construcción y se convierte en una central hidroeléctrica totalmente amortizada*”, *supra* note 93 (announcing that the debt which funded Itaipú was settled with a final installment of USD 115 million on February 28, 2023).

121. *Itaipu define tarifa para ejercicio de 2023*, ITAIPU BINACIONAL (Apr. 17, 2023), <https://www.itaipu.gov.br/sala-de-imprensa/noticia/itaipu-define-tarifa-para-ejercicio-de-2023>.

122. *Id.*

123. “*Una negociación como la del Anexo C es de cuatro a cinco años*”, según el director brasileño de Itaipú, ABC COLOR (Aug. 16, 2023), <https://www.abc.com.py/economia/2023/08/16/una-negociacion-como-la-del-anexo-c-es-de-cuatro-a-cinco-anos-segun-el-director-brasileno-de-itaipu/>.

124. *Revisión del Anexo C de Itaipú: primera reunión en Brasilia ya tiene fecha*, ABC COLOR (Oct. 19, 2023), <https://www.abc.com.py/politica/2023/10/19/revision-del-anexo-c-de-itaipu-primera-reunion-en-brasil-ya-tiene-fecha/> (indicating that the council of Itaipú and presidents Santiago Peña and Lula Da Selva would meet on October 26 to begin negotiations on Annex C).

125. See *Posponen reunión para tratar la revisión del Anexo C de Itaipú*, ULTIMAHORA (Oct. 24, 2023), <https://www.ultimahora.com/posponen-reunion-para-tratar-la-revision-del-anexo-c-de-itaipu> (reporting that the foreign ministers of both Paraguay and Brazil would have to agree upon the new date after negotiations suspended).

necessary to determine whether paragraph VI of Annex “C” of the Treaty of Itaipú, referred to above, requires further agreement between Paraguay and Brazil to start talks on the review process of said instrument or not. To achieve this, said provision will be systematically assessed in the following section in the light of the rules of treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties (VCLT).¹²⁶

B. THE RULES OF TREATY INTERPRETATION

Given that Paraguay and Brazil are the makers of the Treaty of Itaipú,¹²⁷ both are entitled to interpret it. However, interpretation is subject to the operation of certain legal rules.¹²⁸ In this regard, for the purposes of interpretation of Paragraph VI of Annex “C” of the Treaty of Itaipú, deference must be given to the VCLT for one main reason: it establishes a set of rules of interpretation of treaties considered to be reflective of customary international law.¹²⁹ This is especially relevant because the VCLT entered into force only seven years after the Treaty of Itaipú was adopted and ratified,¹³⁰ so the rules of interpretation are not applicable as conventional obligations deriving from the Convention but rather as custom.¹³¹ The rules of treaty interpretation, as contained in the VCLT, consist of a general rule of interpretation (Article 31), supplementary means of interpretation (Article 32), and a rule on interpretation of treaties authenticated in two or more languages (Article 33).¹³² A general overview of said provisions will be provided below.

126. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

127. See Treaty of Itaipú, *supra* note 1.

128. See JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 364 (9th ed. 2019) (highlighting the parties’ ability to interpret the treaty within the framework of legal rules).

129. See RICHARD GARDINER, *TREATY INTERPRETATION* 13–18 (2d ed. 2015) (stating “the provisions on interpretation of treaties contained in Articles 31 and 32 of the Convention reflect pre-existing customary international law”).

130. See VCLT, *supra* note 126; Treaty of Itaipú, *supra* note 1.

131. See GARDINER, *supra* note 129, at 13–18 (stating “the provisions on interpretation of treaties contained in Articles 31 and 32 of the Convention reflect pre-existing customary international law”).

132. See *id.* at 39 (providing the three relevant Articles and their titles); VCLT, *supra* note 126, art. 33.

1. *The General Rule of Interpretation*

The general rule of interpretation, contained in Article 31 of the VCLT, provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties . . .¹³³

i. In Good Faith

The first element appearing in Article 31(1) is “good faith.” This phrase captures the overarching theme in operation, as it points out how a treaty must be interpreted and how a treaty must be read in conjunction with the subsequent elements.¹³⁴ The notion of good faith

133. VCLT, *supra* note 126, art. 31.

134. See GARDINER, *supra* note 129, at 171–72 (noting that “the process of interpretation is seen as an accumulation of elements”); see also Oliver Dörr & Kirsten Schmalenbach, *General Rule of Interpretation in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 521, 548 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) (highlighting that the term “good faith” is an umbrella term for the entire interpretation process); JEREMY HILL, *AUST’S MODERN TREATY*

is also referred to in the Preamble¹³⁵ and in Article 26 (*pacta sunt servanda* principle)¹³⁶ of the VCLT. Good faith creates a presumption that the treaty terms were intended to mean something (rather than nothing), and requires the parties to a treaty to act honestly, fairly and reasonably, and to refrain from taking unfair advantage.¹³⁷ While it has been noted that giving a precise definition of the good faith concept in general can be challenging, the bottom line of good faith appears to be a fundamental requirement of reasonableness qualifying the dogmatism that can result from purely verbal or excessively teleological analysis.¹³⁸

ii. Ordinary Meaning of the Terms

The second element of the general rule of interpretation in Article 31(1) is the requirement to give an “ordinary meaning” to the terms of the treaty in question. For the purposes of clarification, “terms” refer to the words and phrases used in the treaty, rather than the bargain struck by the parties.¹³⁹ The point of departure in the interpretation process is the linguistic and grammatical analysis of the text of the treaty; the ordinary meaning is the usual or regular meaning ascribed to the terms in the text.¹⁴⁰ In this regard, the grammatical form of a treaty, which encompasses the tense in which a specific provision has been phrased, is an important consideration.¹⁴¹ Moreover, the determination of the ordinary meaning of terms involves the temporal aspect (considering whether the terms had a particular ordinary meaning at the time the treaty was concluded) and the language aspect (considering the ordinary meaning of terms in the light of treaties

LAW AND PRACTICE 243 (2023) (noting that interpretation is part of the performance of the treaty).

135. See VCLT, *supra* note 126, pmb1.

136. See *id.* art. 26.

137. See MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 425 (2009).

138. See *General Rule of Interpretation*, *supra* note 134, at 548.

139. See *id.* at 541.

140. See VCLT, *supra* note 126, art. 31; see GARDINER, *supra* note 129, at 164 (providing that a treaty term’s ordinary meaning should be the “starting point” in the interpretation process).

141. See *General Rule of Interpretation*, *supra* note 134, at 541–42.

authenticated in two or more languages).¹⁴² The ordinary meaning element is linked both to good faith and the next element, context, *i.e.*, the interpreter must establish the ordinary meaning of the terms in good faith, and the interpretation of the ordinary meaning of the terms of the treaty cannot be done in isolation, the treaty text must be considered in its entirety.¹⁴³

iii. Context

The third element found in the general rule of interpretation is that the ordinary meaning given to the terms of the treaty must be considered “in their context.”¹⁴⁴ In connection with the aforementioned rule, the general rule of interpretation does not allow establishing an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted.¹⁴⁵ Reference to “context” in the general rule of interpretation under the VCLT has two main roles.¹⁴⁶ First, context is an immediate qualifier of the ordinary meaning of terms used in a treaty.¹⁴⁷ Second, context plays a role in the identification of the material which is to be taken into account as forming context.¹⁴⁸ This contextual material includes the whole text of the treaty, its preamble, and any annexes, as well as the other means mentioned in Article 31(2) and (3).¹⁴⁹ Thus, Article 31 of the VCLT embodies the contextual or systematic means of interpretation which aims at avoiding inconsistencies of the individual

142. See *id.* at 543 (explaining the temporal aspect and language aspect of treaty interpretation).

143. See VILLIGER, *supra* note 137, at 42–28 (explaining treaty interpretation should consider the “entire treaty text” because “treaty terms are not drafted in isolation”); see also HILL, *supra* note 134, at 244 (highlighting that the determination of the ordinary meaning cannot be done in the abstract, only in the *context* of the treaty and in the light of its *object and purpose*) (emphasis in the original).

144. GARDINER, *supra* note 129, at 197 (providing that treaty interpretation should consider the “ordinary meaning of terms in their context”).

145. See *General Rule of Interpretation*, *supra* note 134, at 543.

146. See GARDINER, *supra* note 129, at 197 (explaining the two main roles of “context” in the VCLT rules).

147. See *id.*

148. See *id.*

149. See *id.* (explaining that context directs attention to the text of the treaty and its parts); see also HILL, *supra* note 134, at 244 (noting that one must look at the treaty as a whole, including, *inter alia*, the preamble and any annexes).

term with its surroundings.¹⁵⁰ In addition to the text itself, other elements, such as punctuation and syntax, the structure of the sentence, the use of the same term elsewhere in the treaty or different phrases of the same treaty dealing with the same issue in different wordings, come into play when determining the context.¹⁵¹

iv. Object and Purpose

The fourth element encompassed in the general rule of interpretation is that due regard must be given to the “object and purpose” of the treaty.¹⁵² This is the teleological or functional element of the general rule of interpretation, which mandates that the terms of a treaty be interpreted in a way that advances the latter’s aims.¹⁵³ In distinguishing “object” from “purpose” or vice versa, Professor Richard Gardiner, an associate of the Faculty of Laws at University College London and former legal adviser at the Foreign Office, suggests that a French source was used for the language ultimately used for this phrase in the Convention.¹⁵⁴ In this regard, he notes that French public law developed a distinction between “*l’objet*” of a legal act or instrument, that is what it does in the sense of creating a particular set of rights and obligations, and “*le but*” as the reason for establishing “*l’objet*.”¹⁵⁵

Interpretation in light of a treaty’s object and purpose finds its limits in the treaty text itself.¹⁵⁶ In order to determine the object and purpose

150. See VILLIGER, *supra* note 137, at 427.

151. See *General Rule of Interpretation*, *supra* note 134, at 543–44 (providing that the treaty as a whole should be considered including punctuation, syntax, and sentence structure).

152. See *id.* at 545 (explaining that the “terms of the treaty should be interpreted in a way that advances the latter’s aims,” which was coined by the ICJ as “object and purpose”).

153. See *id.*; see also HILL, *supra* note 134, at 244 (noting that the object and purpose includes a teleological element and element of ‘effectiveness,’ but it does not make the Convention rule as a whole teleological).

154. The French text of the VCLT, along with the Chinese, English, Russian and Spanish texts, are all equally authentic. According to Dörr and Schmalenbach, the ILC drew inspiration from the French version of the International Court of Justice opinion on Reservations to the Genocide Convention, where it referred to “*l’objet et le but*” of the Genocide Convention. See *id.*

155. GARDINER, *supra* note 129, at 212.

156. See VILLIGER, *supra* note 137, at 428.

of a treaty, some treaties contain general clauses specifically stating their purposes. Also, the title of the treaty may be helpful. Classically, the preamble of a treaty is also a place where the parties list the purposes of their agreement.¹⁵⁷ In other cases, the type of treaty may itself attract an assumption of a particular object and purpose.¹⁵⁸

2. *Supplementary Means of Interpretation*

Article 32 of the VCLT provides for the supplementary means of interpretation of a treaty, namely:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.¹⁵⁹

Pursuant to article 32 of the VCLT, the supplementary means of interpretation are to be employed after the general rule of interpretation has been applied.¹⁶⁰ The term “supplementary” corresponds with the French term *complémentaire*, rather than the term “subsidiary.”¹⁶¹

Article 32 considers the “preparatory work” (*travaux préparatoires*) and the “circumstances of conclusion” of the treaty to be supplementary means of treaty interpretation; however, the use of the term “including” shows that this is not an exhaustive list.¹⁶²

157. See *id.* (noting a preamble or general clause at the beginning of a treaty usually states the object or purpose of the treaty).

158. See *General Rule of Interpretation*, *supra* note 134, at 546 (explaining the various methods of determining the object and purpose of a treaty).

159. VCLT, *supra* note 126, art. 32.

160. See *id.*

161. See VILLIGER, *supra* note 137, at 446 (explaining the meaning of “supplementary” in the context of treaty interpretation); see generally GARDINER, *supra* note 129, at 357 (discussing the differing interpretations of the term “supplementary” due to imprecise language translations).

162. Other supplementary means included but not listed in article 32(2) are, for instance: *travaux préparatoires* of an earlier version of the treaty; interpretative

According to Villiger, the *travaux préparatoires* are the most important supplementary means of interpretation.¹⁶³ They include all documents relevant to a forthcoming treaty and generated by the parties during the treaty's preparation up to its conclusion, such as memoranda and other statements and observations of governments transmitted to each other or to the drafting body; diplomatic exchanges between the parties; treaty drafts; negotiation records; and minutes of commission and plenary proceedings.¹⁶⁴

With regard to the circumstances in which a treaty was concluded, they are meant to cover both the contemporary circumstances and the historical context in which the treaty was concluded.¹⁶⁵ This includes the political, social and cultural factors—the *milieu*—surrounding the treaty's conclusion.¹⁶⁶ A distinction must be drawn between “circumstances of the conclusion” and agreements or instruments “made in connection with the conclusion” of the treaty (Article 31(2)).¹⁶⁷ The latter refers to the existence of consensus of the parties on the substance of the treaty, present at the time of the treaty's conclusion, and may, therefore, be considered as context of the treaty itself.¹⁶⁸ “Circumstances,” on the other hand, are the factual situation

declarations made by treaty parties, which do not qualify as reservations; documents not strictly qualifying as *travaux préparatoires*; rational techniques of interpretation; agreements and practice among a subgroup of parties to a treaty not falling within the ambit of interpretation of article 31; non-authentic translations of the authenticated text. VILLIGER, *supra* note 137, at 445.

163. *See id.* (asserting the preparatory work behind a treaty is the most important because it comprises all documents relevant to a forthcoming treaty and generated up to the treaty's conclusion).

164. *See id.* (listing the documents that fall under the category of *travaux préparatoires*); *see also* Oliver Dörr & Kirsten Schmalenbach, *Supplementary Means of Interpretation in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 571, 574–78 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) (explaining the factors used to characterize *travaux préparatoires* as there is not a recognized definition in international law).

165. *See Supplementary Means of Interpretation, supra* note 164, at 578 (noting why the conclusion of a treaty is considered a supplementary means of interpretation).

166. *See VILLIGER, supra* note 137, at 445 (describing what Article 32 of the Vienna Convention considers the circumstances of a treaty's conclusion).

167. *See Supplementary Means of Interpretation, supra* note 164, at 580 (discerning between “circumstances of conclusion” and “agreements made in conclusion”).

168. *Id.* (identifying agreements “made in connection with the conclusion” of the

at time of the conclusion of the treaty, irrespective of any consensus or substance.¹⁶⁹

3. *Interpretation of Treaties Authenticated in Two or More Languages*

Article 33 of the VCLT contains the interpretation rule concerning treaties authenticated in two or more languages, and it provides:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.¹⁷⁰

When concluded, treaties can be bilingual or multilingual. In this regard, at times, discrepancies between the authentic language texts may exist. In this context, Article 33 addresses two questions. The first question answered is which language texts should be considered when interpreting the treaty (Article 33(1) and (2)).¹⁷¹ The second question answered is how to proceed if the various pertinent language texts do

treaty as extrinsic context under Article 31).

169. *See id.* (explaining how “circumstances of the treaty” are qualified and how extrinsic agreements or instruments relating to the conclusion of the treaty may factually be considered among the “circumstances”).

170. VCLT, *supra* note 126, art. 33.

171. *See* Oliver Dörr & Kirsten Schmalenbach, *Interpretation of Treaties Authenticated in Two or More Languages in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY* 587, 587 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) (describing the problems of interpretation if there are material differences between the language texts and how Article 33 addresses the differences).

not coincide (Article 33(3) and (4)).¹⁷²

C. INTERPRETATION OF PARAGRAPH VI OF ANNEX “C” OF THE
TREATY OF ITAIPÚ IN THE LIGHT OF THE RULES OF TREATY
INTERPRETATION

This section will now address the overarching purpose of this research paper—whether the Brazilian interpretation of Paragraph VI of Annex “C” of the Treaty of Itaipú can be regarded as plausible. In order to do so, deference will be given to the aforementioned rules of treaty interpretation as single, systemic operation. At the outset, it is important to note that the epilogue of the Treaty of Itaipú provides that the Treaty was signed “in duplicate in the Portuguese and Spanish languages, both texts being equally authentic.”¹⁷³

In this regard, both Spanish and Portuguese texts of Article VI (for reference, the English text is above) are reproduced below:

Spanish

VI. Revisión

Las disposiciones del presente Anexo serán revisadas, después de transcurrido un plazo de cincuenta años a partir de la entrada en vigor del Tratado, teniendo en cuenta, entre otros conceptos, el grado de amortización de las deudas contraídas por la ITAIPU para la construcción del aprovechamiento, y la relación entre las potencias contratadas por las entidades de ambos países.¹⁷⁴

Portuguese

VI. Revisão

As disposições do presente Anexo serão revistas, após o decurso de um prazo de cinquenta anos a partir da entrada em vigor do Tratado, tendo em conta, entre outros aspectos, o grau de amortização das dívidas

172. See VILLIGER, *supra* note 137, at 456 (pointing to Article 33 when language texts do not coincide); *Interpretation of Treaties Authenticated in Two or More Languages*, *supra* note 171, at 588 (explaining Article 33 initially presumes identical meaning and recommends a search for common meaning).

173. Treaty of Itaipú, *supra* note 1, at 96.

174. *Id.* Annex C, para. VI.

contraídas pela ITAIPU para a construção do aproveitamento e a relação entre as potências contratadas pelas entidades de ambos países.¹⁷⁵

1. *The General Rule of Interpretation*

i. *Ordinary Meaning of the Terms*

a. *“Revisar” and “Rever*

In the Spanish text, “revisadas” is the past participle of “revisar” (to review). According to the *Diccionario de la lengua española*, the Royal Spanish Academy’s dictionary, the definition of “revisar”¹⁷⁶ includes “to view with attention and care,”¹⁷⁷ “to subject something to re-examination in order to correct, amend, or repair it,”¹⁷⁸ and “to update (bring up to date).”¹⁷⁹ Moreover, according to the *Diccionario de Ciencias Jurídicas, Políticas y Sociales* by Manuel Ossorio,¹⁸⁰ “revisar” means “proceed with a review.”¹⁸¹ Accordingly, the definition of the term “revisión” (review) includes “new consideration or examination.”¹⁸²

For its part, the Portuguese text refers to “revistas.” This past participle is not to be confused with the Portuguese verb “revisar”; in reality, it is from the verb “rever.” According to the *Dicionário Priberam da Língua Portuguesa* (DPLP) (Priberam Dictionary of the Portuguese Language), the meaning of “rever”¹⁸³ (to review) includes

175. *Id.*

176. *Revisar*, REAL ACADEMIA ESPAÑOLA: DICCIONARIO DE LA LENGUA ESPAÑOLA, <https://dle.rae.es/revisar> (Spain).

177. *Id.* (defining “revisar” to include “ver con atención y cuidado”).

178. *Id.* (defining “revisar” to mean “ometer algo a nuevo examen para corregirlo, enmendarlo o repararlo”).

179. *Id.* (defining “revisar” to also connote “actualizar (poner al día)”).

180. MANUEL OSSORIO, DICCIONARIO DE CIENCIAS JURÍDICAS, POLÍTICAS Y SOCIALES, *Revisión* (1st ed. 1974) (Guat.) (defining “revisar”).

181. *Id.* (defining “revisar” to mean “proceder a una revisión”).

182. *Id.* (defining “revisión” in Spanish).

183. *Rever*, DICIONÁRIO PRIBERAM ONLINE DE PORTUGUÊS, <https://dicionario.priberam.org/rever> (Port.) (defining “rever” in Portuguese).

“to see again,”¹⁸⁴ “to examine carefully,”¹⁸⁵ and “to do a review of.”¹⁸⁶

b. “Plazo” and “Prazo”

According to the *Diccionario panhispánico del español jurídico* (Pan-Hispanic Dictionary of Legal Spanish) of the Royal Spanish Academy, the definition of “plazo”¹⁸⁷ (period) includes “period of time set for doing something, or the expiration of the same”¹⁸⁸ and “the legal or contractually established time that must elapse for a legal effect to be produced, usually the birth or extinction of a subjective right.”¹⁸⁹ The Portuguese counterpart of “plazo” is “prazo.” According to the *Dicionário Priberam da Língua Portuguesa* (DPLP), the definition of “prazo”¹⁹⁰ includes “period of time during which something lasts.”¹⁹¹

ii. Context

a. Treaty Text and the Joint Declaration as Context

The full title of the Treaty of Itaipú indicates that it concerns the “hydroelectric utilization of the water resources of the Paraná River.”¹⁹² The object of the Treaty, provided in Article I, establishes

184. *Tornar a Ver*, INGLÉS.COM, <https://www.ingles.com/traductor/tornar%20a%20ver> (translating “tornar a ver” to “to examine carefully”).

185. *Rever*, *supra* note 171 (defining “rever” to include “examinar cuidadosamente”).

186. *Fazer a Revisão De*, GOOGLE TRANSLATE, <https://translate.google.com/?sl=auto&tl=en&text=fazer%20a%20revisão%20de&op=translate&hl=en> (translating “fazer a revisão de” to “to do a review of”).

187. *Plazo*, DICCIONARIO PANHISPÁNICO DEL ESPAÑOL JURÍDICO, <https://dpej.rae.es/lema/plazo> (Spain) (defining “plazo” in Spanish).

188. *Id.* (defining “plazo” as “término señalado para realizar algo, o vencimiento del mismo”).

189. *Id.* (defining “plazo” to include “tiempo legal o contractualmente establecido que ha de transcurrir para que se produzca un efecto jurídico, usualmente el nacimiento o la extinción de un derecho subjetivo”).

190. *Prazo*, DICIONÁRIO PRIBERAM ONLINE DE PORTUGUÊS, <https://dicionario.priberam.org/prazo> (Port.) (defining “prazo” in Portuguese).

191. *Período De Tempo Que Dura Alguma Coisa*, GOOGLE TRANSLATE, <https://translate.google.com/details?sl=auto&tl=en&text=Período%20de%20tempo%20que%20dura%20alguma%20coisa&op=translate> (translating “Período de tempo que dura alguma coisa” from Portuguese to English).

192. Treaty of Itaipú, *supra* note 1 (“Treaty concerning the hydroelectric utilization of the water resources of the Parana River owned in condominium by the

that Paraguay and Brazil “agree to utilize for hydroelectric purposes, jointly and in accordance with the provisions of [the] Treaty and the annexes thereto, the water resources of the Paraná River owned in condominium by the two countries. . . .”¹⁹³

In order to achieve this, Paraguay and Brazil created the Itaipú binational entity and agreed to build the Itaipú Dam. In this regard, Article VIII provides that “[t]he resources needed to constitute ITAIPU’S capital shall be furnished to ELETROBRÁS and ANDE respectively by the Brazilian Treasury and by the Paraguayan Treasury. . . .”¹⁹⁴ Moreover, Article IX provides that the resources in addition to those mentioned in Article VIII “as are needed for studies, construction and operation of the power station and of the auxiliary works and facilities shall be provided by the [Parties] or obtained by ITAIPU through credit operations.”¹⁹⁵

Furthermore, Article XV provides that “Annex ‘C’ contains the financial bases of ITAIPU and the conditions for the provision of its electrical services.”¹⁹⁶ In the same vein, Paragraph III of Annex “C” provides for the cost of the electrical services and its components. Two of these components are “[t]he amount needed to pay the finance charges on loans obtained” (Paragraph III.2)¹⁹⁷ and “[t]he amount needed to pay the amortization of the loans obtained” (Paragraph III.3).¹⁹⁸ Additionally, the Joint Declaration issued by the Presidents of Paraguay and Brazil on the date of signing of the Treaty of Itaipú further clarifies the underlying object of the Treaty of Itaipú, namely, attaining “the socio-economic transformation of the region and for the development of Paraguay and Brazil.”¹⁹⁹

two countries, from and including the Salto Grande de Sete Quedas or Salto del Guairá, to the mouth of the Iguassu River (with annexes and exchanges of notes”).

193. *Id.* art. I.

194. *Id.* art. VIII.

195. *Id.* art. IX.

196. *Id.* art. XV.

197. *Id.* Annex C, para. III.

198. *Id.*

199. Joint Statement by the Presidents of the Republic of Paraguay and the Federative Republic of Brazil (Apr. 26, 1973) (on file with the Ministry of Foreign Affairs of Paraguay).

b. *The Wording of Paragraph VI of Annex “C”*

In both Spanish and Portuguese texts of Annex “C” of the Treaty of Itaipú, the wording of Paragraph VI is written in a specific order. The phrase “The provisions of this annex shall be reviewed” is conditioned upon the phrases “after 50 [sic] years have elapsed from the entry into force of the Treaty” and “due regard being given, *inter alia*, to the degree of amortization of the debts contracted by ITAIPU [sic] for the construction of the utilization scheme . . . ,” in that order.²⁰⁰

In this regard, the absolute condition for the provisions of Annex “C” to be reviewed is that fifty years must have elapsed since the Treaty’s entry into force, without any further explicit elaboration on this requirement or its wording. In addition, Paragraph VI is worded in the passive voice of the future indicative tense, “serán revisadas” and “serão revistas.”²⁰¹ This seems to indicate the intention of Paraguay and Brazil to review the provisions of Annex “C” in the future, followed by the temporal condition “after fifty years have elapsed from the entry into force of the Treaty.”²⁰² When reading these two phrases together, it follows that this review requirement is not a vague intention set remotely in the future but rather a mandate for the review to occur after a specific period of time has elapsed.

iii. *Object and Purpose*

From the title, the Preamble and Article I, the overarching object and purpose of the Treaty of Itaipú is the utilization “for hydroelectric purposes, jointly and in accordance with the provisions of the [Treaty] and the annexes thereto, the water resources of the Paraná River owed in condominium by the two countries. . . .”²⁰³ Hence, the Treaty of Itaipú is essentially aimed at the production of hydroelectricity. In light of all the above, it is unreasonable to argue that, in accordance with Paragraph VI of Annex “C” of the Treaty of Itaipú, there is a “double consent” requirement to start the review process of such an additional instrument, for the actual existence of that provision would be pointless.

200. Treaty of Itaipú, *supra* note 1, Annex C, para. VI.

201. *Id.*

202. *Id.*

203. *Id.* Annex A, art. 1.

iv. Outcome

The Treaty of Itaipú was conceived with the object and purpose of generating hydroelectricity in benefit of Paraguay and Brazil.²⁰⁴ The ultimate goal of this joint project is the attainment of development for both states.²⁰⁵ In order to do so, the parties to the Treaty decided to create a binational entity and to build a dam on the Paraná River.²⁰⁶

The parties to the Treaty entered into credit operations to finance the construction of the dam.²⁰⁷ In order to service that debt, the amount needed to pay the finance charges on loans obtained and the amount needed to pay the amortization of the loans obtained were added to the cost of the electrical services.²⁰⁸ Paragraph VI of Annex “C” of the Treaty of Itaipú was added to the text of the Annex based on the estimate that the aforementioned debt would be fully serviced by 2023.²⁰⁹

This addition of paragraph VI indicates that both Paraguay and Brazil were aware that the debt would be serviced by that time *ab initio* and, therefore, that a default consequence of the debt service would be the reduction of the cost of electrical services. Had it been the intention of the parties to maintain this logical consequence deriving from the debt service, there would have been no reason to include paragraph VI of Annex “C” of the Treaty of Itaipú.

In this regard, under the presumption of good faith, the wording of paragraph VI of Annex “C” of the Treaty of Itaipú denotes that the parties agreed to the review or reexamination of the provisions contained in the Annex once a specific period of time elapsed, specifically fifty years after the entry into force of the Treaty. In addition, the use of “plazo” and “prazo” (which has been omitted in the English version published in the U.N. Treaty Series) reaffirm the idea that a specific period of time must have elapsed. Nowhere in this

204. *See id.* Annex A, art. 2.

205. *See id.*

206. *See id.* Annex B, para. III.

207. *See id.* art. IX, X.

208. *See id.* Annex C, para. III.

209. *See* DEBERNARDI, *supra* note 17, at 179 (noting that it was agreed to give a validity of fifty years from the entry into force of the Treaty of Itaipú to Annex “C”, based on the estimates that the debt of the loans obtained would be serviced by that time).

provision is it suggested that both parties would be required to give further consent to do as provided. Moreover, the use of “serán revisadas” and “serão revistas,” as noted above,²¹⁰ confirm the mandatory nature of the provision, as opposed to the use of “podrán ser revisadas” and “poderão ser revistas” (*may* be reviewed), which would indeed indicate possibility and, hence, the need of consent from both parties. Thus, paragraph VI of Annex “C” of the Treaty of Itaipú does not merely suggest a responsibility but prescribes one.

Overall, the ultimate purpose of paragraph VI of the Treaty of Itaipú is to entitle both Paraguay and Brazil, masters of the Treaty and of the joint project, to review the provisions of Annex “C” fifty years after the entry into force of the Treaty.²¹¹ It is an obligation of conduct that parties must fulfill in good faith.²¹² Because Annex “C” deals with the components of the cost of the electrical services provided by the Itaipú binational entity, both parties ought to have a right to present their views with an aim to review the said provisions. This dual right is closely related to the teleological purpose of the attainment of development of the Treaty. To argue that additional consent is required deprives any meaning from the provision itself.

2. *Supplementary Means of Interpretation*

i. The Circumstances in which the Treaty was Concluded

Regrettably, no sources leading to any sort of *travaux préparatoires* of the Treaty of Itaipú were found in the process of writing this research paper. However, the circumstances in which the Treaty was concluded, particularly its recent historical background, is useful in confirming the overarching goal of the Treaty.

As noted above, just eight years before Paraguay and Brazil adopted, signed, and ratified the Treaty of Itaipú, they found themselves in a dire diplomatic crisis involving a military invasion on a disputed territory.²¹³ As it has already been noted above, in 1966, the

210. Treaty of Itaipú, *supra* note 1, Annex C, para. VI.

211. *See id.*

212. *See id.* pmb., art. III.

213. *See* GLOBAL INFRASTRUCTURE HUB, *supra* note 85, at 5 (discussing the territorial conflict between Brazil and Paraguay that involved the ability to produce hydroelectric power).

two states agreed on the Act of Iguazu, eventually putting an end to the military invasion and the diplomatic crisis.²¹⁴ In paragraph III of the Act, the two foreign ministers of Paraguay and Brazil proclaimed the willingness of their governments to proceed “to the study and survey of the economic possibilities” of the Guairá Waterfalls.²¹⁵ This phrase must be read in the light of the object and purpose of the Treaty of Itaipú and the 1973 Joint Declaration. When read together, it follows that the intention of Paraguay and Brazil was to develop a joint project based on the generation of hydroelectricity from the water resources of the Paraná River that would advance the development of both countries.

ii. Non-Authenticated Language Texts of the Treaty

Pursuant to the mandate of Article 102 of the UN Charter and the General Assembly Regulations to give effect to Article 102, the U.N. Treaty Series has published the authenticated Spanish and Portuguese texts of the Treaty of Itaipú.²¹⁶ In addition, it has also published translations into English and French. As noted above, the English text of paragraph VI of Annex “C” omits any reference to a “period of time,” only referring directly to the fifty years that must elapse.²¹⁷ However, notably, the French text of paragraph VI of Annex “C” provides:

VI. Révision

Les dispositions de la présente annexe seront révisées à l'expiration d'une période de 50 ans à compter de l'entrée en vigueur du Traité, eu égard, notamment, au degré d'amortissement des dettes contractées par l'ITAIPU pour l'exécution des travaux d'aménagement hydroélectrique et à la relation existant entre les puissances souscrites par les entités de chacun des deux pays (emphasis added).²¹⁸

As noted, the French text underscores that the review of the

214. See *id.* (describing the circumstances surrounding the Act of Iguazu, which set up the foundation for the Treaty of Itaipú).

215. Act of Iguazu, *supra* note 60, art. III (agreeing to study and survey the hydraulic resources of Salto Grande de Sete Quedas or Salto del Guairá).

216. See Treaty of Itaipú, *supra* note 1, at 91.

217. *Id.* at Annex C, para VI.

218. *Id.*

provisions of the Annex are subject to the condition of the expiry of a period of time (as with the Spanish and Portuguese texts), namely, fifty years to be counted from the entry into force of the Treaty.

iii. Outcome

In resorting to available supplementary means of interpretation, two things are confirmed: first, the object and purpose of Treaty is the generation of hydroelectricity with the ultimate aim of advancing the development of Paraguay and Brazil. Second, paragraph VI of the Treaty of Itaipú is intended to provide an obligation of reviewing its provisions once fifty years from the entry into force of the Treaty have elapsed. Based on all the above, a systemic interpretation of paragraph VI of Annex “C” of the Treaty of Itaipú leads to the conclusion that no further consent was envisaged by the parties when adopting such a provision. Because the debt was totally serviced by that time, there is a presumption that parties must start a review process in good faith within a reasonable period of time after the fiftieth anniversary of the entry into force of the Treaty of Itaipú, that is, August 13, 2023.

D. NEGOTIATIONS IN GOOD FAITH IN INTERNATIONAL LAW: THE
GABČÍKOVO-NAGYMAROS CASE

Due to the potential consequences of the position advanced by Brazil regarding the interpretation of Annex “C” of the Treaty of Itaipú on the obligation to negotiate, it is appropriate to refer now to a similar case between Hungary and Slovakia on the construction of a barrage system on the Danube River: the *Gabčíkovo–Nagymaros* case before the International Court of Justice (“ICJ” or “The Court”). In 1993, Hungary and Slovakia, through a Special Agreement, jointly instituted proceedings before the ICJ regarding certain issues arising out of differences which had existed between the two states on the implementation and the termination of the Treaty of 16 September 1977 on the Construction and Operation of the Gabčíkovo–Nagymaros Barrage System (the “1977 Treaty”) and on the construction and operation of the “provisional solution.”²¹⁹

Hungary and the former Czechoslovakia concluded the 1977

219. *Gabčíkovo–Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, ¶ 7 (Sep. 25).

Treaty.²²⁰ The Treaty provided for the construction and operation of a barrage system between the towns of Gabčíkovo, Czechoslovakia (now Slovakia) and Nagymaros (Hungary) as a “joint investment.”²²¹ According to the Preamble of the 1977 Treaty, the barrage system was designed to attain “the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube River for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties.”²²² The Treaty envisioned a cross-border barrage system.²²³

Based on the scope of the provisions of the 1977 Treaty, the project was to have taken the form of an integrated joint project with the two states on an equal footing with respect to the financing, construction and operation of the works.²²⁴ Its single and indivisible nature was to have been realized through a Joint Contractual Plan which complemented the Treaty.²²⁵ Work on the project started in 1978 but, as a result of intense criticism which the project generated in Hungary, the Hungarian government decided to suspend the works at Nagymaros on May 13, 1989.²²⁶

During the same period, Hungary and Czechoslovakia held negotiations.²²⁷ In addition, the Czechoslovakian government started investigating alternative solutions.²²⁸ One of the “provisional solutions” was known as “Variant C” and consisted of a unilateral diversion of the Danube by Czechoslovakia, which included the construction of an overflow dam and a levee linking that dam to the south bank of the bypass canal.²²⁹ In 1991, the now Slovak government decided to begin construction to put the Gabčíkovo Project “into

220. See Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks, Hung.-Czechoslovakia, Sep. 16, 1977, 1109 U.N.T.S. 235.

221. *Id.* at pmb., art. 1.

222. *Id.* at pmb.

223. See generally *id.*

224. Gabčíkovo–Nagymaros Project, 1997 I.C.J. ¶ 20.

225. See *id.* ¶ 24.

226. See *id.* ¶ 22.

227. See *id.* ¶ 23.

228. See *id.*

229. See *id.* ¶ 25.

operation by the provisional solution.”²³⁰

In the meantime, discussions between the two states continued without any success.²³¹ In 1992, Hungary notified Czechoslovakia of its decision to terminate the 1977 Treaty with effect from May 25, 1992.²³² In October 1992, Czechoslovakia began work to close the Danube River, and starting on October 23, began the river dam project.²³³ In 1993, Slovakia became an independent state.²³⁴ Soon after, it would sign the Special Agreement with Hungary to submit a dispute before the ICJ, as noted above.²³⁵

According to Article 2 of the Special Agreement, the Court was requested to decide, “on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable”:²³⁶

(a) whether [Hungary] was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to [Hungary];

(b) whether the [Czechoslovakia] was entitled to proceed, in November 1991, to the “provisional solution” and to put into operation from October 1992 this system . . . ([consisting of the] damming up of the Danube at river kilometre 1851,7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by [Hungary].²³⁷

The Court was also asked to determine the legal consequences, including the rights and obligations for the parties, arising from its judgment on the questions referred to above.²³⁸ In its Judgment of

230. Gabčíkovo–Nagymaros Project, ¶ 23.

231. *See id.*

232. *See id.* ¶ 7.

233. *See id.* ¶ 23.

234. *See id.* ¶ 25.

235. *See id.*

236. Gabčíkovo–Nagymaros Project, ¶ 2, art. 2.

237. *Id.*

238. *Id.*

September 25, 1997, the Court found that “Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the [1977 Treaty] and related instruments attributed responsibility to it”; that “Czechoslovakia was entitled to proceed, in November 1991, to the ‘provisional solution’ as described in the terms of the Special Agreement”; that “Czechoslovakia was not entitled to put into operation, from October 1992, the ‘provisional solution’”; that the notification, on May 19, 1992, [on the termination of the 1977 Treaty] and related instruments by Hungary did not have the legal effect of terminating them.”²³⁹

Moreover, with the regard to the legal consequences, including the rights and obligations of the parties, deriving from its judgment, the Court held, *inter alia*, that “Slovakia, as a successor to Czechoslovakia, became a party to the [1977 Treaty] as from January 1, 1993”; that “Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the [1977 Treaty], in accordance with such modalities as they may agree upon.”²⁴⁰ In determining the future conduct of Hungary and Slovakia, the Court observed that “the 1977 Treaty is still in force and consequently governs the relationship between the Parties . . . it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.”²⁴¹ Moreover, the Court noted that the 1977 Treaty was not only a joint investment project for the production of energy, but was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment.²⁴² In order to achieve these objectives the parties “accepted obligations of conduct, obligations of performance, and obligations of result.”²⁴³

The Court then went on to observe that Hungary and Slovakia were under a legal obligation, during the negotiations to be held by virtue

239. *Id.* ¶ 155.

240. *Id.*

241. Gabčíkovo–Nagymaros Project, ¶ 132.

242. *Id.* ¶¶ 132–35.

243. *Id.* ¶ 135.

of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty could best be served, keeping in mind that all of them should be fulfilled. However, the Court noted it did not have the authority to determine what shall be the final result of the negotiations to be conducted by the parties.²⁴⁴ In recalling its Judgment from the *North Sea Continental Shelf* cases, the Court observed:

[The Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.²⁴⁵

Additionally, the Court underscored that the *pacta sunt servanda* rule (Article 26 of the VCLT) required in this case that “the Parties find an agreed solution within the co-operative context of the Treaty,” and that, under Article 26 of the VCLT, “[t]he principle of good faith obliges the Parties to apply [the Treaty] in a reasonable way and in such a manner that its purpose can be realized.”²⁴⁶

Despite the Court’s judgment, however, twenty years of bilateral negotiations on the modalities of implementation of the judgment or on a settlement outside of the frame of the judgment have been fruitless.²⁴⁷ According to Nagy, there was no tangible change in the situation on the ground as a result of a substantive agreement between the parties.²⁴⁸ While there were frequent interventions in the water management system as well as in the environment in a broader sense, they all were either unilateral or harmonized in other fora.²⁴⁹

Parallel to the bilateral negotiations process, Slovakia filed a request

244. *Id.* ¶ 141.

245. *Id.*

246. *Id.* ¶ 142.

247. See Boldizsár Nagy, *The ICJ Judgment in the Gabčíkovo-Nagymaros Project Case and Its Aftermath: Success or Failure?*, in *A BRIDGE OVER TROUBLE WATERS: DISPUTE RESOLUTION IN THE LAW OF INTERNATIONAL WATERCOURSES AND THE LAW OF THE SEA* 21, 35 (Hélène Ruiz Fabri et al. eds., 2020) (noting the ineffective result of negotiations concerning the implementation of judgment).

248. See *id.* (describing the 21 years of bilateral negotiations which resulted in nothing).

249. See *id.* (describing how the broad interventions in the water management system and environment did not amount to a substantive agreement).

for an additional judgment from the Court in 1998.²⁵⁰ According to Slovakia, such an additional Judgment was necessary because of the unwillingness of Hungary to implement the judgment delivered by the Court in 1997.²⁵¹ In 2017, however, Slovakia requested the Court to place on record the discontinuance of the proceedings and to direct the removal of the case from the List.²⁵²

E. IMPLICATIONS

In light of the aforementioned, the immediate consequence of the Brazilian interpretation would be maintaining the status quo with regard to the cost of the electrical services provided by the Itaipú binational entity. As noted above, following partial and full service of the debt, the cost has been gradually reduced, and no progress has been made in the review of Annex “C” of the Treaty of Itaipú.²⁵³ Brazil would undermine the good faith presumption in the performance of the Treaty and, specifically of paragraph VI, by insisting on its position regarding the scope of paragraph VI of Annex “C” of the Treaty of Itaipú and by seeking to impose its position.

Certainly, the effect of this situation entails depriving Paraguay of its right to advance its own positions regarding the assessment of the cost of the electrical services provided by the Itaipú binational entity once the debt is serviced. Limiting Paraguay in this way could be detrimental to its development prospects.²⁵⁴ In this respect, mechanisms for amicable dispute settlement or redress exist to address such a dispute.

To begin, the Treaty of Itaipú itself provides for a dispute settlement

250. See *Gabčíkovo–Nagymaros Project (Hung./Slovk.): Slovakia Requests an Additional Judgment*, No. 98/128, 1 (Sep. 3, 1998) <https://www.icj-cij.org/public/files/case-related/92/092-19980903-PRE-01-00-EN.pdf>.

251. See *id.*

252. See *Gabčíkovo–Nagymaros Project (Hung./Slovk.): The Court Places on Record the Discontinuance by Slovakia of the Procedure Begun by Means of its Request for an Additional Judgment*, No. 2017/31, 1 (Jul. 21, 2017), <https://www.icj-cij.org/public/files/case-related/92/092-20170721-PRE-01-00-EN.pdf>.

253. See Natacha Che, *Macroeconomic Impact of the Itaipú Treaty Review for Paraguay* 6–7 (IMF, Working Paper No. 129, 2021) (explaining that the completion of debt payments could affect Paraguay’s revenue since the dam will be able to operate at a much lower cost after 2023).

254. See Treaty of Itaipú, *supra* note 1, Annex C, art. VI.

mechanism in Article XXI, which refers to the “usual diplomatic means.”²⁵⁵ A formal disagreement may materialize with regard to the review process of Annex “C” pursuant to paragraph VI. In this scenario, Paraguay could enter into direct negotiations with Brazil, in a similar fashion to the *Gabčíkovo–Nagymaros* case,²⁵⁶ within a reasonable period of time.

If negotiations are unsuccessful, Paraguay could consider bringing a claim against Brazil before the ICJ for the breach of its obligation under the Treaty of Itaipú. Certainly, it is highly unlikely that Brazil would consent to a Special Agreement to submit a dispute before the Court.²⁵⁷ In addition, Brazil has not deposited a declaration recognizing the jurisdiction of the Court as compulsory. However, Paraguay could seek the grounds for the Court’s jurisdiction on the basis of the American Treaty on Pacific Settlement (“Pact of Bogotá”), to which both Paraguay and Brazil are parties.²⁵⁸ The Pact of Bogotá contains a clause which provides for judicial procedure before the ICJ.²⁵⁹ Neither Paraguay nor Brazil have expressed a reservation to this provision.²⁶⁰ In such a hypothetical scenario, even in the event of a favorable judgment by the ICJ, it would be up to both parties to fulfill the obligation of negotiating in good faith, with the reminder that even if the obligation to negotiate is not an obligation of result, the parties are to act fairly and reasonably, and to refrain from taking unfair advantage from a situation. If these means of dispute settlement fail, there are other alternatives deriving from the law of state responsibility that merit separate examination on another occasion.

IV. CONCLUDING REMARKS

It is clear that paragraph VI of Annex “C” of the Treaty of Itaipú provides for an independent obligation to negotiate in good faith

255. *Id.* art. XXII.

256. *See* *Gabčíkovo–Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. 7, ¶ 141 (Sep. 25).

257. *See* Rules of Court, art. 39, 1978 I.C.J. Acts & Docs. 93.

258. *See* American Treaty on Pacific Settlement, 115–16, May 13, 1949, 30 U.N.T.S. 55.

259. *See id.* arts. XXXI–XXXVII.

260. *See id.* 108–12.

without any further conditions other than the elapsing of a specific time period, *i.e.*, fifty years from the entry into force of the Treaty of Itaipú. To argue the contrary would simply deprive paragraph VI of Annex “C” of any value. A systemic interpretation of paragraph VI of Annex “C” of the Treaty of Itaipú, grounded in the application of the rules of treaty interpretation, leads to the conclusion that the purpose of paragraph VI is to entitle both parties to the Treaty to the assessment of the provisions of Annex “C” in light of the overarching object and purpose of the Treaty.

Taking into account that the debt of the loans obtained by the parties for the construction of the Itaipú dam was serviced in early 2023, it is clear that both Paraguay and Brazil might not pursue similar interests with regard to the cost of the electrical services provided by the Itaipú binational entity. This conflict is where paragraph VI of Annex “C” plays the fundamental role of mandating both parties to negotiate in good faith. Rather than imposing their positions unilaterally, Paraguay and Brazil ought to make their best efforts to find a middle ground that brings the positions of both parties as close as possible. As noted, the *Gabčíkovo-Nagymaros* case underscores this idea.²⁶¹ Were a formal dispute to arise, Paraguay would be entitled to make a case asserting Brazil’s potential breach of its obligation to negotiate in good faith. In the framework of the Treaty of Itaipú, despite being an obligation of conduct, the obligation to negotiate pursuant to paragraph VI of Annex “C” operates under the presumption of good faith. In 2023, or as soon as reasonably possible, it will incumbent upon Paraguay and Brazil to live up to this concept and to the overarching *pacta sunt servanda* principle.

261. See *Gabčíkovo–Nagymaros Project*, 1997 I.C.J. ¶ 141.