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Summary
Unofficial

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Dispute over the Status and Use of the Waters of the Silala (Chile v. *Bolivia)*

Summary of the Judgment of 1 December 2022

I. GENERAL BACKGROUND (PARAS. 28-38)

The Court begins by setting out the general background of the case by recalling that the Silala River has its source in the territory of Bolivia. It originates from groundwater springs in the Southern (Orientales) and Northern (Cajones) wetlands, located in the Potosí Department of Bolivia, approximately 0.5 to 3 kilometres north-east of the common boundary with Chile at an altitude of around 4,300 metres. Following the natural topographic gradient which slopes from Bolivia towards Chile, the flow of the Silala, comprised of surface water and groundwater, traverses the boundary between Bolivia and Chile. In Chilean territory, the Silala River continues to flow south-west in the Antofagasta region of Chile until its waters discharge into the San Pedro River at about 6 kilometres from the boundary.

The Court further recalls that over the years, both Parties have granted concessions for the use of the Silala waters. This use of the waters of the Silala started in 1906, when the "Antofagasta (Chili) and Bolivia Railway Company Limited" (known as the "FCAB") acquired a concession from the Chilean Government for the purpose of increasing the flow of drinking water serving the Chilean port city Antofagasta. Two years later, in 1908, the FCAB also obtained a right of use from the Bolivian Government for the purpose of supplying the steam engines of the locomotives that operated the Antofagasta-La Paz railway. The FCAB built an intake (Intake No. 1) in 1909 on Bolivian territory, at approximately 600 metres from the boundary. In 1910, the pipeline from Intake No. 1 to the FCAB's water reservoirs in Chile was officially put into operation. In 1928, the FCAB constructed channels in Bolivia. Chile claims that this was done for sanitary reasons, to inhibit breeding of insects and avoid contamination of potable water. According to Bolivia, the channelization had the purpose of artificially drawing the water from the surrounding springs and *bofedales*, which enhanced the surface flow of the Silala into Chile. In 1942, a second intake and pipeline were built in Chilean territory at approximately 40 metres from the international boundary. The Court notes that on 7 May 1996, the Minister for Foreign Affairs of Bolivia issued a press release in response to certain articles in the Bolivian press referring to an alleged diversion by Chile of the waters of the "boundary Silala river". He indicated that there was "no water diversion" as confirmed during the field work carried out by the Mixed Boundary Commission in 1992, 1993 and 1994. The Minister noted, however, that he would include the issue on the bilateral agenda "given that the waters of the Silala river have been used since more than a century by Chile" at a cost to Bolivia.

On 14 May 1997, Bolivian local authorities revoked and annulled the concession granted to the FCAB in 1908 to exploit the spring waters of the Silala. A Supreme Decree, endorsing this decision, makes reference to "evidence of the improper use" of the Silala waters "outside the granting of their use, with prejudice to the interests of the State and in clear violation . . . of the State Political Constitution". The Court further notes that by 1999, the question of the status of the Silala and the character of its waters had become a point of contention between the Parties. The two Parties attempted to reach a bilateral agreement but did not succeed. Chile indicates that it decided to request a judgment from the Court on "the nature of the Silala River as an international watercourse and of Chile's rights as a riparian State", following several statements made by the President of Bolivia, Mr. Evo Morales, in 2016, in which he accused Chile of illegally exploiting the waters of the Silala without compensating Bolivia, stated that the Silala was "not an international river" and expressed an intention to bring the dispute before the Court. Chile accordingly instituted proceedings against Bolivia before the Court on 6 June 2016.

II. EXISTENCE AND SCOPE OF THE DISPUTE: GENERAL CONSIDERATIONS (PARAS. 39-49)

Before examining the submissions of the Parties, the Court notes that it must, at the outset, determine whether it has jurisdiction to entertain the claims and the counter-claims of the Parties and, if so, whether there are reasons that prevent the Court from exercising its jurisdiction in whole or in part. Chile seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. Pursuant to that provision, the existence of a dispute between the Parties is a condition of the Court's jurisdiction. The Court observes in this regard that, in accordance with this established jurisprudence, "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interest", and that the "dispute must in principle exist at the time the Application is submitted to the Court". The Court further observes that the Parties have not contested the Court's jurisdiction, with the exception of one objection raised by Chile regarding Bolivia's first counter-claim, which the Court addresses below. Thus, the Court is satisfied that it has jurisdiction to adjudicate the dispute between the Parties. In light of the evolution of some positions of the Parties in the course of the proceedings and considering that each Party now contends that certain claims or counter-claims are without object, or present hypothetical questions, the Court makes some general observations with respect to these assertions.

The Court recalls that, even if it finds that it has jurisdiction, "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore". The Court has emphasized that "[t]he dispute brought before it must . . . continue to exist at the time when the Court makes its decision" and that "there is nothing on which to give judgment" in situations where the object of a claim has clearly disappeared. It "has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object". Such a situation may cause the Court to "deci[de] not to proceed to judgment on the merits".

The Court has held "that it cannot adjudicate upon the merits of the claim" when it considers that "any adjudication [would be] devoid of purpose". The Court observes that its task is not limited to determining whether a dispute has disappeared in its entirety. The scope of a dispute brought before the Court is circumscribed by the claims submitted to it by the parties. Therefore, the Court also has to ascertain whether specific claims have become without object as a consequence of a convergence of positions or agreement between the Parties, or for some other reason. To this end, the Court carefully assesses whether and to what extent the final submissions of the Parties continue to reflect a dispute between them. The Court recalls that it has no power to "substitute itself for [the parties] and formulate new submissions simply on the basis of arguments and facts advanced". However, it is "entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions". In undertaking this task, the Court will take into account not only the submissions, but also, *inter alia*, the Application as well as all the arguments put forward by the Parties in the course of the written and oral proceedings. The Court will thus

interpret the submissions, in order to identify their substance and to determine whether they reflect a dispute between the Parties.

The Court observes that each Party maintains that certain submissions of the other Party, while reflecting points of convergence between the Parties, remain vague, ambiguous or conditional, and therefore cannot be taken to express agreement between them. Each has therefore requested the Court to render a declaratory judgment with respect to certain submissions, pointing to the need for legal certainty in their mutual relations. The Applicant emphasized the need for a declaratory judgment to prevent the Respondent from changing its position in the future on the law applicable to international watercourses and to the Silala. The Court notes that "[i]t is clear in the jurisprudence of the Court and its predecessor that 'the Court may, in an appropriate case, make a declaratory judgment'".

Given that the Court's role in a contentious case is to resolve existing disputes, the operative paragraph of a judgment should not, in principle, record points on which the Court finds the parties to be in agreement. Statements made by the parties before the Court must be presumed to be made in good faith and the Court carefully assesses such statements. If the Court finds that the parties have come to agree in substance regarding a claim or a counter-claim, it will take note of that agreement in its judgment and conclude that such a claim or counter-claim has become without object. In such a case, there is no call for a declaratory judgment.

The Court notes that, in the present case, many submissions are closely interrelated. A conclusion that a particular claim or counter-claim is without object does not preclude the Court from addressing certain questions that are relevant to such a claim or counter-claim in the course of examining other claims or counter-claims that remain to be decided. The Court further recalls that its function is "to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties". The Court reaffirms that "it is not for the Court to determine the applicable law with regard to a hypothetical situation". In particular, it has held that it does not pronounce "on any hypothetical situation which might arise in the future".

III. CLAIMS OF CHILE (PARAS. 50-129)

1. Submission *(a)*: the Silala River system as an international watercourse governed by customary international law (paras. 50-59)

The Court observes at the outset that neither Chile nor Bolivia is party to the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter referred to as the "1997 Convention") or to any treaty governing the non-navigational uses of the Silala River. Accordingly, in the present case, the respective rights and obligations of the Parties are governed by customary international law. The Court notes that Chile's submission *(a)* contains the legal propositions that the Silala waters are an international watercourse under customary international law, and that the customary international law rules relating to international watercourses apply to the Silala waters in their entirety. The Court observes that the legal position originally taken by Bolivia in its Counter-Memorial positively opposed both legal propositions advanced by Chile. In particular, Bolivia contested that the rules on the non-navigational uses of international watercourses under customary international law apply to the "artificially enhanced" surface flow of the Silala.

The Court observes that the positions of the Parties with respect to the legal status of the Silala waters and the rules applicable under customary international law have converged in the course of the proceedings. During the oral proceedings, Bolivia has on several occasions expressed its agreement with Chile's claim that — despite the "artificial enhancement" of the surface flow of the Silala River — the Silala waters qualify in their entirety as an international watercourse under customary international law, and stated that, therefore, customary international law applies both to the "naturally flowing" waters and the "artificially enhanced" surface flow of the Silala.

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

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

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

2. Submission *(b)*: Chile's entitlement to the equitable and reasonable utilization of the waters of the Silala River system (paras. 60-65)

The Court observes that, when these proceedings were instituted, Chile's claim regarding its entitlement to the equitable and reasonable use of the waters of the Silala, which includes both the "naturally flowing" and "artificially enhanced" parts, was positively opposed by Bolivia. During the course of the proceedings, however, it became apparent that the Parties agree that the principle of equitable and reasonable utilization applies to the entirety of the waters of the Silala, irrespective of their "natural" or "artificial" character. The Parties also agree that they are both entitled to the equitable and reasonable utilization of the Silala waters under customary international law. It is not for the Court to address a possible difference of opinion regarding a future use of these waters that is entirely hypothetical. For these reasons, the Court finds that the Parties agree with respect to Chile's submission *(b)*. Accordingly, the Court concludes that the claim made by Chile in its final submission *(b)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

3. Submission *(c)*: Chile's entitlement to its current use of the waters of the Silala River system (paras. 66-76)

The Court notes that, when these proceedings were instituted, Chile's claim to be entitled to its current use of the waters of the Silala was positively opposed by Bolivia as far as it concerned those parts of the flow which Bolivia describes as "artificially enhanced". Considering the statements made by Bolivia during the oral proceedings, the Court also notes that the Parties agree that Chile has a right to the use of an equitable and reasonable share of the waters of the Silala irrespective of

the "natural" or "artificial" character or origin of the water flow. Furthermore, Bolivia does not claim in these proceedings that Chile owes compensation to Bolivia for past uses of the waters of the Silala.

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

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

Regarding Bolivia's contention that Chile's use is without prejudice to Bolivia's future uses of the Silala, the Court reaffirms that there is no opposition of views regarding a corresponding right of Bolivia to the equitable and reasonable use of the Silala waters, as Chile does not deny Bolivia's proposition in this regard. For these reasons, the Court finds that the Parties have, in the course of the proceedings, come to agree with respect to Chile's submission *(c)*. In this connection, the Court takes note of statements by Chile according to which it is no longer contested that it is entirely within Bolivia's sovereign powers to dismantle the channels and to restore the wetlands in its territory in conformity with international law. Since the Parties agree regarding Chile's submission *(c)*, the Court concludes that the claim made by Chile in its final submission *(c)* no longer has any object and that, therefore, the Court is not called upon to give a decision thereon.

4. Submission *(d)*: Bolivia's obligation to prevent and control harm resulting from its activities in the vicinity of the Silala River system (paras. 77-86)

The Court notes that when these proceedings were instituted, Bolivia positively opposed the claim contained in Chile's submission *(d)* with respect to the applicability of the obligation to prevent transboundary harm to the "artificially enhanced" flow of the Silala. The Court observes that the Parties agree that they are bound by the customary obligation to prevent transboundary harm. Furthermore, the Parties now agree that this obligation applies to the Silala waters irrespective of whether they flow naturally or are "artificially enhanced". The Parties also agree that the obligation to prevent transboundary harm is an obligation of conduct and not an obligation of result, and that it may require the notification of, and exchange of information with, other riparian States and the conduct of an environmental impact assessment.

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

When assessing whether and to what extent the final submissions of the Parties continue to reflect the dispute between them, the Court may interpret the submissions of the Parties, taking into account the Application as a whole and the arguments of the Parties before it. The Court notes that Chile has sometimes referred to the obligation to prevent transboundary harm, without specifying that such an obligation is limited to significant transboundary harm. However, Chile has also repeatedly used the term "significant harm" as the threshold for the application of the obligation of prevention, both in its written pleadings and during the oral proceedings. The Court further notes that neither in its written nor in its oral pleadings did Chile ask the Court to apply a lower threshold than that of "significant harm". The Court is of the view that Chile's varying terminology cannot be interpreted, in the absence of more specific indications to the contrary, as expressing a disagreement in substance with the threshold of "significant transboundary harm" put forward by Bolivia and repeatedly used by Chile itself, including with reference to Article 7 of the 1997 Convention.

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

5. Submission *(e)*: Bolivia's obligation to notify and consult with respect to measures that may have an adverse effect on the Silala River system (paras. 87-129)

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

In support of their positions with respect to the relevant rules of customary international law, both Parties refer to the 1997 Convention. They also refer to the draft articles on the law of the non-navigational uses of international watercourses adopted by the International Law Commission (hereinafter the "ILC" or the "Commission") in 1994 (hereinafter the "ILC Draft Articles"), which served as the basis for the 1997 Convention, as well as to the commentaries of the ILC to those Draft Articles. The Court notes in this regard that both Parties consider that a number of provisions of the 1997 Convention reflect customary international law. They disagree, however, about whether this is true as regards certain other provisions, including those relating to procedural obligations, in particular the obligation to notify and consult.

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

A. Applicable legal framework (paras. 92-102)

The Court notes that the customary obligations relating to international watercourses are incumbent on the riparian States of the Silala only if the Silala is in fact an international watercourse. It recalls in this regard that, even though both Parties agree that the Silala is an international watercourse, Bolivia has not explicitly recognized that the definition of "international watercourse" set out in Article 2 of the 1997 Convention reflects customary international law, contrary to what Chile, for its part, asserts. The Court considers that modifications that increase the surface flow of a watercourse have no bearing on its characterization as an international watercourse.

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

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

According to the jurisprudence of the Court and that of its predecessor, an international watercourse constitutes a shared resource over which riparian States have a common right. As early as 1929, the Permanent Court of International Justice declared, with regard to navigation on the River Oder, that there is a community of interest in an international watercourse which provides "the basis of a common legal right". More recently, the Court applied this principle to the non-navigational uses of international watercourses and observed that it has been strengthened by the modern development of international law, as evidenced by the adoption of the 1997 Convention.

Under customary international law, every riparian State has a basic right to an equitable and reasonable sharing of the resources of an international watercourse. This implies both a right and an obligation for all riparian States of international watercourses: every such State is both entitled to an equitable and reasonable use and share, and obliged not to exceed that entitlement by depriving other riparian States of their equivalent right to a reasonable use and share. This reflects "the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource". In the present case, under customary international law, the Parties are both entitled to an equitable and reasonable use of the waters of the Silala as an international watercourse and obliged, in utilizing the international watercourse, to take all appropriate measures to prevent the causing of significant harm to the other Party.

The Court further observes that the principle of equitable and reasonable use of an international watercourse must not be applied in an abstract or static way, but by comparing the situations of the States concerned and their utilization of the watercourse at a given time. The Court recalls that in general international law it is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". "A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" in a transboundary context, and in particular as regards a shared resource.

The Court has also emphasized that the above-mentioned obligations are accompanied and complemented by narrower and more specific procedural obligations, which facilitate the implementation of the substantive obligations incumbent on riparian States under customary international law. As the Court has already had occasion to state, it is in fact only "by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations".

This is why the Court considers that the obligations to co-operate, notify and consult are an important complement to the substantive obligations of every riparian State. In the Court's view, "[t]hese obligations are all the more vital" when, as in the case of the Silala in the present

proceedings, the shared resource at issue "can only be protected through close and continuous co-operation between the riparian States".

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

B. Threshold for the application of the obligation to notify and consult under customary international law (paras. 103-118)

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

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

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

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

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

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

The Court observes that the content of this Article corresponds to a large extent to its own jurisprudence on the procedural obligations incumbent on States under customary international law as regards transboundary harm, including in the context of the management of shared resources. Indeed, in its jurisprudence the Court has confirmed the existence, in certain circumstances, of an obligation to notify and consult other riparian States concerned. It has emphasized that this customary obligation applies when "there is a risk of significant transboundary harm". The Court recalls that, in that judgment, it specified the steps and the approach to be taken by a State planning to undertake

an activity on or around a shared resource or generally capable of having a significant transboundary effect. The State in question

> "must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.
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> . . . . . .
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> If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk."

The Court is aware of the differences between the formulations used in Article 12 of the 1997 Convention and those used in its own jurisprudence regarding the threshold for the application of the customary obligation to notify and consult, and on the duty to conduct a prior environmental impact assessment. In particular, the Convention refers to "planned measures which may have a significant adverse effect upon other watercourse States", whereas the Court has referred to "a risk of significant transboundary harm". The Court also notes that the ILC's commentary does not specify the degree of harm that meets the threshold for the application of the obligation of notification contained in Article 12 of the Draft Articles.

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

The Court considers that Article 12 of the 1997 Convention does not reflect a rule of customary international law relating to international watercourses that is more rigorous than the general obligation to notify and consult contained in its own jurisprudence. It therefore concludes that each riparian State is required, under customary international law, to notify and consult the other riparian State with regard to any planned activity that poses a risk of significant harm to that State.

C. Question of Bolivia's compliance with the customary obligation to notify and consult (paras. 119-129)

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

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

Consequently, the Court would only need to consider the question whether Bolivia has conducted an objective assessment of the circumstances and of the risk of significant transboundary harm in accordance with customary law, if it were established that any of the activities undertaken

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

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

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

IV. COUNTER-CLAIMS OF BOLIVIA (PARAS. 130-162)

1. Admissibility of the counter-claims (paras.130-137)

The Court recalls that Bolivia, in its Counter-Memorial, made three counter-claims. The Court, in its Order of 15 November 2018, did not consider that it was required to rule definitively, at that stage of the proceedings, on the question of whether Bolivia's counter-claims met the conditions set forth in the Rules of Court and deferred the matter to a later stage. Before considering the merits of the counter-claims, the Court determines whether they fulfil the conditions set forth in its Rules. Article 80, paragraph 1, of its Rules provides that "[t]he Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party". The Court has previously characterized these two requirements as relating to "the admissibility of a counter-claim as such" and has explained that the term "admissibility" must be understood "to encompass both the jurisdictional requirement and the direct connection requirement".

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

The Court recalls that Chile stated, in a letter to the Registry and then through its representative at a meeting between the President of the Court and the Agents of the Parties, that it did not intend to contest the admissibility of Bolivia's counter-claims.

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

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

The Court considers that, in this case, the counter-claims are directly connected with the subject-matter of the principal claims, both in fact and in law. It is indeed clear from the Parties' submissions that their claims form part of the same factual complex. Similarly, the respective claims of both Parties concern the determination and application of customary rules in the legal relations between the two States with regard to the Silala. The Court is also of the view that Bolivia's counter-claims are not offered merely as defences to Chile's submissions but set out separate claims. The Court thus concludes that the requirements of Article 80, paragraph 1, of its Rules are met and that it may examine Bolivia's counter-claims on the merits.

2. First counter-claim: Bolivia's alleged sovereignty over the artificial channels and drainage mechanisms installed in its territory (paras. 138-147)

In its first counter-claim, Bolivia requested the Court to adjudge and declare that it has sovereignty over the artificial channels and drainage mechanisms in the Silala located in its territory and that it has the right to decide whether and how to maintain them.

The Court has previously stated that, as is the case with principal claims, it "must establish the existence of a dispute between the parties with regard to the subject-matter of the counter-claims". Given that the Parties' positions have changed considerably throughout the present proceedings, as already noted, the Court must satisfy itself that the first counter-claim has not become without object.

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

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

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

As noted above, the Parties agree that Bolivia's right to construct, maintain or dismantle the infrastructure in its territory must be exercised in accordance with the applicable rules of customary international law. In particular, Bolivia clearly stated during the oral proceedings that its sovereign right over this infrastructure, including the right to dismantle it, must be exercised in compliance with the customary obligations applicable with regard to significant transboundary harm. The Parties also agree that the rules applicable to the Silala include, in particular, the right to equitable and

reasonable utilization by riparian States, the exercise of due diligence to avoid causing significant harm to other watercourse States, and compliance with the general obligation to co-operate as well as with all procedural obligations. It is possible that the Parties may, in the future, express divergent views on the implementation of these obligations in the event of infrastructure installed on the Silala being dismantled. This possibility, however, does not alter the fact that Chile does not contest the right which is the subject-matter of the first counter-claim, namely Bolivia's right to maintain or dismantle the channels located in its territory. The Court considers that Bolivia may rely on Chile's acceptance of Bolivia's right to dismantle the channels.

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

3. Second counter-claim: Bolivia's alleged sovereignty over the "artificial" flow of Silala waters engineered, enhanced or produced in its territory (paras. 148-155)

In its second counter-claim as presented in its final submissions, Bolivia requested the Court to adjudge and declare that it has sovereignty over the artificial flow of Silala waters engineered, enhanced or produced in its territory, and that Chile has no acquired right to that artificial flow.

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

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

The Court also observes that the second counter-claim, as presented in Bolivia's final submissions, rests on the premise that Chile is claiming an "acquired right" over the current flow of the Silala. As the Court noted earlier, Chile has clearly stated, first, that it is not claiming any such "acquired right" and, second, that it recognizes that Bolivia has a sovereign right to dismantle the

infrastructure and that any resulting reduction in the flow of the waters of the Silala into Chile would not in itself constitute a violation by Bolivia of its obligations under customary international law. Consequently, the Court concludes that there is no longer any disagreement between the Parties on this point.

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

4. Third counter-claim: the alleged need to conclude an agreement for any future delivery to Chile of the "enhanced flow" of the Silala (paras. 156-162)

In its third counter-claim as presented in its final submissions, Bolivia requests the Court to adjudge and declare that any request addressed by Chile to Bolivia for the delivery of the enhanced flow of the Silala, and the conditions and modalities thereof, including the compensation to be paid for any such delivery, are subject to the conclusion of an agreement with Bolivia. In that regard, the Court recalls that it is not for the Court to pronounce on hypothetical situations. It may rule only in connection with concrete cases where there exists, at the time of the adjudication, an actual dispute between the parties. This is, however, not the case with Bolivia's third counter-claim, which does not concern an actual dispute between the Parties. Rather, it seeks an opinion from the Court on a future, hypothetical situation.

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

V. OPERATIVE CLAUSE (PARA. 163)

For these reasons,

THE COURT,

(1) By fifteen votes to one,

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

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

AGAINST: *Judge* Charlesworth;

(2) By fifteen votes to one,

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

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

AGAINST: *Judge* Charlesworth;

(3) By fifteen votes to one,

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

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

AGAINST: *Judge* Charlesworth;

(4) By fourteen votes to two,

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

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

AGAINST: *Judges* Robinson, Charlesworth;

(5) Unanimously,

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

(6) By fifteen votes to one,

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

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

AGAINST: *Judge* Charlesworth;

(7) By fifteen votes to one,

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

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

AGAINST: *Judge* Charlesworth;

(8) Unanimously,

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

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

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Declaration of Judge Tomka

Judge Tomka notes that the Judgment most likely comes as a surprise to the Parties. Indeed, it decides almost nothing. Most of the final submissions of the Parties are found to no longer have any object such that the Court is not called upon to give a decision thereon. This outcome has been made possible by the Court's reliance on and recourse to the pronouncement made in its 1974 Judgment in the *Nuclear Tests (Australia* v. *France)* case. According to that pronouncement, the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so, as this is one of the attributes of its judicial functions. The Judgment was criticized by several Members of the Court at the time who vigorously dissented. These Members took issue with the 1974 Judgment's basic premise which led the Court to modify the scope of the submissions rather than interpret them.

Judge Tomka accepts that the Court may be entitled to interpret the final submissions of a party. He recalls that the Court is also entitled to seek clarification from the party who has formulated the submissions when they lack clarity. He considers, however, that the Court should avoid an interpretation of the submissions which is at odds with the ordinary meaning of the words and legal concepts used therein. The decisive weight shall be put on the final submissions read out by the agent and subsequently submitted to the Registry.

Declaration of Judge Charlesworth

Judge Charlesworth concurs with the Court's rejection of one of Chile's claims and one of Bolivia's counter-claims. She observes that the Court neither upholds nor rejects the remaining claims and counter-claims, but that it has instead shifted its attention to ascertaining whether the Parties' positions have converged, a solution with which she disagrees.

Judge Charlesworth notes that the requirement for the existence of a dispute, like other elements on which the Court's jurisdiction depends, must be fulfilled at the time of the institution of proceedings. In her view, the Court has never identified the grounds on which a dispute might disappear in the course of the proceedings or the legal consequences of such disappearance. Judge Charlesworth considers that the Judgment separates the dispute requirement from all other jurisdictional elements, in so far as fulfilment of this requirement is a necessary but not a sufficient condition for the Court to adjudicate. She points out that the Judgment does not explain whether the disappearance of a dispute deprives the Court of its jurisdiction, or whether it renders the application inadmissible.

Judge Charlesworth argues that an appeal to the Court's function of deciding disputes does not assist in clarifying the Court's role in ascertaining the continued existence of a dispute and that adjudication of persisting, albeit reduced, disputes does not run counter to the Court's function. For her, the Court's analysis adds complexity and uncertainty to the jurisprudence on the concept of a dispute, and it is inconsistent with the jurisprudence concerning the relevance of events taking place in the course of the proceedings for the purpose of ascertaining the existence of a dispute.

Judge Charlesworth thinks that the Court's analysis merges two distinct issues: the first concerns the circumstances under which a claim is deprived of its object, while the second concerns the legal effects of a convergence of positions between the parties to a dispute. In her view, the Court's jurisprudence provides no support for the proposition that the convergence of positions between the parties may deprive a claim of its object. After discussing other relevant judgments, Judge Charlesworth focuses on the *Nuclear Tests* cases, which, in her view, are distinct from the situation here. She argues that the Court's reasoning in those cases unfolded in three steps: first, the Court identified the "true object" of the applicants' claims as being the termination of nuclear testing by the respondent; second, the Court found that the respondent had made a legally binding undertaking to that effect; third, the Court concluded that the dispute between the parties had

disappeared "because the object of the claim ha[d] been achieved by other means". According to Judge Charlesworth, the respondent's legally binding undertaking was a substitute for the legally binding judgment that the applicants had sought to obtain.

Judge Charlesworth considers that the situation in the present case is different from *Nuclear Tests* to the extent that there is no indication in the Judgment that the object of any claim or counter-claim has been achieved by other means. In particular, she finds that the Court stops short of explaining the legal effect of a Party's reliance in its counterpart's representations, or indeed of a subsequent shift in the Parties' positions. In her view, unless parties commit to legally binding obligations, a pronouncement by the Court on the rights and duties of the parties is not incompatible with the Court's judicial function.

For Judge Charlesworth, the Parties' oral proceedings revealed that there remains some ambiguity about the extent of the agreement between the Parties on particular issues. In the circumstances, she states that the Court should have issued a declaratory judgment, which could assist in stabilizing the legal relations between the Parties.

Judge Charlesworth suggests that, even assuming a convergence of positions between the Parties, the Court should have issued a declaratory judgment recording the Parties' agreement. In her view, such judgments are in line with the spirit of the Statute of the Court and its predecessor. Judge Charlesworth thinks that, while the Court may refrain from recording agreements taking place prior to its seisin, it is understandable for the Court to note an agreement arrived at between the Parties during the proceedings. She proposes that such a judgment is in the interest of legal certainty between the parties because it ensures that the parties commit to their positions.

Judge Charlesworth concludes by arguing that States asserting rights for themselves or obligations for other States have an interest in having those rights or obligations definitively affirmed or rejected in a legally binding judgment by the Court possessing jurisdiction. In her view, the Court has not responded to this interest in the present case.

Separate opinion of Judge *ad hoc* Simma

Although Judge Simma voted in favour of the operative part of the Judgment, he did so with reluctance. He accepts that the Court, being a court of justice, cannot exceed the inherent limitations incumbent upon it in the exercise of its judicial function. He wonders, however, if justice is served when the Court renders a judgment of the kind it rendered today. The Judgment decides almost nothing and does not settle, with binding force, the points which were in dispute between the Parties when Chile instituted the proceedings in 2016. Most of the points in dispute are found to have disappeared in the course of the proceedings. Judge Simma wishes to make three sets of observations.

The first set of observations concerns the disappearance of certain points in dispute in the course of the proceedings. Judge Simma notes that the Respondent abandoned most of its case and most of its submissions in the course of the proceedings. This led the Parties to ask the Court to reject some or all of the other Party's submissions on the ground that they no longer had any object. Yet the Parties had difficulty in explaining what exactly they were agreed on.

Judge Simma considers that the test employed in the Judgment to determine whether a point in dispute has disappeared sets too low a bar. He notes that, in the Judgment, the Court sought to ascertain "whether specific claims ha[d] become without object as a consequence of a convergence of positions or agreement between the Parties, or for some other reason". In this regard, he notes that the Court has never used the "convergence of positions" standard before. This standard is too low. A convergence of positions is not the same as an agreement. Parties before the Court may converge but still disagree about their submissions.

Judge Simma then turns to the second set of observations which concerns the interpretation of the Respondent's submissions and counter-claims. In his view, the Court did not abide by its stated interpretative methodology when it interpreted Bolivia's counter-claim *(b)*. The interpretation adopted in the Judgment goes against the ordinary meaning of the terms used in that submission and disregards the origin of that claim. The interpretation adopted in the Judgment, Judge Simma adds, also makes counter-claim *(b)* entirely redundant with counter-claim *(a)*. For him, this interpretation is open to question.

Judge Simma further notes that the Court rejects the theory of sovereignty over the "artificial flow" of the Silala waters which was advanced by the Respondent.

Judge Simma then turns to his third set of observations. He considers that States appearing before the Court have a legitimate interest in seeking declaratory judgments that may ensure recognition of a situation at law, once and for all and with binding force. In his view, the present Judgment casts doubt on this interest. He is troubled that the Judgment might be read as sending the signal that any position may be held, however untenable, so long as this position is abandoned at the end of the judicial proceedings. In this regard, Judge Simma sees a difference between a dispute which has disappeared because the parties genuinely agree, and a dispute which has artificially been hollowed out by one party.

In addition, Judge Simma wonders why the Judgment does not record in its operative part the agreement of the Parties reached in the course of the proceedings. In his view, this would have been consistent with the Court's practice. It would have been appropriate and helpful to the Parties in the circumstances of this case. Judge Simma regrets that the Court has rendered a judgment which is unhelpful to the Parties.

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