Corrigé
Corrected

CR 2022/8

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2022

Public sitting

held on Tuesday 5 April 2022, at 3 p.m., at the Peace Palace,

President Donoghue presiding,

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

VERBATIM RECORD

ANNÉE 2022

Audience publique

tenue le mardi 5 avril 2022, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

***en l'affaire relative au* Différend concernant le statut et l'utilisation des eaux du Silala (Chili c. Bolivie)**

COMPTE RENDU

Present:	President	Donoghue
	Vice-President	Gevorgian
	Judges	Tomka
		Abraham
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Robinson
		Salam
		Iwasawa
		Nolte
		Charlesworth
	Judges *ad hoc*	Daudet
		Simma
	Registrar	Gautier

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte
Mme Charlesworth, juges
MM. Daudet
Simma, juges *ad hoc*

M. Gautier, greffier

The Government of Chile is represented by:

H.E. Ms Ximena Fuentes Torrijo, Vice-Minister for Foreign Affairs of the Republic of Chile, Professor of Public International Law, University of Chile,

as Agent, Counsel and Advocate;

Ms Carolina Valdivia Torres, Former Vice-Minister for Foreign Affairs of the Republic of Chile,

as Co-Agent;

H.E. Ms Antonia Urrejola Noguera, Minister for Foreign Affairs of the Republic of Chile,

H.E. Mr. Hernán Salinas Burgos, Ambassador of the Republic of Chile to the Kingdom of the Netherlands,

as National Authorities;

Mr. Alan Boyle, Emeritus Professor of Public International Law, University of Edinburgh, Barrister, Essex Court Chambers, member of the Bar of England and Wales,

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization, University of Geneva, member of the Institute of International Law,

Ms Johanna Klein Kranenberg, Legal Adviser and General Co-ordinator, Ministry of Foreign Affairs of Chile,

Mr. Stephen McCaffrey, Carol Olson Endowed Professor of International Law, University of the Pacific, McGeorge School of Law, former Chair of the International Law Commission,

Mr. Samuel Wordsworth, QC, Barrister, Essex Court Chambers, member of the Bar of England and Wales, member of the Paris Bar,

as Counsel and Advocates;

Ms Mariana Durney, Professor and Head of Department of International Law, Pontificia Universidad Católica de Chile,

Mr. Andrés Jana Linetzky, Professor of Civil Law, University of Chile,

Ms Mara Tignino, Reader, University of Geneva, Lead Legal Specialist of the Platform for International Water Law at the Geneva Water Hub,

Mr. Claudio Troncoso Repetto, Professor and Head of Department of International Law, University of Chile,

Mr. Luis Winter Igualt, former Ambassador of the Republic of Chile, Professor of International Law, Pontificia Universidad Católica de Valparaíso and Universidad de Los Andes,

as Counsel;

Le Gouvernement du Chili est représenté par :

S. Exc. Mme Ximena Fuentes Torrijo, vice-ministre des affaires étrangères de la République du Chili, professeure de droit international public à l'Universidad de Chile,

comme agent, conseillère et avocate ;

Mme Carolina Valdivia Torres, ancienne vice-ministre des affaires étrangères de la République du Chili,

comme coagent ;

S. Exc. Mme Antonia Urrejola Noguera, ministre des affaires étrangères de la République du Chili,

S. Exc. M. Hernán Salinas Burgos, ambassadeur de la République du Chili auprès du Royaume des Pays-Bas,

comme représentants de l'Etat ;

M. Alan Boyle, professeur émérite de droit international public à l'Université d'Edimbourg, avocat, Essex Court Chambers, membre du barreau d'Angleterre et du pays de Galles,

Mme Laurence Boisson de Chazournes, professeure de droit international et organisation internationale à l'Université de Genève, membre de l'Institut de droit international,

Mme Johanna Klein Kranenberg, conseillère juridique et coordinatrice générale, ministère des affaires étrangères du Chili,

M. Stephen McCaffrey, professeur de droit international, titulaire de la chaire Carol Olson à la McGeorge School of Law de l'Université du Pacifique, ancien membre et ancien président de la Commission du droit international,

M. Samuel Wordsworth, QC, avocat, Essex Court Chambers, membre du barreau d'Angleterre et du pays de Galles, membre du barreau de Paris,

comme conseils et avocats ;

Mme Mariana Durney, professeure et doyenne du département de droit international à la Pontificia Universidad Católica de Chile,

M. Andrés Jana Linetzky, professeur de droit civil à l'Universidad de Chile,

Mme Mara Tignino, maître d'enseignement et de recherche à l'Université de Genève et spécialiste juridique principale de la plateforme pour le droit international de l'eau douce au Geneva Water Hub,

M. Claudio Troncoso Repetto, professeur et doyen du département de droit international à l'Universidad de Chile,

M. Luis Winter Igualt, ancien ambassadeur de la République du Chili, professeur de droit international, Pontificia Universidad Católica de Valparaíso et Universidad de los Andes,

comme conseils ;

Ms Lorraine Aboagye, Barrister, Essex Court Chambers, member of the Bar of England and Wales,

Ms Justine Bendel, Lecturer in Law, University of Exeter, Marie Curie Fellow at the University of Copenhagen,

Ms Marguerite de Chaisemartin, JSD Candidate, University of the Pacific, McGeorge School of Law,

Ms Valeria Chiappini Koscina, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of Chile,

Ms María Trinidad Cruz Valdés, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of Chile,

Mr. Riley Denoon, JSD Candidate, University of the Pacific, McGeorge School of Law, member of the Bars of the provinces of Alberta and British Columbia,

Mr. Marcelo Meza Peñafiel, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of Chile,

Ms Beatriz Pais Alderete, Legal Adviser, National Directorate for State Borders and Boundaries, Ministry of Foreign Affairs of Chile,

as Legal Advisers;

Mr. Coalter G. Lathrop, Special Adviser, Sovereign Geographic, member of the Bar of the State of North Carolina,

as Scientific Adviser;

Mr. Jaime Moscoso Valenzuela, Minister Counsellor, Embassy of Chile in the Netherlands,

Mr. Hassán Zeran Ruiz-Clavijo, First Secretary, Embassy of Chile in the Netherlands,

Ms María Fernanda Vila Pierart, First Secretary, Embassy of Chile in the Netherlands,

Mr. Diego García González, Second Secretary, Embassy of Chile in the Netherlands,

Ms Josephine Schiphorst, Executive Assistant to the Ambassador, Embassy of Chile in the Netherlands,

Ms Devon Burkhalter, Farm Press Creative,

Mr. David Swanson, Swanson Land Surveying,

as Assistant Advisers.

The Government of Bolivia is represented by:

H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Rogelio Mayta Mayta, Minister for Foreign Affairs of the Plurinational State of Bolivia,

Mme Lorraine Aboagye, avocate, Essex Court Chambers, membre du barreau d'Angleterre et du pays de Galles,

Mme Justine Bendel, maître de conférences en droit à l'Université d'Exeter, chargée de recherche dans le cadre du programme Marie Curie de l'Université de Copenhague,

Mme Marguerite de Chaisemartin, doctorante en droit à la McGeorge School of Law, Université du Pacifique,

Mme Valeria Chiappini Koscina, conseillère juridique, direction nationale des frontières et limites de l'Etat, ministère des affaires étrangères du Chili,

Mme María Trinidad Cruz Valdés, conseillère juridique, direction nationale des frontières et limites de l'Etat, ministère des affaires étrangères du Chili,

M. Riley Denoon, doctorant en droit à la McGeorge School of Law, Université du Pacifique, membre des barreaux des provinces de l'Alberta et de la Colombie-Britannique,

M. Marcelo Meza Peñafiel, conseiller juridique, direction nationale des frontières et limites de l'Etat, ministère des affaires étrangères du Chili,

Mme Beatriz Pais Alderete, conseillère juridique, direction nationale des frontières et limites de l'Etat, ministère des affaires étrangères du Chili,

comme conseillers juridiques ;

M. Coalter G. Lathrop, conseiller spécial au cabinet Sovereign Geographic, membre du barreau de l'Etat de Caroline du Nord,

comme conseiller scientifique ;

M. Jaime Moscoso Valenzuela, conseiller au ministre, ambassade du Chili aux Pays-Bas,

M. Hassán Zeran Ruiz-Clavijo, premier secrétaire à l'ambassade du Chili aux Pays-Bas,

Mme María Fernanda Vila Pierart, première secrétaire à l'ambassade du Chili aux Pays-Bas,

M. Diego García González, deuxième secrétaire à l'ambassade du Chili aux Pays-Bas,

Mme Josephine Schiphorst, assistante exécutive de l'ambassadeur à l'ambassade du Chili aux Pays-Bas,

Mme Devon Burkhalter, Farm Press Creative,

M. David Swanson, Swanson Land Surveying,

comme conseillers assistants.

Le Gouvernement de la Bolivie est représenté par :

S. Exc. M. Roberto Calzadilla Sarmiento, ambassadeur de l'Etat plurinational de Bolivie auprès du Royaume des Pays-Bas,

comme agent ;

S. Exc. M. Rogelio Mayta Mayta, ministre des affaires étrangères de l'Etat plurinational de Bolivie,

Mr. Freddy Mamani Laura, President of the Chamber of Deputies of Bolivia,

Ms Trinidad Rocha Robles, President of the International Policy Commission of the Chamber of Senators of Bolivia,

Mr. Antonio Colque Gabriel, President of the Commission for International Policy and Protection for Migrants of the Chamber of Deputies of Bolivia,

H.E. Mr. Freddy Mamani Machaca, Vice-Minister for Foreign Affairs of Bolivia,

Mr. Marcelo Bracamonte Dávalos, General Adviser to the Minister for Foreign Affairs of Bolivia,

as National Authorities;

Mr. Alain Pellet, Professor Emeritus of the University Paris Nanterre, former Chairman of the International Law Commission, President of the Institut de droit international,

Mr. Rodman R. Bundy, former *avocat à la Cour d'appel de Paris*, member of the Bar of the State of New York, partner, Squire Patton Boggs LLC, Singapore,

Mr. Mathias Forteau, Professor, University Paris Nanterre, member of the International Law Commission,

Mr. Gabriel Eckstein, Professor of Law, Texas A&M University, member of the Bar of the State of New York and the District of Columbia Bar,

as Counsel and Advocates;

Mr. Emerson Calderón Guzmán, Professor of Public International Law, Universidad Mayor de San Andrés and Secretary General of the Strategic Directorate for Maritime Claims, Silala and International Water Resources (DIREMAR),

Mr. Francesco Sindico, Associate Professor of International Environmental Law, University of Strathclyde Law School, Glasgow, and Chairman of the International Union for Conservation of Nature (UICN) World Commission on Environmental Law, Climate Change Law Specialist Group,

Ms Laura Movilla Pateiro, Associate Professor of Public International Law, University of Vigo,

Mr. Edgardo Sobenes, Consultant in International Law (ESILA),

Ms Héloïse Bajer-Pellet, member of the Paris Bar,

Mr. Alvin Yap, Advocate and Solicitor of the Supreme Court of Singapore, Associate, Squire Patton Boggs LLP, Singapore,

Mr. Ysam Soualhi, Researcher, Center Jean Bodin (CJB), University of Angers,

as Counsel;

Ms Alejandra Salinas Quiroga, DIREMAR,

Ms Fabiola Cruz Morena, Embassy of Bolivia in the Netherlands,

as Technical Assistants.

M. Freddy Mamani Laura, président de la chambre des députés de la Bolivie,

Mme Trinidad Rocha Robles, présidente de la commission de politique internationale de la chambre des sénateurs de la Bolivie,

M. Antonio Colque Gabriel, président de la commission de politique internationale et de protection des migrants de la chambre des députés de la Bolivie,

S. Exc. M. Freddy Mamani Machaca, vice-ministre des affaires étrangères de la Bolivie,

M. Marcelo Bracamonte Dávalos, conseiller général du ministre des affaires étrangères de la Bolivie,

comme autorités nationales ;

M. Alain Pellet, professeur émérite de l'Université Paris Nanterre, ancien président de la Commission du droit international, président de l'Institut de droit international,

M. Rodman R. Bundy, ancien avocat à la Cour d'appel de Paris, membre du barreau de l'Etat de New York, associé au cabinet Squire Patton Boggs LLC (Singapour),

M. Mathias Forteau, professeur à l'Université Paris Nanterre, membre de la Commission du droit international,

M. Gabriel Eckstein, professeur de droit à l'Université A&M du Texas, membre des barreaux de l'Etat de New York et du district de Columbia,

comme conseils et avocats ;

M. Emerson Calderón Guzmán, professeur de droit international public à l'Universidad Mayor de San Andrés, secrétaire général du bureau stratégique de reconnaissance des prétentions maritimes, du Silala et des ressources hydriques internationales (DIREMAR),

M. Francesco Sindico, professeur associé de droit international de l'environnement à la faculté de droit de l'Université de Strathclyde, Glasgow, président du groupe de spécialistes du droit relatif au changement climatique de la Commission mondiale de droit de l'environnement de l'Union internationale pour la conservation de la nature (UICN),

Mme Laura Movilla Pateiro, professeure associée de droit international public à l'Université de Vigo,

M. Edgardo Sobenes, consultant en droit international (ESILA),

Mme Héloïse Bajer-Pellet, membre du barreau de Paris,

M. Alvin Yap, avocat et *solicitor* à la Cour suprême de Singapour, avocat au cabinet Squire Patton Boggs LLP (Singapour),

M. Ysam Soualhi, chercheur au Centre Jean Bodin (CJB) de l'Université d'Angers,

comme conseils ;

Mme Alejandra Salinas Quiroga, DIREMAR,

Mme Fabiola Cruz Morena, ambassade de Bolivie aux Pays-Bas,

comme assistantes techniques.

The PRESIDENT: Please be seated. The sitting is open.

I would like to note that the following judges are present with me in the Great Hall of Justice: Vice-President Gevorgian and Judges Tomka, Abraham, Xue, Sebutinde, Iwasawa, Nolte and Charlesworth; while Judges Bennouna,–Yusuf, Bhandari, Robinson and Salam and Judges *ad hoc* Daudet and Simma are participating by video link.

The Court meets this afternoon to hear the continuation of Bolivia's first round of oral argument, including on its own counter-claims.

I shall now give the floor to Mr. Rodman Bundy. You have the floor, Mr. Bundy.

Mr. BUNDY:

BOLIVIA HAS NOT BREACHED ANY OBLIGATIONS OWING TO CHILE

1. Thank you, Madam President. Madam President, distinguished judges, it is, as always, an honour to appear before the Court today and it is also an honour for me to represent the Plurinational State of Bolivia in this case. My task at this stage of the case is to address Chile's claims that Bolivia has breached certain obligations relating to the use of the waters of the Silala.

Introduction

2. In its pleadings, Chile alleges that Bolivia has breached obligations owed to Chile with respect to activities that are said to either have been contemplated, or carried out, by Bolivia in the vicinity of the Silala in Bolivian territory. These claims appear as submissions *(d)* and *(e)* to Chile's Memorial. For convenience, I will place these submissions on the screen — you will also find them at tab 3.1 of your folders. As can be seen, in Chile's submission *(d)*, Chile requests the Court to adjudge and declare that:

> "*(d)* Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm to Chile resulting from its activities in the vicinity of the Silala River".

And if we turn to submission *(e)*, slightly longer,

> "*(e)* Bolivia has an obligation to cooperate and to provide Chile with timely notification of planned measures which may have an adverse effect on shared water resources, to exchange data and information and to conduct where appropriate an environmental impact assessment, in order to enable Chile to evaluate the possible effects of such planned measures. Obligations that Bolivia has breached so far as

> concerns its obligation to notify and consult Chile with respect to activities that may affect the waters of the Silala River or the utilization thereof by Chile."

3. In this presentation, I will show that, based on the applicable principles of customary international law discussed by Professor Pellet, yesterday, and on the facts that I shall discuss, neither of these submissions has any merit.

4. With respect to the claim in submission *(d)* that Bolivia must take all appropriate measures to prevent and control pollution and other forms of harm to Chile, the claim is without object. That no doubt explains why Chile said absolutely nothing — nothing at all — about it on Friday other than the distinguished Agent's passing statement that Bolivia acknowledges the duty to consult and prevent significant harm[1]. Otherwise, not a word on submission *(d)*.

5. Madam President, the duty to prevent and control pollution is nothing new. As explained by Bolivia's Agent yesterday, Bolivia takes environmental matters very seriously and always has respected the need to prevent and control pollution or other forms of significant transboundary harm. For its part, Chile has never asserted, much less demonstrated, that the very modest activities that Bolivia undertook in its territory in the vicinity of the Silala have caused the slightest pollution to the waters of the Silala or any other form of harm to Chile. Indeed, Chile expressly acknowledges in its written pleadings that it does not ask the Court to specify precisely what measures Bolivia should take to prevent or control pollution[2]. Nor does Chile explain in what way Bolivia failed to take such measures or breached any obligation in this respect. No doubt this is because there is no evidence whatsoever that Bolivia has not taken appropriate steps, when called for, to prevent and control pollution.

6. The plain fact is that the quality of the waters of the Silala that flow into Chile remains the same as it has been for almost 100 years since the drainage works were installed in 1928, unaffected by any form of human-generated pollution, and Chile has not shown the contrary. There being no dispute between the Parties over this matter, as Professor Forteau noted in his presentation, Chile's submission *(d)* is without object and should be rejected.

7. As for Chile's submission *(e)* that Bolivia breached its obligation to notify and consult with Chile regarding activities that may adversely affect the Silala, this too has no merit. As

---

[1] CR 2022/6, p. 21, para. 22 (Fuentes Torrijo).

[2] MCh, Vol. 1, para. 5.17.

Professor Pellet showed yesterday, a duty to notify and consult under customary international law only arises when a risk of "significant" transboundary harm has been confirmed. Yet, none of the very modest activities that Chile hinges its claim on gave rise to any risk of harm, let alone significant harm.

8. On Friday, counsel for Chile first referred to a concession granted by Bolivia in 2000 to the DUCTEC company to commercialize the waters of the Silala[3]. It is true that Chile protested this concession. However, what counsel failed to mention is that DUCTEC took no steps to implement its concession with concrete plans involving the use of the waters of the Silala, and the concession was thereafter cancelled by Bolivia in May 2003[4].

9. Next, counsel mentioned tentative proposals by the Department of Potosí to construct a weir, or a small dam, along the Silala and a mineral water bottling plant. However, neither of these ideas ever got off the ground either and, accordingly, there was nothing to notify or consult over. As for Bolivia's establishment of a temporary fish farm, which Ms Klein Kranenberg described as "unsuccessful" and "abandoned"[5], and a minor military post and ten small houses referred to by Professor Boisson de Chazournes[6], these too did not give rise to a risk of any harm — much less, significant harm — to Chile.

10. That explains why Chile never alleged that it suffered any such harm and it never objected to these initiatives, at least not until it instituted this case. In reality, the matter was a non-issue between the Parties and there was no breach by Bolivia of any obligation to notify or consult.

11. With that overview, Madam President, the remainder of my presentation will be in two parts. First, I shall address the background to Chile's claims to show how the facts lend no support for its two claims, submissions *(d)* and *(e)*. Secondly, drawing on Professor Pellet's presentation on the applicable law, I will turn to the legal shortcomings of Chile's submissions, which further undermine its claims.

---

[3] CR 2022/6, p. 51, para. 25 (Boisson de Chazournes).

[4] MCh, Vol. 3, Ann. 50.

[5] CR 2022/6, p. 31, para. 24 (Klein Kranenberg).

[6] CR 2022/6, p. 52, para. 28 (Boisson de Chazournes).

I. The factual background

12. The background facts relevant to Chile's claims are straightforward and largely uncontested. I have already noted that the DUCTEC concession mentioned by counsel on Friday never even reached the pre-implementation stage and DUCTEC never used the waters before the concession was cancelled in 2003. The other matters at issue were first raised in a diplomatic Note that Chile sent to Bolivia on 7 May 2012[7]. In that Note, which you will find under tab 3.2 of your folders, Chile drew attention to an announcement apparently disseminated in the press, but not annexed by Chile, made by the Government of the Department of Potosí in Bolivia concerning the possible construction of a fish farm along the Silala waters, and other potential projects involving a weir and the establishment of a mineral water bottling plant[8]. Significantly, Chile did not question Bolivia's entitlement in principle to carry out these projects. To recall what Chile said it its Memorial:

> "The Chilean Government observes attentively that the various initiatives ***that are being planned in connection*** with this water resource in Bolivia, and that could be consistent with Bolivia's legitimate rights to use this resource, upstream from the boundary, in accordance with international law."[9]

This Note did not request any particular information from Bolivia. Rather, it simply indicated that Chile would be interested in receiving timely information about the projects prior to their "concretization".

13. Bolivia responded by a Note dated 24 May 2012[10]. In that response, Bolivia repeated an invitation it had made in 2011 for Chile to make a joint visit to the region and Bolivia underscored that, in accordance with its culture of dialogue, Bolivia remained willing to explore ways to lead to a common understanding for ~~***movement***~~ ***moving forward*** in the treatment of the matter.

14. Chile repeated its request for information "at the appropriate time" in another Note sent on 9 October 2012[11]. Bolivia's response came on 25 October 2012, just two weeks later[12]. In its Note, Bolivia once again repeated its invitation to Chile to conduct a joint visit to the area under the

---

[7] MCh, Vol. 2, Ann. 34.

[8] *Ibid.*

[9] *Ibid.*

[10] CMB, Vol 2, Ann. 12.

[11] MCh, Vol. 2, Ann. 35.

[12] MCh, Vol. 2, Ann. 36.

auspices of the Chile-Bolivia Political Consultation Mechanism[13]. However, Chile never followed up on that proposal.

15. In any event, the fish farm was a one-time event that caused no pollution or other harm to Chile, and Chile has never claimed as much. To the contrary, in their first report filed with Chile's Memorial, Chile's experts state that:

> "Using an internationally accepted Morphological Quality Index (MQI), the river is classified as in 'good' status. A healthy population of rainbow trout, with a wide range of sizes and weights, demonstrates that the general state of the river, with respect to perennial flows, water quantity and quality, and the availability of food, is sufficient to sustain a healthy fish population"[14].

16. Regarding the possible construction of a weir and a mineral water bottling plant, as I said, Chile simply refers to a 2012 announcement by the government of the Department of Potosí about a possible project but provides no evidence concerning any actual implementation of these proposals. As Bolivia explained in its Counter-Memorial[15], neither of these projects got off the drawing board, and they never reached the implementation or even the pre-implementation stage. Accordingly, any obligation to notify was not triggered since there was nothing to notify.

17. Throughout 2013 and into 2014, the Parties exchanged a number of Notes in which they basically repeated their positions, with Bolivia continuing to push for discussions and field observations under the Political Consultation Mechanism[16]. By 2014, the fish farm was a forgotten matter and it was apparent that neither the weir nor the bottling plant were going forward. In short, the matter was not pursued. Indeed, what Chile's counsel neglected to tell you last Friday is that, since its last Note on the subject, dated 27 March 2014[17], Chile has made no further reference over the past eight years to these events in diplomatic correspondence, and no allegation of breach of an international obligation by Bolivia until such a claim was surprisingly advanced in these proceedings.

18. Turning to the question of the military post and the ten small houses, the Court will see from the image on the screen, taken from the drone video that Bolivia supplied in Annex 30 to its Rejoinder and that Professor Eckstein displayed yesterday, that these rather modest installations are

---

[13] MCh, Vol. 2, Ann. 36.

[14] MCh, Vol. 1, p. 174.

[15] CMB, para. 158.

[16] MCh, Vol. 2, Anns. 37.1-37.12 and 38.1-38.2.

[17] MCh, Vol. 2, Ann. 38.1.

located about 3 km upstream from the international boundary in Bolivian territory, with the houses situated well back from the Orientales, or Southern, branch of the Silala.

19. On 7 February 2017, Chile sent a Note to Bolivia in which it requested information concerning the use of the waters of the Silala with respect to these installations[18]. Bolivia duly responded on 24 March 2017, stating that it would let Chile know regarding the requested information as soon as it was available[19]. You can find these Notes under tab 3.3 of your folders.

20. Bolivia followed up with a further Note to Chile dated 25 May 2017, which is in tab 3.4[20]. In this Note, Bolivia informed Chile that the extremely modest infrastructure that existed posed no danger of generating any pollution or affecting the water quality of the Silala springs given that the houses were uninhabited, as they remain today. With respect to the military post, Bolivia first noted that the preservation and conservation of the waters of the Silala were "a permanent concern of Bolivia". Those were the words Bolivia used at the time. Then Bolivia explained that "appropriate mechanisms that ensure the preservation and conservation of the aforementioned waters have been provided" and that "[t]herefore the use of the waters is minimal and the disposal thereof is controlled through a system of basic sanitation that prevents contamination in the area"[21].

21. Chile made no response to that Note, another point passed over by Professor Boisson de Chazournes on Friday, and Chile did not raise the matter or complain of any pollution thereafter. As I have said, what is clear is that there has been absolutely no pollution or other form of harm emanating from the Bolivian side of the boundary at any time, and no complaint from Chile to the contrary. All this shows that Bolivia did exercise due diligence in taking measures to prevent pollution and did co-operate by responding to Chile's query. Given that none of Bolivia's very limited activities have ever given rise to a risk of transboundary harm, let alone significant transboundary harm, it follows that there are no factual grounds for either of Chile's submissions *(d)* or *(e)*.

---

[18] MCh, Vol. 2, Ann. 39.1.

[19] MCh, Vol. 2, Ann. 39.2.

[20] MCh, Vol. 2, Ann. 39.3.

[21] *Ibid.*

II. Chile's claims are legally unfounded

22. I now turn to the legal factors which, when considered together with the facts, further undermine Chile's claims. Because these have already been discussed in part by Professor Pellet, I can be relatively brief. I will first deal with Chile's submission *(d)*, pursuant to which Chile asks the Court to adjudge and declare, as I have noted, that "Bolivia has an obligation to take all appropriate measures to prevent and control pollution and other forms of harm". After that, I will turn to submission *(e)*, the allegation that Bolivia has breached its obligation to notify and consult Chile with respect to activities that — to use Chile's words — "may affect"[22] the waters of the Silala or the utilization thereof by Chile.

(a) Chile's submission *(d)*

23. So starting with submission *(d)*, the facts show that there is no dispute between the Parties over the need to take appropriate measures to prevent and control pollution, although it should be recalled that, contrary to Chile's submission *(d)*, the applicable standard is to prevent "significant harm" — not just any harm.

24. I mention this, Madam President, distinguished judges, because, as Professor Pellet noted, Chile in its Memorial advanced the rather extreme — and untenable — proposition that Bolivia is under an obligation to take measures to eliminate as far as possible the risk of pollution or "causing *any other kind of harm* in Chile"[23]. While in its later pleadings Chile acknowledged that the relevant standard concerns "significant harm", not just any harm, this is not reflected in Chile's submissions as they stand today.

25. Notwithstanding that precision, there are three key points which I would respectfully ask the Court to bear in mind in assessing Chile's submission *(d)*. *First*, Chile has at no time alleged that Bolivia failed to control pollution or other forms of harm. *Second*, Bolivia itself acknowledged in its Note of 25 May 2017 that pollution and preservation and conservation of the Silala waters was one of its permanent concerns[24]. *Third*, there has been no pollution or harm, much less significant harm,

---

[22] MCh, Vol. 1, para. 5.32.

[23] MCh, Vol. 1, para. 5.16, emphasis added.

[24] MCh, Vol. 2, Ann. 39.3.

with respect to the waters flowing into Chile. There being no dispute between the Parties on these points, Chile's submission *(d)* is without object and should be rejected.

26. As the Court has previously noted, it has jurisdiction over "legal disputes", with the consequence — and I quote from the Court's Judgment on the preliminary objections in the *Marshall Islands* v. *United Kingdom* case — "[t]he existence of a dispute between the Parties is thus a condition of the Court's jurisdiction"[25].

27. And as we all know, the Court has frequently recalled that, in order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other"[26]. Or in other words, once again to quote the Court: "[t]he two sides must 'hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations"[27].

28. In the present case, while the Parties may have different views over some issues relating to the status of the waters of the Silala, the facts that I have discussed show that they do not hold different views over the obligation to control pollution or other forms of significant transboundary harm, as to which, I would recall, there has been none. Thus, there is no "legal dispute" on this issue that the Court needs to decide. That being the case, Chile's claim set out in submission *(d)* is, as I said, otiose, and the Court — in our respectful submission — should decline to exercise jurisdiction over it.

29. Yet, even if that were not the case, the obligation to take all appropriate measures to prevent causing significant transboundary harm is not a one-way street, as Chile's submissions imply. As the Court recognized in the *Pulp Mills* case, all riparian States (regardless of whether they are downstream or upstream States) have equal obligations in relation to the "obligation to act with due diligence [with] respect [to] all activities which take place under the jurisdiction and control of each

---

[25] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 849, para. 36.

[26] *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962,* cited in *Marshall Islands* v. *United Kingdom, supra*, p. 849, para. 37.

[27] *Alleged Violations of Sovereign Rights and Maritime Spaces (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I),* p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74. See also *supra: Marshall Islands* v. *United Kingdom, I.C.J. Reports 2016 (II)*, p. 849, para. 37.

[of the] part[ies]"[28]. I would simply point out that this mutual obligation is reflected in Bolivia's submission *(f)*, but it finds no place whatsoever in Chile's submissions.

(b) Chile's submission *(e)*

30. Madam President, now let me turn to Chile's assertion that Bolivia has breached the obligation to notify and consult with respect to the very limited activities undertaken by Bolivia in the vicinity of the Silala. This, as you will recall, is the subject of Chile's submission *(e)*.

31. As Professor Pellet has explained, in its Judgment in the *Construction of a Road* and *Certain Activities* cases, the Court clearly articulated the nature and the scope of the obligation to notify and consult with respect to activities along a river giving rise to a potential risk of significant transboundary harm under customary international law, which is the applicable law in this case.

— First, the State undertaking such activities must assess whether there is a risk of significant harm.

— Second, *only* if such assessment indicates that there is such a risk, is a State obliged to conduct an environmental impact assessment.

— Third, again, *only* if the impact assessment confirms that there is a risk of significant transboundary harm is the obligation to notify and consult triggered[29].

32. These rules not only reflect customary international law; they are based on good sense and reasonableness. Clearly, very minor activities that give rise to no risk of significant transboundary harm do not require an environmental impact assessment to be prepared, or notification or consultation with other States. Were it otherwise, both upstream and downstream States, whether along a large river such as the Rhine, or the Danube or the Mekong, or smaller rivers such as the Silala, would be inundated with wholly unnecessary environmental impact assessments, the need for consultation and bureaucratic costs when in reality the activities in question are insignificant. That is what we have here. Bolivia's activities were insignificant. There was absolutely no risk of significant harm or any harm.

---

[28] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 79, para. 197.

[29] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, pp. 706-707, para. 104.

33. I have already noted that the DUCTEC concession — which counsel seems to rely on on the other side — resulted in no concrete plans to use the waters of the Silala — and the "abandoned"[30] or unsuccessful fish farm posed absolutely no risk of any harm — and that Chile never complained otherwise. I also have explained that Bolivia never put into action or operation its preliminary ideas for building a weir or a water bottling plant using the waters of the Silala. In such circumstances, there was clearly no risk of any significant harm to Chile. That being the case, there was no breach by Bolivia of any obligation owing to Chile, whether a duty to notify and consult or otherwise. To recall what the the Court said in its Judgment in the *Gabčíkovo-Nagymaros* case:

> "A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act'"[31].

34. Here, we neither have a wrongful act nor, for most of these examples, any preparatory action whatsoever. If I turn to the ten small houses that you saw on the video and the military post, Bolivia assured Chile as a matter of good faith and neighbourliness that these activities presented no risk or danger to Chile because appropriate measures had been taken to prevent any such risk. And I would suggest that the correctness of Bolivia's assurance is borne out by the fact that there is absolutely no evidence that these activities produced the slightest pollution or other forms of harm, let alone significant harm, and that it is telling that Chile itself never thereafter complained of any such harm.

35. In short, at no time, including since the emergence of the dispute in the late 1990s, has Bolivia undertaken any activities that could potentially have a significant adverse effect on Chile with respect to the waters of the Silala. That not only underscores Bolivia's good faith, it equally, I would suggest, exposes the artificiality of Chile's claims in submissions *(d)* and *(e)*.

36. Madam President, in concluding my presentation, I think it is useful to place Chile's claims as reflected in submissions *(d)* and *(e)* in perspective.

---

[30] CR 2022/6, p. 31, para. 24 (Klein Kranenberg).

[31] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 54, para. 79, citing *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/52/10)*, p. 141, and *YILC*, 1993, Vol. II, Part 2, p. 57, para. 14.

37. The facts show that Chile has had unimpeded use of all of the waters of the Silala that flow across the border for over 100 years. Under the FCAB concession, those waters were supposed to be used for steam locomotives, but Chile itself acknowledges that the waters were used for human consumption, copper mining by the State-owned CODELCO mining company and other mining activities, such as the saltpetre industry[32]. In other words, Chile has been free up to today to use all of the waters of the Silala as it chooses, and Bolivia has never impeded or caused the slightest harm to those activities.

38. Given that state of affairs, coupled with the fact that there is absolutely no factual or legal basis for Chile's claims that Bolivia breached any obligations owing to Chile with respect to the Silala, there is — we have to say — a certain cynicism in Chile's claims. How can Chile, which has had complete use of all of the waters of the Silala for decades — waters the quantity and quality of which Bolivia has in no way compromised — how can Chile accuse Bolivia of breaches? The claims ring hollow. And it is for these reasons, Madam President, Members of the Court, that Bolivia respectfully requests that Chile's submissions *(d)* and *(e)* be rejected.

39. Madam President, that concludes my presentation. I thank the Court for its attention. We will now be turning to Bolivia's counter-claims, and I would ask that the floor be given to Professor Forteau to commence this part of Bolivia's case.

The PRESIDENT: I thank Mr. Bundy for his statement. I now give the floor to the next speaker, Professor Mathias Forteau. You have the floor, Professor.

M. FORTEAU : Je vous remercie, Madame la présidente.

LES DEMANDES RECONVENTIONNELLES DE LA BOLIVIE

INTRODUCTION ET PREMIÈRE DEMANDE RECONVENTIONNELLE

1. Madame la présidente, Mesdames et Messieurs les juges, il me revient cet après-midi d'introduire les demandes reconventionnelles de la Bolivie puis d'examiner la première d'entre elles. M. Bundy me succédera à cette barre pour traiter des deuxième et troisième demandes reconventionnelles.

[32] MCh, Vol. 1, paras. 2.19-2.20.

I. Introduction générale

2. Madame la présidente, comme nous l'avons souligné hier, la position articulée par le Chili devant la Cour est contestable à certains égards : d'une part, celui-ci ne voit dans les eaux du Silala qu'un cours d'eau «naturel», alors que, de toute évidence, il a fait l'objet d'importants travaux et mécanismes de drainage et de canalisation ; d'autre part, le Chili retient une conception très unilatéraliste des droits relatifs aux eaux du Silala, en passant sous silence dans ses conclusions finales les droits de la Bolivie. Cela explique que la Bolivie ait éprouvé le besoin de formuler dans la présente instance non seulement plusieurs demandes en réponse aux réclamations du Chili, mais également trois demandes reconventionnelles[33].

3. Ces trois demandes ont été formulées de la manière suivante dans le contre-mémoire — vous les trouverez sous l'onglet n° 4.1 du dossier des juges, à la fois en français et en anglais, et avec quelques amendements dans la version française à la traduction proposée par le Greffe :

> «*a)* la Bolivie détient la souveraineté sur les canaux artificiels et les installations de drainage du Silala qui sont situés sur son territoire et a le droit de décider si ceux-ci doivent être maintenus et de quelle manière ;
>
> *b)* la Bolivie détient la souveraineté sur les eaux du Silala dont l'écoulement a été artificiellement aménagé, amélioré ou créé sur son territoire, et le Chili n'a pas droit à cet écoulement artificiel ;
>
> *c)* toute fourniture, par la Bolivie au Chili, d'eaux s'écoulant artificiellement du Silala, ainsi que les conditions et modalités d'une telle fourniture, notamment la redevance à verser, sont soumises à la conclusion d'un accord avec la Bolivie».

4. Dans sa duplique, la Bolivie a clarifié que la troisième demande était dirigée vers l'avenir et non vers le passé et que, si les canaux et autres installations venaient à être démantelés, bien entendu les deuxième et troisième demandes reconventionnelles deviendraient alors sans objet[34].

5. Ces trois demandes reconventionnelles ont été formulées dans le respect de l'article 80 du Règlement de la Cour. Elles relèvent clairement de votre compétence et sont, tout aussi clairement, en connexité directe avec l'objet des demandes du Chili[35]. Celui-ci a d'ailleurs indiqué qu'il «ne

---

[33] CMB, par. 165 et suiv.

[34] DB, par. 100.

[35] CMB, par. 166-172.

contesterait pas la recevabilité» de ces demandes reconventionnelles, ce dont la Cour a pris acte dans son ordonnance du 15 novembre 2018[36].

6. A la suite du dépôt du contre-mémoire de la Bolivie, le Chili a indiqué dans un premier temps qu'un second tour de procédure écrite n'était pas nécessaire et qu'il convenait de passer immédiatement à la phase orale de la procédure, y compris sur les demandes reconventionnelles[37]. Après que la Cour a estimé que le dépôt d'une réplique et d'une duplique sur la seule question des demandes reconventionnelles était nécessaire et que celles-ci ont été déposées, le Chili a toutefois sollicité de la Cour de se voir accorder le «droit de présenter une pièce additionnelle sur les demandes reconventionnelles», ce que la Cour a autorisé[38]. A cette occasion, le Chili a soumis de nouvelles expertises, sur lesquelles la Bolivie n'a pas eu l'opportunité de se prononcer par écrit.

7. Les échanges écrits sur les demandes reconventionnelles ont permis à certains égards de rapprocher les points de vue des Parties ou d'apporter des clarifications utiles quant à leurs positions juridiques. Certains points restent toutefois en débat. Ils feront l'objet des présentations de cet après-midi.

II. La première demande reconventionnelle

8. La première demande reconventionnelle est sans ambiguïté. La Bolivie demande à la Cour de dire et juger qu'elle possède la souveraineté sur les canaux et autres infrastructures situées sur son territoire et qu'elle a le droit de décider si et comment ces installations doivent être maintenues. Cette demande ne devrait pas poser le moindre problème pour deux raisons :

a) premièrement, parce qu'une telle souveraineté est clairement reconnue en droit international, y compris dans la jurisprudence de votre Cour[39] ;

b) deuxièmement, parce que, dans ses écritures, le Chili concède sur le principe que la Bolivie possède de tels droits souverains.

---

[36] *Différend concernant le statut et l'utilisation des eaux du Silala (Chili c. Bolivie), ordonnance du 15 novembre 2018, C.I.J. Recueil 2018 (II)*, p. 704-705 ; DB, par. 3.

[37] *Différend concernant le statut et l'utilisation des eaux du Silala (Chili c. Bolivie), ordonnance du 15 novembre 2018, C.I.J. Recueil 2018 (II)*, p. 704.

[38] Voir l'ordonnance de la Cour du 18 juin 2019 dans la présente affaire.

[39] Voir CMB, par. 106-107 ; voir aussi CMB, par. 83 ; CR 2022/7, p. 55-56, par. 14-15 (Pellet).

9. Après avoir constaté que les installations concernées se situent exclusivement sur le territoire bolivien[40], le Chili a indiqué en effet qu'il accepte que la Bolivie détient «la propriété de l'infrastructure située sur son territoire», propriété qui, comme le précise le Chili, découle du principe fondamental de la souveraineté territoriale[41]. De manière tout aussi explicite, le Chili indique qu'il «reconnaît pleinement la souveraineté qu[e] la Bolivie détient sur les canaux et systèmes de drainage artificiels du Silala situés sur son territoire, ainsi que son droit de décider si ceux-ci doivent être maintenus et de quelle manière»[42]. Le Chili souscrit également à l'affirmation de la Bolivie selon laquelle la restauration des zones humides justifierait un éventuel démantèlement de ces infrastructures[43] et encourage même la Bolivie à restaurer ces zones[44]. Enfin, le Chili reconnaît qu'il «n'est pas en droit de demander à [la Bolivie] d'installer ou de maintenir des infrastructures à son profit»[45].

10. Le Chili a ajouté dans sa réplique que la première demande reconventionnelle ne serait pas «contestée par le Chili», ce dont il faudrait déduire selon lui qu'il n'existe aucun différend sur celle-ci et que, par voie de conséquence, cette demande serait «sans objet»[46]. Dans sa dernière pièce de procédure écrite, le Chili estime, dans le même sens, que la première demande reconventionnelle est «non-controversée»[47] et que la Cour n'aurait pas compétence à l'égard de celle-ci pour cause d'absence de différend[48]. Les conclusions finales du Chili sont toutefois plus confuses sur ce point, puisqu'elles indiquent que la première demande tomberait en dehors du champ de la compétence de la Cour, ou bien alternativement qu'elle serait sans objet, ou bien encore qu'elle devrait être rejetée[49].

---

[40] CMB, par. 174, renvoyant à MCh, par. 4.59-4.61.

[41] PACh, par. 2.6.

[42] RCh, par. 1.14 ; voir aussi DB, par. 17.

[43] CMB, par. 175-180.

[44] RCh, par. 1.14.

[45] PACh, par. 2.60.

[46] RCh, par. 1.5.

[47] PACh, par. 1.21.

[48] PACh, par. 1.7.

[49] RCh, p. 75 ; voir aussi PACh, p. 57.

11. Les positions du Chili que je viens de rappeler appellent deux remarques :

a) Tout d'abord, le Chili estime que dès lors qu'une demande est devenue sans objet, parce qu'il n'y a plus de désaccord entre les Parties, la Cour ne peut adjuger la demande correspondante. Pour parvenir à la conclusion que la première demande reconventionnelle est sans objet, il est nécessaire cependant de constater d'abord que les Parties sont d'accord sur le point en question ; autrement dit, pour que la Cour puisse parvenir à la conclusion que cette demande est sans objet ou qu'il n'y a pas de différend, il est nécessaire de déclarer d'abord que, selon les deux Parties, la Bolivie possède bien et pleinement les droits souverains qu'elle revendique.

b) Ensuite, le fait pour le Chili de «ne pas contester» — selon ses termes — la première demande reconventionnelle, d'estimer qu'elle est «non-controversée» et d'affirmer qu'il n'y a plus de différend implique nécessairement que l'Etat chilien acquiesce à l'ensemble de cette demande, sans conditions. De fait, les conclusions finales du Chili sur la première demande reconventionnelle ne sont accompagnées d'aucune réserve d'aucune sorte. Le Chili précise même dans sa dernière pièce de procédure écrite que les positions des deux Parties sur cette demande «disposent du différend … dans sa totalité»[50]. Il indique aussi que, à ses yeux, cette demande serait même un «truisme»[51].

12. A dire vrai, Madame la présidente, je pourrais m'arrêter ici : ces déclarations du Chili et ses conclusions finales suffisent apparemment à disposer de la question en tant qu'elles acceptent, formellement et expressément, *et sans la moindre réserve*, la première demande reconventionnelle de la Bolivie. Le Chili a réitéré vendredi d'ailleurs que, sur le principe, il «has no objection to Bolivia dismantling the channels»[52].

13. Le problème, toutefois, est que le Chili souffle le chaud et le froid sur cette première demande reconventionnelle. Vendredi, il vous a présenté une version idéalisée de sa position, en passant sous silence les limites qu'il a posées par ailleurs dans ses écritures à la première demande reconventionnelle[53]. Limites — M. Pellet l'a rappelé hier — que le Chili n'a pas cru bon d'expliciter

---

[50] PACh, p. 9, note 36.

[51] PACh, par. 1.21.

[52] CR 2022/6, p. 23, par. 30 (Fuentes Torrijo).

[53] CR 2022/6, p. 23, par. 30 (Fuentes Torrijo) ; p. 58, par. 4 *c)* ii), et *d)* (Wordsworth).

vendredi. Les écritures du Chili laissent en effet entendre, à rebours de la formulation de ses conclusions finales, que les droits souverains de la Bolivie seraient soumis à un certain nombre de conditions, comme le révèle l'usage répété dans ses écritures de termes comme «pour autant que»[54] («insofar as»), «sans préjudice de»[55] («without prejudice to»), «pourvu que»[56] («provided») ou encore «sauf si»[57] («unless»).

14. La Bolivie a souligné dans sa duplique ces ambiguïtés de la position chilienne[58], mais celles-ci n'ont pas été entièrement dissipées depuis. Ces ambiguïtés sont de plusieurs sortes :

a) Le Chili conditionne pour commencer dans ses écritures le droit de la Bolivie de démanteler les canaux et infrastructures à son propre droit d'utilisation équitable et raisonnable des eaux du Silala, voire à son utilisation actuelle de ces eaux[59]. En invoquant le droit d'utilisation équitable et raisonnable en relation avec la première demande reconventionnelle, le Chili semble considérer que l'effet du démantèlement des infrastructures sur le débit du Silala devrait être considéré comme une atteinte potentielle à son droit d'utilisation des eaux du Silala. Cela revient à plaider que l'usage actuel ou tout usage qu'il pourrait faire de ces eaux à l'avenir pourrait être opposé au droit de la Bolivie de démanteler les installations artificielles. Cette affirmation vide de sa substance l'acceptation apparemment inconditionnelle par le Chili de la première demande reconventionnelle[60].

b) Le Chili prétend par ailleurs que le démantèlement des installations ne devrait pas «perturber les conditions naturelles du système hydrographique du Silala»[61], ce qui est ambigu et contradictoire dans les termes : le but du démantèlement des installations, des infrastructures, si ce démantèlement advient, ne sera pas de porter atteinte à l'état naturel des eaux du Silala mais, à l'inverse, de *restaurer* cet état naturel[62].

---

[54] RCh, par 1.5 ; par. 1.14.

[55] RCh, par. 2.73.

[56] PACh, par. 1.18.

[57] PACh, par. 1.20.

[58] DB, par. 31-43.

[59] DB, par. 33-34.

[60] Voir, par exemple, RCh, par. 2.73 ou par. 2.39.

[61] RCh, par. 1.8 *b)*.

[62] DB, par. 39-43.

c) Cela vaut bien sûr sous la réserve de l'interdiction de causer des dommages transfrontières significatifs, mais cette interdiction est très différente de la prétendue obligation dont se prévaut le Chili de ne pas «perturber les conditions naturelles du Silala». Ce que suggère en réalité le Chili à travers cette prétendue obligation, c'est qu'il aurait une sorte de droit acquis au maintien de l'état actuel des eaux du Silala et donc de son usage de celles-ci, droit acquis qui l'emporterait sur le droit de démantèlement de la Bolivie. Cela revient, une fois de plus, à nier purement et simplement la première demande reconventionnelle.

d) Le Chili semble aussi estimer que le démantèlement de ces installations pourrait, en lui-même, être qualifié de dommage. Dommage qui, comme tel, viendrait limiter le droit souverain de la Bolivie de démanteler. Selon le Chili, en effet, la Bolivie serait tenue, en cas de démantèlement, à une obligation de notification de toutes mesures «susceptibles d'avoir des effets préjudiciables sur des ressources en eau partagées»[63]. Cela va très au-delà de ce qu'impose le droit international coutumier, comme Alain Pellet l'a rappelé hier[64]. De nouveau, cela revient en réalité du côté du Chili à revendiquer un droit de regard et de contrôle — et même un pouvoir de veto — sur le droit souverain de la Bolivie de démanteler les installations artificielles, ce qui contredit la première demande reconventionnelle, et ce qui est injustifié au regard du droit international.

15. Comme je l'indiquais, le Chili n'a pas totalement clarifié sa position sur ces différents points dans sa dernière pièce de procédure écrite, ni lors de son premier tour de plaidoiries, alors même que, dans sa duplique, la Bolivie l'avait incité à apporter les clarifications nécessaires[65].

16. Au paragraphe 1.19 de son exposé écrit additionnel, le Chili énonce que la référence dans ses conclusions finales à son droit d'usage actuel des eaux du Silala n'aurait pas d'effet pour l'avenir et viserait uniquement à faire reconnaître que son utilisation actuelle des eaux du Silala est, à ce jour, conforme au droit international — demande pour le moins superfétatoire, puisque, comme cela a été dit hier, la Bolivie n'a jamais pris aucune mesure contre un tel usage, qui n'a jamais été entravé.

17. Le Chili ajoute au paragraphe suivant de ses écritures — paragraphe que l'agente du Chili a réitéré vendredi *expressis verbis* — que, «[p]ar conséquent, une réduction (si tant est qu'elle se

[63] RCh, par. 2.38.

[64] Voir aussi CMB, par. 153-157.

[65] DB, par. 45.

produit) de l'écoulement de surface transfrontière résultant du démantèlement des canaux en Bolivie n'emporterait pas violation du droit international coutumier»[66]. Mais le même paragraphe précise cependant immédiatement : «sauf si les obligations que la Bolivie a acceptées étaient mises en cause d'une manière ou d'une autre», en renvoyant notamment ici au principe de l'utilisation équitable et raisonnable[67]. Madame la présidente, il est difficile de comprendre le sens de l'argumentation chilienne. Cela revient en effet à opposer au droit de démantèlement de la Bolivie le droit du Chili d'utiliser les eaux du fleuve, comme si ces deux droits pouvaient être incompatibles l'un avec l'autre. De nouveau, cela laisse entendre que, du côté du Chili, ce dernier aurait un droit à l'utilisation actuelle des eaux qui pourrait être affecté par le démantèlement des installations. Une nouvelle fois, cela revient, implicitement, à revendiquer un droit acquis à cette utilisation actuelle.

18. Cette revendication du Chili prête d'autant plus à confusion qu'il prétend par ailleurs que, je cite, «la restauration complète des zones humides aurait une incidence minime sur l'écoulement transfrontière vers son territoire»[68]. Mais, si l'on se place dans la perspective du Chili, on ne voit pas pourquoi il serait nécessaire dans ce cas de soumettre le démantèlement des installations au respect du droit d'utilisation équitable et raisonnable du Chili puisque, selon lui, le démantèlement n'aurait de toute manière aucun effet sur cette utilisation. A moins de considérer que, bien qu'il s'en défende, le Chili est peut-être en réalité plus inquiet qu'il veut bien l'avouer au sujet de la réduction substantielle du débit du cours d'eau que produirait un tel démantèlement des installations artificielles.

19. Tout aussi confuse est l'affirmation selon laquelle la première demande reconventionnelle serait «sapée» («undermine[d]») par «la décision de la Bolivie de ne pas retirer les canaux et restaurer les zones humides sur son territoire, alors qu'elle aurait pu le faire après que la concession bolivienne de 1908 a pris fin en 1997»[69] — un argument suggéré à nouveau vendredi de manière plus subliminale par Mme Klein Kranenberg[70]. Mais si la Bolivie a bel et bien le droit de démanteler les installations artificielles, en quoi l'absence d'exercice de ce droit dans le passé affecterait le droit en

---

[66] PACh, par. 1.20.

[67] PACh, p. 8, par. 1.20, et note 33.

[68] RCh, par. 2.77.

[69] PACh, par. 2.53 *d)*.

[70] CR 2022/6, p. 31, par. 25 (Klein Kranenberg).

question ? A moins de considérer qu'il s'agirait d'un droit précaire dans son existence, qui pourrait disparaître par caducité, ce qui serait pour le moins surprenant s'agissant d'un droit souverain.

20. Dans ses pièces de procédure écrite postérieures au mémoire, le Chili maintient par ailleurs l'ambiguïté sur la portée du principe du «no-harm», principe qui se limite — on le sait — aux seuls dommages transfrontières significatifs[71]. Là encore, l'incertitude demeure.

a) Je ne reviens pas ici sur la question de la mise en balance des intérêts, que M. Pellet a abordée hier[72].

b) En revanche, je me dois de souligner qu'il est surprenant que, dans une section de ses dernières écritures consacrée au droit de démanteler les installations artificielles, le Chili se réfère à nouveau, par le prisme cette fois-ci de l'obligation de ne pas causer de dommages transfrontières significatifs, au droit d'utilisation équitable et raisonnable des eaux du Silala[73]. C'est là mélanger deux choses très différentes : s'il est certain que tout démantèlement des installations devra se faire dans le respect de l'obligation de veiller à ne pas causer de dommage transfrontière significatif, en revanche, le démantèlement ne peut pas, en tant que tel, être considéré comme une atteinte au droit du Chili à l'utilisation équitable et raisonnable des eaux du Silala. Si, comme l'estiment les experts de la Bolivie, ce démantèlement cause une réduction substantielle du débit des eaux de surface, cette réduction n'affectera pas le droit du Chili à l'utilisation équitable et raisonnable des eaux du Silala, et ne pourra pas non plus, en tant que telle, être qualifiée de dommage transfrontière significatif, contrairement à ce que suggère le Chili. En replaçant une fois de plus le débat sur le terrain de l'utilisation équitable et raisonnable, le Chili semble à nouveau vouloir vider de sa substance la première demande reconventionnelle.

c) Enfin, au paragraphe 1.18 de sa dernière pièce de procédure écrite, le Chili réitère sa position selon laquelle le droit de démanteler serait soumis à l'obligation de notifier, informer et consulter le Chili en lien avec «toutes mesures projetées». Cette allégation très extensive ne correspond pas au droit international coutumier applicable, comme l'a rappelé hier M. Pellet, et elle ne peut donc venir, elle non plus, limiter le droit souverain de démantèlement de la Bolivie.

---

[71] CMB, par. 134-139 ; DB, par. 22 ; PACh, par. 2.33 et suiv.

[72] CR 2022/7, p. 58 et suiv., par. 21 et suiv. (Pellet).

[73] Voir PACh, par. 2.52.

21. Sur tous ces points, Madame la présidente, il est attendu du Chili qu'il clarifie ses positions et qu'il mette en harmonie ses explications et ses allégations avec ses conclusions finales.

22. Mesdames et Messieurs les juges, je vous remercie de votre aimable attention. M. Bundy passera maintenant à l'examen des deuxième et troisième demandes reconventionnelles. Je vous serais reconnaissant, Madame la présidente, de bien vouloir à cet effet appeler M. Bundy à cette barre.

The PRESIDENT: I thank Professor Forteau for his statement and I call Mr. Bundy back to the podium, please.

Mr. BUNDY:

BOLIVIA'S SECOND AND THIRD COUNTER-CLAIMS

Introduction

1. Thank you, Madam President, distinguished judges, in this final presentation of Bolivia's first round, it falls to me to address Bolivia's second and third counter-claims.

2. These two counter-claims are set out as counter-claims *(b)* and *(c)* in the submissions to Bolivia's Rejoinder. For ease of reference you will also find them under tab 5.1 of the folders and I will display them on the screen. Counter-claim *(b)*, as you can see, reads as follows: "Bolivia has sovereignty over the artificial flow of [the] Silala waters engineered, enhanced, or produced in its territory and Chile has no right to that artificial flow". And counter-claim *(c)* is cast in the following terms: "Any delivery from Bolivia to Chile of artificially-flowing waters of the Silala, and the conditions and modalities thereof, including the compensation to be paid for the said delivery, are subject to the conclusion of an agreement with Bolivia."

3. In order to explain the content and justification for these two counter-claims, my presentation will proceed in four parts.

— *First*, I will explain the general principles on which the counter-claims are based.

— *Second*, I will review the relevant factual background that provides important context for the counter-claims.

— *Third*, I will take up Bolivia's second counter-claim — that is counter-claim *(b)* — in order to explain what is meant by, and what the justification is for, Bolivia's claim that it has "sovereignty" over the artificial or enhanced flow of the Silala in its territory, and that Chile has no corresponding right to that flow.

— *Fourth and finally*, I will address the third counter-claim in order to explain why Bolivia maintains that, in the event Bolivia decides to exercise its right to dismantle the canal works — as Professor Forteau has just discussed — and yet Chile indicates, as it has done in the past, that it wants to continue to receive its share of the waters of the Silala based on the enhanced surface flow that the channelization produces, the cost of maintaining the channels and the delivery by Bolivia to Chile of such enhanced flow would need to be subject to the conclusion of an agreement between the Parties.

4. With that brief introduction, Madam President, let me start with the general principles on which counter-claims *(b)* and *(c)* are based.

I. The basic principles underlying counter-claims *(b)* and *(c)*

5. I would like to mention three such principles. The first, discussed by Professor Forteau, is that Bolivia has sovereignty over the man-made canal works constructed in its territory by a private company in 1928, and that Bolivia thus has the right under international law to dismantle those works, for example to restore the Silala and its environment to their natural state, if Bolivia so chooses. I will not repeat what Professor Forteau has just said on this point other than to emphasize that Chile does not dispute this right although, as I shall show, this was not always its position in the past, and there is no guarantee that this will remain its position in the future.

6. Second, the consequence of Bolivia's right to dismantle the channels is that Chile has no vested or acquired right to an equitable and reasonable share of any enhanced surface flow that the canal works may produce over and above the natural surface flow and groundwater flow of the Silala. When I speak of the "natural surface flow", I mean the quantity and quality of the waters that would flow across the border without the canals. While the experts of the Parties differ on the magnitude of the effect that the installed canals have had in increasing surface flows, they agree that dismantling the canals will have some such effect in diminishing the surface flow and increasing the groundwater

flow instead[74]. The important point is that, whatever the size of that effect, in the event Bolivia dismantles the canal works as is its right, Chile cannot complain that, by virtue of that act, it has been deprived of an equitable and reasonable use of the waters of the Silala. As Professor Pellet noted yesterday, Chile has acknowledged this as a matter of principle in its Additional Pleading. Just to recall Chile's own words: "Thus a reduction (if any) of the cross-boundary surface flow resulting from the dismantling of the channels in Bolivia would not be considered a violation of customary international law"; and then Chile added this somewhat ambiguous caveat: "unless the obligations that Bolivia has accepted were somehow engaged"[75].

7. This brings me to the third principle underlying Bolivia's counter-claims. As was also observed by Professor Pellet, Bolivia too is entitled to an equitable and reasonable utilization of the waters, just as Chile. This principle is reflected in Bolivia's submission 1 *(c)* in the Counter-Memorial, which states that "Bolivia and Chile are each entitled to the equitable and reasonable utilization of the naturally-flowing Silala waters, in accordance with customary international law".

8. But in contrast, Chile's submission — the relevant submission which is their submission *(c)* — only asks the Court to adjudge and declare, "[u]nder the standard of equitable and reasonable utilization, Chile is entitled to its current use of the waters of the Silala River". There is nothing about Bolivia's corresponding right to an equitable and reasonable use of the waters. Nor is there anything about Chile's professed recognition of Bolivia's right to dismantle the channels in its territory, which necessarily means that Chile has no entitlement to its current use of the surface flows of the waters in perpetuity.

9. In its Application, Chile even went so far as to threaten to request provisional measures "should Bolivia engage in any conduct that may have an adverse effect on Chile's current utilization of the waters of the Silala River"[76]. Now that was a pretty extraordinary threat given that Chile, then as now, is receiving *all* of the waters of the Silala. And not only did Chile's threat to bring provisional measures amount to an implicit rejection of the principle that Bolivia, as the upstream riparian, also

---

[74] See e.g. MCh, p. 107, First Expert Report, p. 11, and *ibid.*, p. 140, First Expert Report, p. 44; CMB, Ann. 17, DHI Expert Report, p. 2; WSB, p. 12, para. 50.

[75] APCh, para. 1.20.

[76] Application of Chile (hereinafter "ACh"), para. 52.

has an entitlement to an equitable and reasonable share, it also effectively denied Bolivia's right to dismantle the drainage system situated in its own territory because that *may* have an adverse effect on Chile's current use of all the waters.

10. On Friday, Ms Klein Kranenberg rhetorically asked why has Bolivia not dismantled the channels since it terminated the FCAB concession in 1997[77]. In addition to Professor Forteau's remarks on this point, I would suggest that counsel look no further than Chile's own Application, which, I said, threatened provisional measures if Bolivia engaged in *any conduct* that *may* have an adverse effect on Chile's current use. For its part, Bolivia had no desire to exacerbate the dispute.

11. In short, Chile's Application instituting this case, and its submissions, give every impression that Chile views these proceedings as a one-way street: it has rights, Bolivia has obligations.

12. Now, obviously, this is untenable. To the contrary, the fact that Chile has no acquired right to the enhanced flow caused by the construction of the canals, coupled with Bolivia's own entitlement to an equitable and reasonable share of the waters of the Silala, are important factors to take into account in considering Bolivia's second counter-claim. And as for the third counter-claim, these factors also underpin the need for there to be an agreement if, in the future, Chile wishes to maintain the status quo and the current surface flows rather than have Bolivia exercise its right to dismantle the canals.

II. The relevant factual background

13. Madam President, having recalled those basic principles, I now turn to the second part of my presentation in which I will discuss certain aspects of the factual background that provide context for Bolivia's counter-claims.

A. The original concession granted to FCAB

14. As you have heard, the original concession to use the waters was granted by Bolivia to the private FCAB company pursuant to a Deed of Concession entered into in 1908[78].

---

[77] CR 2022/6, p. 31, para. 25 (Klein Kranenberg).

[78] MCh, Ann. 41.

15. The concessionaire announced the intention to build intake works in Bolivian territory for the purpose of using the waters for its steam locomotives because the waters then being used by the company were said to cause corrosion in the locomotives and were thus unfit[79]. The agent representing FCAB also declared that the concessionaire would respect the legal provisions containing any right that might impair the concession, and further declared to leave one third of the collected waters for Bolivia for any service that may be necessary at some distant time in the future[80]. Thus, even at that time, it was recognized, at least by the concessionaire, that Bolivia had an entitlement with respect to the waters of the Silala, even though it was not then using them.

16. In 1928, ostensibly to inhibit the breeding of insect eggs in the Silala headlands and to avoid contamination of the potable water supply to the city of Antofagasta — why that was relevant, since FCAB was supposed to be using the waters for locomotives, not for the people of Antofagasta — but ostensibly to inhibit these insect eggs, FCAB constructed the series of channels in Bolivian territory that clearly affected the flow of the surface waters; otherwise, there would have been no need for the channels. Significantly, Chile admits in its Memorial that, contrary to the terms of the FCAB concession, from the early twentieth century onwards, the waterworks, pipelines and infrastructure developed by FCAB allowed for the efficient use of the waters in Chile, "initially for human consumption and railway operation, later increasingly for other industrial purposes"[81]. Moreover, as Professor Eckstein observed yesterday, given the uses to which FCAB actually put the waters, it strains credibility to believe that the railway company built literally thousands of metres of canals and pipes in Bolivian territory merely to reduce insect eggs. To the extent the works would have increased the surface flow, it clearly would have been to the benefit of the railway company and, later, Chile.

17. As you have heard, on 14 May 1997, Bolivia cancelled the concession on the grounds that the waters were not being used for their original purpose — i.e. for the steam locomotives, which

[79] MCh, Ann. 41, p. 19.

[80] MCh, Ann. 41, p. 21.

[81] MCh, para. 2.31.

FCAB in the meantime had phased out of service[82]. Chile raised no objection to the cancellation of the concession.

B. Events leading to the negotiation of an initial basic agreement

18. By 2000, the use of the waters of the Silala had emerged as a serious issue between the Parties. Accordingly, the Parties established a joint technical commission which started taking some rudimentary measurements on each side of the boundary. This was followed, in 2004, with the creation of a joint working group on the Silala issue and a joint technical commission to exchange views and carry out joint technical and scientific studies on the nature, origin and flow of the waters of the Silala[83].

19. In 2006, the Parties' Working Group on Bilateral Affairs placed the Silala issue on its agenda and agreed that a further meeting should be held "to unify criteria that would allow a final, practical and satisfactory solution for both Parties to be reached"[84].

20. To that end, on 10 June 2008, at the Third Meeting of the Bolivia-Chile Working Group on the Silala Issue, it was agreed that two aspects of the issue would be pursued simultaneously:

(i) a joint study on technical issues; and

(ii) conclusion of an immediate basic agreement on the topics on which there is consensus.

With respect to this initial basic agreement, the Working Group acknowledged that both countries had sufficient knowledge at that time to advance the joint determination of the criteria and formulas to solve the Silala issue, with the aim that this initial agreement would then be "perfected" later by a final agreement incorporating the results of the joint technical studies to be carried out[85].

21. This was followed, in June 2008, by a meeting of the Bolivia-Chile Political Consultation Mechanism, at which meeting the Parties agreed that the content of an immediate basic agreement "that takes into account the water resource in its existing uses, the rights of each country, and the

[82] MCh, Ann. 46.

[83] MCh, para. 3.22; CMB, paras. 29-32.

[84] MCh, Ann. 22.

[85] MCh, Ann. 23.

means and mechanisms for its use in order to generate economic benefits for Bolivia, taking into account the sustainability of the resource" would be exchanged within the following 60 days[86].

22. On 14 November 2008, the joint Working Group on the Silala Issue met again. At that point, the Group proposed the conclusion of this provisional agreement, which would serve as the basis for the final agreement. It was agreed, at that time, that the waters freely available in Bolivia, and not used by Bolivia, would be made available for use in Chile and that a mechanism would therefore be agreed that allows for the constitution of these exploitation rights at the border as well as the value for its exclusive use by Chile. The Working Group also agreed that Bolivia would not affect the nature and continuity of such waters[87]. The implication of this last point was that Bolivia would not dismantle the canal works since that would inevitably affect the nature and continuity of the surface waters — in other words, the quantity and/or quality of the flow.

23. By 29 July 2009, the Parties had agreed on the text of a basic initial agreement which, along with the results of the scientific studies the Parties agreed to undertake, would form the basis for the final, long-term agreement[88]. You will find the text of that initial agreement under tab 5.2 of your folders.

24. Chile has been noticeably silent about the contents of this agreement, and it did not bother to annex a copy of the draft agreement in its written pleadings nor in its folder of so-called "key documents" it distributed last week. Nonetheless, despite the reticence of our colleagues on the other side of the Bar, several points stand out from the 2009 draft agreement that provide important context both for Bolivia's submission that it is entitled to an equitable and reasonable utilization of the waters, and for Bolivia's second and third counter-claims.

— *First*, in the initial agreement, Chile recognized that Bolivia was entitled to at least 50 per cent of the flow notwithstanding that Bolivia was not then making use of the waters. Bolivia's share of the waters, that 50 per cent share, could be *increased* as a result of the scientific studies to be undertaken, but it would not be decreased: that was in Articles 2 and 6 of the agreement. That stands in stark contrast to Chile's threat in its Application to request provisional measures if

[86] CMB, Ann. 6.

[87] CMB, Ann. 7.

[88] CMB, Ann. 8.

Bolivia engaged in any conduct that would have an adverse effect on Chile's current use of all of the waters of the Silala.

— *Second*, under the initial agreement Bolivia could abstract its share of the waters for internal use or sales to third parties, including to Chilean entities, who had a right of first refusal: that was in Article 3.

— *Third*, Chile agreed that its public or private entities would pay compensation for any of the waters freely available to Bolivia and abstracted in Bolivia's territory that were delivered to Chile, with a formula proposed for assessing how that compensation would be determined: you will find that in Articles 3, 13 and 14~~)~~.

— *Fourth*, the Parties agreed that no works would be undertaken either individually or jointly that could affect the quality or quantity of the existing cross-border flow. For practical purposes, that meant that Bolivia could not unilaterally dismantle the canal works, which inevitably would have had some effect on the quantity or quality of the waters. In contrast, Chile now states that Bolivia is fully entitled to dismantle the channels, provided that it does so in accordance with international law[89]. But that was not its position in 2009 and it was not its position when it issued its threat for provisional measures in its application, and there is no certainty that it will remain Chile's position in the future.

25. In November 2009, a revised draft of the initial agreement was prepared, which you will find under tab 5.3 of your folders. It contained most of the substantive provisions of the July draft with some minor amendments advanced by Bolivia that were by and large uncontroversial, together with a statement at the beginning in a new Article 1 of each Party's general position on the status of the waters[90]. So, that was the situation at the end of 2009.

26. In October 2010, at a meeting of the Working Group on the Silala Issue, Bolivia proposed the inclusion of an article in the initial agreement that would address past Chilean uses of the waters and the issue of compensation for such uses[91]. Chile rejected this suggestion. Chile also rejected Bolivia's position that Bolivia should be entitled to use the freely available waters in its territory or

[89] APCh, para. 1.18.

[90] CMB, Ann. 9.

[91] CMB, Ann. 10.

to reconstitute the natural conditions of the Silala Springs, which inevitably would have involved dismantling the channel works. As a result of Chile's refusal to continue discussions on the initial agreement, further work to finalize that agreement came to a halt.

27. Notwithstanding this, it is important to note that the Parties — at that time in 2010 — had no disagreement over the substantive provisions that were included in the 2009 draft. Any disagreement related to Chile's past use of the waters, and whether there was any compensation due to that, whether from Chile or from the private FCAB Company. While the initial agreement was never signed and thus did not come into force, the Parties' positions as reflected in the drafts of that agreement are instructive because they provide an indication of what they considered equitable and reasonable at the time — and in fact it is the only indication we have.

28. As the Court noted back in its Judgment in the *Tunisia/Libya* case, in connection in that case with the continental shelf boundary between the two countries, even though the Parties' conduct in that case did not rise to the level of even a tacit agreement, the Court stated that "it is evident that the Court must take into account whatever indicia are available of the line or lines which the Parties themselves . . . considered [to be] equitable or acted upon as such".[92] Bolivia would suggest that in the present case, it is equally appropriate for the Court to take into account the indications of what the Parties considered to be equitable reflected in the draft 2009 initial agreement.

29. Following the break-down of discussions on the initial agreement, Bolivia explored ways in which it might make use of the waters of the Silala in its territory and other activities. I have discussed this in my earlier presentation, the idea of constructing the weir, the bottling plant that never went forward, the fish farm, military outpost and ten small houses, none of which gave rise to any risk of significant or in fact any transboundary harm and the fact that Chile never alleged the contrary.

30. That is all, Madam President, I wish to say about the background facts at this stage. I now turn to the specifics of Bolivia's second and third counter-claims.

---

[92] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 84, para. 118. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 68, para. 89.

III. Bolivia's second counter-claim

31. As I noted at the outset of my presentation, in its second counter-claim, Bolivia referred to its sovereignty over the "artificial flow" of the Silala waters engineered, enhanced or produced in its territory, and that Chile has no right to that "artificial" flow. Chile has taken issue with the reference to Bolivia's "sovereignty" over that flow. Professor Boyle, speaking on behalf of Professor McCaffrey — to whom we send our very best wishes — argued that international law does not recognize such a concept, and that it runs counter to the principle of equitable and reasonable utilization of shared watercourses and the community of interests of riparian States[93]. I shall explain why Chile's contentions in this respect are misguided and why Bolivia's Counter-claim *(b)* is both logically sound and legally justified.

32. The Parties agree that the man-made waterworks were constructed by a private enterprise in Bolivia's territory. And they also agree that, as a consequence, Bolivia has sovereignty over the waterworks, which includes, amongst others, the right to dismantle those works to restore the wetlands if it so chooses. Chile cites no principle of customary international law that would deny Bolivia that right. To the contrary, Chile has made it abundantly clear that Bolivia possesses this right, although it only did so *after* these proceedings had been instituted. To recall Chile's words in its Reply:

> "Chile does not dispute Bolivia's Counter-claim *(a)* [the counter-claim that Professor Forteau addressed] that [Bolivia] 'has sovereignty over the artificial channels and drainage mechanisms in the Silala that are located in its territory and therefore has the right to decide whether and how to maintain them'."[94]

33. But the corollary of that admission is that Chile has no legal right to insist that the enhanced surface flow, or the artificial flow, produced by the channel works must be maintained; it is Bolivia's sovereign right to take that decision. And it is in this sense that the reference in the first part of Bolivia's Counter-claim *(b)* — to its "sovereignty" over the artificial flow of the Silala waters engineered, enhanced and originating in its territory — it is in this sense that that should be understood. Bolivia can decide if the waterworks that produced the artificial flow remain or not. That is Bolivia's sovereign decision. And for the same reasons, the second part of Bolivia's Counter-claim *(b)* — that Chile has no right to that artificial flow — necessarily follows. It has no

---

[93] CR 2022/6, p. 42, para. 24 (Boyle/McCaffrey). See also RCh, para. 2.4.

[94] RCh, para. 2.27.

acquired right the current flow, the enhanced flow, produced by the waterworks in the future if Bolivia decides to dismantle the channels, as is its right. So, contrary to Professor Boyle's contention, there is in this respect a difference between the natural surface flow and the enhanced or "artificial" flow.

34. We know that Chile has obviously benefited from that flow for many years. But it has no acquired right to continue to receive the enhanced flow produced by the channels and the drainage mechanism in the future, as I said, if Bolivia decides to exercise its sovereign right to dismantle the infrastructure. In other words, the equitable and reasonable utilization principle does not oblige Bolivia to maintain the waterworks. And therefore, Bolivia maintains that its Counter-claim *(b)* is fully justified.

35. To come back to a point that Professor Pellet made yesterday regarding Bolivia's entitlement under international law to an equitable and reasonable share of the waters of the Silala for future uses, there are several factors that Bolivia submits be taken into account that arise as a consequence of Bolivia's Counter-claim *(a)* — the right to dismantle the works and *(b)* — Bolivia's sovereign right to decide whether the enhanced flow remains or not, and these factors include the following:

36. *First*, a central reason for dismantling the canals would be to restore the *bofedales*, the wetlands, and the environment to its natural condition. ~~***And***~~ I think there can be no dispute that the protection and preservation of the environment is a key principle of international law. As you have heard, the *bofedales* are a part of a Ramsar site — the Los Lípez site in Bolivia — that have been designated for protection in accordance with the Ramsar Convention to which both Bolivia and Chile are parties. As noted by the Conference of the Contracting Parties to the Ramsar Convention, "[a] key requirement for wetland conservation and wise use is to ensure that adequate water of the right quality is allocated to wetlands at the right time"[95].

37. Chile criticizes a Ramsar report that concluded — based on a site visit to the wetlands — that the Bolivian wetlands had been degraded due to the channel works. Although Chile criticizes this Ramsar report, Professor Eckstein recalled yesterday that the Court itself has observed in its

[95] CMB, para. 178; Resolution VIII.1, Guidelines for the allocation and management of water for maintaining the ecological functions of wetlands, Annex, para. 2, RAMSAR COP8, Valencia, Spain, 18-26 Nov. 2002.

Judgment in the *Certain Activities* and *Construction of a Road* cases that "the presence of Ramsar protected sites heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive"[96]. That is what we are dealing with here, a particularly sensitive wetland. Moreover, the criticism of the Ramsar report by Chile defies common sense. You saw those canals yesterday in the diagrams and on the video. Clearly, they drained the waters from the wetlands: a recognized method for draining and drying out stagnant or standing water is to dig a series of canals to drain the area. You really need to look no further than the canals in the Netherlands to appreciate the point, albeit obviously on a larger scale. For present purposes, the key point is that Bolivia should not be penalized with respect to its equitable and reasonable share of the waters of the Silala by the dismantling of the canal works for environmental reasons in order to restore the *bofedales*.

38. The *second* factor worth taking into account is that the Parties and their experts agree that a substantial portion of the waters associated with the Silala system in Bolivian territory comprises groundwater and that this groundwater flows downhill into Chile from Bolivia[97]. Last Friday, Chile's advocates repeatedly emphasized this point. In Professor McCaffrey's words, the groundwater of the Silala "would all eventually flow to Chile anyway"[98], and that "the total quantity of water making its way to Chile remains the same, however it gets there"[99]. Chile also stressed that the groundwater forms part of the watercourse along with the surface flow under international law. To the extent that dismantling the canals causes a significant decrease in the surface flow, as Bolivia's experts have shown would be the case, the groundwater will increase. No dispute on that. However, in that event, Chile will be able to recover the corresponding groundwater in its own territory as a major part of its equitable and reasonable share. Indeed, Chile's Agent noted on Friday that groundwater sources, which are part of the Silala watercourse system, already contribute some 124 l/s of additional water, groundwater, that flows into the Silala, just downstream of the boundary[100]. So Chile is getting the 160 or 170 l/s of surface flow, but they are also just down from the boundary benefiting already with

---

[96] *Certain Activities Carried out by Nicaragua in the Border Area Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 721, para. 155.

[97] WSCh, p. 15, paras. 3 (i) and (ii); WSB, p. 2, paras. 1.1 (1) and (3).

[98] CR 2022/6, p. 36, para. 8 (Boyle/McCaffrey).

[99] CR 2022/6, p. 37, para. 8 (Boyle/McCaffrey).

[100] CR 2022/6, p. 18, para. 9 (Boyle/McCaffrey).

an additional 124 l/s of groundwater flow. Take that into consideration when considering what is equitable and reasonable in the future.

39. *Third*, in assessing Bolivia's equitable and reasonable entitlement for future uses, account should also be taken of the fact that Chile has obviously benefited for many years, and continues to benefit today, by having had use of *all* the waters, all the cross border flow, and the groundwater flow. Chile has used the waters not simply for human consumption, but for industrial purposes as well without informing Bolivia of these uses, at least not until these proceedings. While Bolivia does not take issue with Chile's use of this flow up to the present, the application of equitable principles dictates that this factor, along with the others I have mentioned, should be taken into account in assessing Bolivia's entitlement.

IV. Bolivia's third counter-claim

40. In the remaining few minutes, I would like to turn to Bolivia's third counter-claim. You will recall, it is on the screen. I will not read it again. You have seen it; it involves the need for an agreement, if the current situation or the current status is to be maintained.

41. This counter-claim addresses the situation where Bolivia decides to dismantle the canal works (as is its right) and Chile indicates that it would prefer the waterworks to remain in place, and to receive the delivery of the enhanced surface flows caused by those works, i.e. the current flow, which would be over and above what it would otherwise be entitled to under the equitable and reasonable standard as applied to the natural surface and groundwater flow without the waterworks.

42. Now obviously Bolivia is well aware that in these proceedings Chile has stated that it has no objection to Bolivia dismantling the channel works. If Bolivia dismantles the channel works, Bolivia's third counter-claim, which looks to the future with the canal works still in place, would be without object, as Professor Forteau already noted.

43. But as I have explained, this agreement or encouragement for Bolivia to dismantle the canals was not Chile's position in the past when the Parties negotiated the 2009 initial agreement, and it was not Chile's position in its Application where Chile reserved the right to request provisional measures should Bolivia engage in *any* conduct that *may* have an adverse effect on Chile's then current use, i.e. with the canals, of the waters of the Silala. In other words, it is entirely possible that

Chile's position may change in the future, particularly given the risk, as demonstrated by DHI, that dismantling the canal works could significantly reduce the surface flow that crosses the border. Chile argues that this surface flow/groundwater flow distinction makes no difference because all the water flows into Chile. But the fact of the matter is that, in the past, it certainly did make a difference. FCAB and the Chilean company CODELCO built three intakes to siphon off the surface flow. They were only interested in the surface flow. There is no evidence that they used groundwater.

44. Bearing in mind that Chile has no acquired right to continue to receive the enhanced surface flow produced by the channels, in the event Bolivia decides to dismantle those channels and Chile reverts to its former position that it wants the current claim to be maintained, Bolivia submits that it is entitled to be compensated. This would include the cost of maintaining the channels and the value of the enhanced surface flow resulting from the canal works that would thereby continue to flow across the border into Chile over and above what Chile would be entitled to, based on the natural flow of the waters, and that value or compensation could be used by Bolivia also to help restore the wetlands.

45. The notion of compensation from Chile for the delivery of waters is not novel. As I noted earlier, in the 2009 draft initial agreement, ~~***in that agreement***~~ Chile agreed to compensate Bolivia for any waters abstracted by Bolivia in its territory forming part of Bolivia's agreed share that were delivered to Chile. In fact, Chile even wanted a right of first refusal to purchase those waters. And there was a formula for valuing that.

46. In the present case, the conditions, modalities and compensation due to Bolivia for keeping the channels in operation and maintaining the current flow would also need to be negotiated between the Parties. This is what is reflected in Bolivia's counter-claim *(c)*, which states that these elements would be subject to an agreement.

47. As Professor Pellet observed yesterday, international law in general, and the 1997 Watercourses Convention in particular, encourages the conclusion of such agreements between riparian States. As he recalled, the ILC, in its 1994 report, emphasized that the optimal utilization, protection and development of international watercourses are best achieved by means of an agreement tailored to the specific characteristics of the watercourse in question and the needs of the concerned States. Bolivia's counter-claim *(c)* is advanced in this spirit, and is designed to meet the

particular — and really quite special — circumstances characterizing the waters of the Silala in their upper reaches in Bolivia, and the interests and needs of both Parties. There is absolutely nothing in Bolivia's third counter-claim that runs counter to international law generally or the community of interests principle mentioned by Professor Boyle.

48. That, Madam President and distinguished judges, is the essence of Bolivia's third counter-claim — second and third counter-claims I have discussed — that Bolivia considers are fully justified given the particular circumstances of this case. It brings me to the end of my presentation on counter-claims *(b)* and *(c)*, and also it brings us to the end of Bolivia's first round presentation. I thank the Court very much for its attention.

The PRESIDENT: I thank Mr. Bundy, whose statement brings to an end this afternoon's sitting. Oral argument in the case will resume on Wednesday 6 April at 4 p.m., when Chile will present its observations on the counter-claims of Bolivia.

The sitting is adjourned.

The Court rose at 4.40 p.m.