Corrigé
Corrected

*CR 2022/9*

**International Court of Justice**

**THE HAGUE**

**Cour internationale de Justice**

**LA HAYE**

**YEAR 2022**

*Public sitting*

*held on Wednesday 6 April 2022, at 4 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 mercredi 6 avril 2022, à 16 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. The Court meets this afternoon to hear the observations of Chile on the counter-claims of Bolivia.

I shall now give the floor to Prof. Laurence Boisson de Chazournes. You have the floor, Professor.

Mme BOISSON DE CHAZOURNES :

**LA COUR N'EST PAS COMPÉTENTE POUR CONNAÎTRE DE LA PREMIÈRE DEMANDE RECONVENTIONNELLE DE LA BOLIVIE, OU, À TITRE SUBSIDIAIRE, LA DEMANDE RECONVENTIONNELLE DE LA BOLIVIE EST SANS OBJET ET DOIT ÊTRE REJETÉE**

1. Madame la présidente, Mesdames et Messieurs les juges, c'est pour moi un grand honneur de me présenter à nouveau devant votre Cour au nom de la République du Chili.

2. Par trois demandes reconventionnelles présentées dans son contre-mémoire, la Bolivie demande à la Cour de clarifier les droits et obligations qui s'appliquent aux eaux du Silala et aux ouvrages liés à leur utilisation[1]. Ainsi que le Chili le démontrera, la Cour se doit de rejeter ces trois demandes reconventionnelles. Mes collègues établiront que les deuxième et troisième demandes n'ont aucun fondement en fait ou en droit. Je m'appliquerai, pour ma part, à démontrer qu'il n'existe pas et qu'il n'a jamais existé de différend quant à la première demande reconventionnelle bolivienne.

3. Dans sa première demande reconventionnelle, la Bolivie prie la Cour de se prononcer et de déclarer que la Bolivie a la souveraineté sur les chenaux artificiels et les systèmes de drainage liés aux eaux du Silala situés sur son territoire. En tant que corollaire de cette souveraineté, la Bolivie demande également à la Cour de se prononcer sur son droit à décider s'il faut entretenir ces chenaux et systèmes de drainage et les modalités de leur entretien[2].

4. Mesdames et Messieurs les juges, la Bolivie argumente à tort qu'il n'y aurait pas d'accord entre les Parties quant à la souveraineté de celle-ci sur les installations précitées ainsi que sur leur entretien et leur fonctionnement[3]. Le Chili a toujours reconnu la souveraineté de la Bolivie sur les chenaux situés sur son territoire. Il a d'ailleurs renouvelé cette reconnaissance dans ses écritures en

---

[1] CMB, par. 171.

[2] CMB, par. 106 ; DB, par. 31.

[3] CMB, par. 174.

affirmant que : «la souveraineté de la Bolivie sur les chenaux et systèmes de drainage artificiels du Silala sur son territoire … n'est pas contestée par le Chili»[4]. Il en découle qu'il n'existe pas de différend entre les deux Parties pour ce qui est de la première demande. La Cour de céans n'a donc pas compétence pour trancher la première demande reconventionnelle de la Bolivie (I). Quand bien même votre juridiction déciderait qu'un différend existe, celui-ci est devenu sans objet au cours de la procédure, ainsi que les pièces écrites le démontrent (II).

## I. En l'absence d'un différend, la Cour n'est pas compétente pour juger de la première demande reconventionnelle de la Bolivie

5. Mesdames et Messieurs les juges, la Cour n'a pas compétence pour traiter de la première demande reconventionnelle car il n'existe pas de différend entre les deux Parties à ce sujet. Le Chili ne conteste ni la souveraineté de la Bolivie sur les chenaux situés sur son territoire ni le droit de cette dernière à procéder à leur démantèlement.

6. Or, Madame la présidente, «[l]'existence d'un différend entre les parties est une condition à la compétence de la Cour»[5]. La Bolivie et le Chili sont tous deux d'accord sur la nécessité de cette condition[6]. Cette condition ressort à la fois du Statut de la Cour et du pacte de Bogotá, base de compétence de la présente affaire[7].

7. Selon l'article 38 de son Statut, la Cour a pour mission «de régler conformément au droit international les différends qui lui sont soumis». Aux termes de l'article XXXI du pacte de Bogotá, «les Hautes Parties Contractantes en ce qui concerne tout autre Etat américain déclarent reconnaître comme obligatoire de plein droit … la juridiction de la Cour sur tous les différends d'ordre juridique surgissant entre elles». Autrement dit, pour que la compétence de votre juridiction puisse être établie, il doit y avoir différend.

8. Comme la Cour l'a souvent souligné, un différend s'entend comme «un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre

---

[4] RCh, par. 1.5 (note de bas de page omise).

[5] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 26, par. 50.

[6] CR 2022/7, p. 45, par. 22, et p. 48, par. 35 (Forteau).

[7] MCh, par. 1.10-1.14.

deux personnes»[8]. Il doit donc avoir été établi «que la réclamation de l'une des parties se heurte à l'opposition manifeste de l'autre»[9]. Il s'agit d'une question de fond, et non de forme ou de procédure[10].

9. Une telle opposition en droit ou en fait ne peut pas être établie dans le cas présent. Le Chili n'a jamais nié la souveraineté de la Bolivie sur les chenaux situés sur son territoire[11]. Comment le pourrait-il ? Le Chili n'a pas été impliqué dans la construction de ces chenaux en territoire bolivien, ainsi que cela a été rappelé lors des audiences du 1er avril dernier[12]. Ces chenaux ont été construits par la compagnie ferroviaire britannique Antofagasta (Chili) and Bolivia Railway Company Limited (FCAB) sur la base d'une concession octroyée par le Gouvernement bolivien en 1908[13]. Il est donc difficile d'y voir une quelconque remise en cause de la souveraineté bolivienne sur ces installations.

10. Le Chili ne conteste pas non plus le souhait de la Bolivie de démanteler les chenaux[14].

11. Le Chili n'a d'ailleurs jamais pu contester un tel droit. Ce n'est en effet que lors de la présentation du contre-mémoire dans la présente instance que la Bolivie, pour la première fois, a fait part de sa volonté de démanteler ces chenaux[15]. Je dis bien pour la première fois. En effet, la Bolivie a tenté, lors des audiences du 4 avril dernier, de prétendre que le Chili aurait refusé à la Bolivie le droit de démanteler les canaux en 2002[16]. Or, les documents cités par la Bolivie font place à une tout autre réalité qu'il est intéressant de mentionner dans le contexte de la présente instance. En 2002, la Bolivie avait évoqué l'option «de fermer l'écoulement des eaux de source du Silala, canalisées par

---

[8] *Concessions Mavrommatis en Palestine, arrêt nº 2, 1924, C.P.J.I. série A nº 2*, p. 11 ; voir aussi *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 84, par. 30.

[9] *Sud-Ouest africain (Ethiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), exceptions préliminaires, arrêt, C.I.J. Recueil 1962*, p. 328.

[10] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 27, par. 50, citant *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I)*, p. 84, par. 30.

[11] RCh, par. 1.14 et 2.39.

[12] CR 2022/6, p. 29, par. 15-17 (Klein Kranenberg).

[13] RCh, par. 1.8.

[14] *Ibid.*

[15] CMB, par. 165 *a)* et par. 174.

[16] CR 2022/7, p. 14, par. 21 (Calzadilla Sarmiento) ; p. 43, par. 18 *c)* iii) (Forteau).

des moyens artificiels en direction du territoire chilien»[17], sinon de saisir un tribunal arbitral ou la Cour internationale de Justice[18]. En réaction à cela, le Chili fit part, le 4 mars 2002, de son rejet de «toutes mesures susceptibles d'empêcher les eaux du Silala de poursuivre leur cours au Chili et, à cet égard, appel[ait] l'attention sur l'esprit de coopération»[19]. Mesdames et Messieurs les juges, comme il peut être constaté, la question du démantèlement de chenaux n'a pas été évoquée dans les échanges que je viens de présenter. En revanche la menace par la Bolivie de couper l'écoulement des eaux du Silala à destination du Chili a bien été évoquée. Il n'existait donc pas de différend sur le démantèlement des chenaux avant la saisine de la Cour, mais il y avait déjà bien un différend entre le Chili et la Bolivie portant sur les eaux du Silala.

12. La présentation d'une demande reconventionnelle ne change rien. Il n'existe toujours pas de différend à propos du droit de la Bolivie de procéder au démantèlement des chenaux sis sur son territoire. Le Chili ne conteste pas ce droit.

13. Selon la Bolivie, les chenaux et les systèmes de drainage construits artificiellement auraient affecté négativement les eaux du Silala et contribué à la dégradation des *bofedales* et au déclin des zones humides[20]. Comme le Chili l'a indiqué[21], la Bolivie peut prendre les mesures qu'elle juge nécessaires et appropriées pour y remédier[22], en accord avec les obligations de droit international qui trouvent application.

14. Mesdames et Messieurs les juges, il appert de cette présentation qu'aucun différend n'oppose le Chili et la Bolivie quant à la souveraineté de cette dernière sur les chenaux situés sur son territoire et son droit à les démanteler.

---

[17] Communiqué de presse du ministère des affaires étrangères de la Bolivie, 26 février 2002. MCh, vol. 3, annexe 49, p. 131.

[18] *Ibid.*

[19] Communiqué de presse du ministère des affaires étrangères du Chili en date du 4 mars 2002. MCh, vol. 3, annexe 60, p. 58.

[20] CMB, par. 176.

[21] RCh, par. 1.5 (note de bas de page omise) ; PACh, par. 1.21 (notes de bas de page omises).

[22] CMB, par. 175.

## II. La première demande reconventionnelle de la Bolivie est devenue sans objet au cours de la procédure

15. Toutefois, si la Cour venait à considérer qu'un différend existait au moment où la Bolivie a présenté sa demande reconventionnelle relativement à la souveraineté de la Bolivie sur les chenaux situés sur son territoire et son droit à les démanteler, *quod non*, les échanges d'écritures entre les Parties dans la présente affaire ont rendu celui-ci sans objet.

16. Ainsi que l'a rappelé votre juridiction dans l'affaire des *Essais nucléaires*, et comme la Bolivie l'a noté[23], «[l]a Cour, comme organe juridictionnel, a pour tâche de résoudre des différends existant entre Etats. L'existence d'un différend est donc la condition première de l'exercice de sa fonction judiciaire.»[24]

17. Il y a défaut d'objet lorsque, ainsi que nous venons de le voir, le différend n'a jamais existé. Mais il peut également y avoir défaut d'objet lorsque celui-ci a cessé d'exister[25]. En effet, il ne suffit pas que le différend existe seulement au moment de la saisine de la Cour. Celui-ci doit «persister au moment où elle statue»[26]. C'est ce qu'a reconnu la Cour de céans dans l'affaire du *Cameroun septentrional* :

> «Qu'au moment où la requête a été déposée la Cour ait eu ou non compétence pour trancher le différend qui lui était soumis, il reste que les circonstances qui se sont produites depuis lors rendent toute décision judiciaire sans objet. La Cour estime dans ces conditions que, si elle examinait l'affaire plus avant, elle ne s'acquitterait pas des devoirs qui sont les siens.»[27]

18. Votre juridiction avait ajouté que dans ces cas, et pour «sauvegarder sa fonction judiciaire»[28], la Cour doit «en tirer les conséquences qui s'imposent»[29] et refuser d'entreprendre

---

[23] CR 2022/7, p. 48, par. 35 (Forteau).

[24] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 270-271, par. 55 ; *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 476, par. 58 ; voir également *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 33-34.

[25] Outre les exemples précités, voir également *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), arrêt, C.I.J. Recueil 2002*, p. 14-15, par. 32 ; *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 95, par. 66.

[26] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 270-271, par. 55 ; *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 476, par. 58.

[27] *Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 38.

[28] *Ibid.*

[29] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 270-271, par. 55 ; *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 476, par. 58.

l'examen de l'affaire au fond. Pour les mêmes raisons, la Cour doit refuser d'entreprendre l'examen au fond de la première demande reconventionnelle de la Bolivie.

19. En l'espèce, le Chili a reconnu dans les termes les plus clairs la souveraineté de la Bolivie sur les canaux situés sur son territoire en affirmant, dans sa réplique, que : «la souveraineté de la Bolivie sur les chenaux et systèmes de drainage artificiels du Silala sur son territoire … n'est pas contestée par le Chili»[30]. Le Chili a également reconnu dans les termes les plus clairs le droit de la Bolivie de procéder au démantèlement du système de chenaux. Le Chili a précisé que, «si la Bolivie souhaite retirer les chenaux et procéder à la restauration des zones humides afin que celles-ci reviennent à leur état d'avant les années 1920, le Chili l'encourage vivement à le faire»[31]. Enfin, les deux Etats s'accordent sur le fait que le démantèlement doit se faire en conformité avec le droit international coutumier[32]. Toutefois, la Bolivie a, le 5 avril, invoqué un argument entièrement nouveau et totalement infondé selon lequel le Chili revendiquerait un droit acquis[33]. Le Chili nie catégoriquement cette assertion. Le Chili n'a jamais revendiqué un tel droit. Comme le Chili l'a clairement dit lors des audiences du 1er avril[34] et le rappelle aujourd'hui :

> «une réduction (si tant est qu'elle se produit) de l'écoulement de surface transfrontière résultant du démantèlement des chenaux en Bolivie n'emporterait pas violation du droit international coutumier sauf si les obligations que la Bolivie a acceptées étaient mises en cause d'une manière ou d'une autre. De même, la contamination non anthropique des eaux du Silala par des larves d'insectes se reproduisant dans les zones humides ne serait pas non plus considérée comme une violation des principes susmentionnés.»[35]

20. Le Chili réitère que les droits souverains de la Bolivie, et notamment son droit souverain à démanteler les chenaux, doivent s'exercer en accord avec les principes de droit coutumier applicables aux cours d'eau internationaux. Ce n'est pas une condition imposée par le Chili, il ne s'agit que de l'application de la règle de droit. La Bolivie voudrait-elle bénéficier de la prérogative de ne pas être liée par le droit coutumier auquel elle est pourtant tenue ? Si tel était le cas, la première demande reconventionnelle devrait être rejetée.

---

[30] RCh, par. 1.5 (note de bas de page omise).

[31] RCh, par. 1.8.

[32] RCh, par. 1.5 (note de bas de page omise) ; DB, par. 32, 36 et 38.

[33] CR 2022/8, p. 26, par. 14 *c)* (Forteau).

[34] CR 2022/6, p. 23-24, par. 30 (Fuentes Torrijo).

[35] PACh, par. 1.20 (notes de bas de page omises).

21. Madame la présidente, Mesdames et Messieurs les juges, la première demande reconventionnelle n'a plus d'objet, si l'on peut considérer qu'elle en ait jamais eu un. Par conséquent, la Cour ne peut faire droit à la demande bolivienne car cela irait à l'encontre de sa fonction judiciaire.

22. Ceci conclut ma plaidoirie. Il me reste à remercier la Cour de son attention. Je vous saurais gré, Madame la présidente, de bien vouloir donner la parole à M. McCaffrey.

The PRESIDENT: I thank Professor Boisson de Chazournes for her statement. I now invite the next speaker, Professor Stephen McCaffrey, to take the floor. You have the floor, Professor.

Mr. McCAFFREY: Thank you, Madam President.

**BOLIVIA'S SECOND COUNTER-CLAIM IS UNTENABLE**

1. Madam President, distinguished Members of the Court, good afternoon. It is a privilege to appear before you, even if remotely, on behalf of the Republic of Chile.

2. My task today is to show why the Court must find that Bolivia's second counter-claim is untenable.

3. Madam President, Members of the Court, in its second counter-claim, Bolivia asks the Court to adjudge and declare that "Bolivia has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no right to that artificial flow"[36]. This request of Bolivia harkens back to matters dealt with in my first speech — kindly delivered by Professor Boyle — in its reliance on the claim that Bolivia has *exclusive* sovereignty over a portion of ~~*a*~~ ***the*** watercourse *shared* with Chile. Yet, in its pleadings before you, on Monday and Tuesday Bolivia has retreated considerably from that position. In these pleadings, Bolivia's counsel made no mention of sovereignty in relation to a so-called "artificial flow"[37] and, yesterday, Bolivia's position was entirely recast, with its former argument none too subtly tossed into the dustbin where it has always belonged. Sovereignty instead made only a rather bashful appearance in the form of a sovereign right of Bolivia to decide what to do in its territory — a wholly uncontroversial proposition. Bolivia has thus abandoned a legal basis, that it ~~***really***~~ never had ***really*** in the first place,

[36] CMB, para. 181, submission *(b)*.

[37] CR 2022/7.

for claiming rights in what it calls the "artificial flow" of the Silala. What Bolivia did replace this with, in relation to its new claim concerning maintenance of the channels, Chile is struggling to understand. Bolivia's second counter-claim is thus vastly reduced in scope and will be treated accordingly here.

**I. Bolivia has effectively abandoned sovereignty as a basis for its claims to what it calls the "artificial flow"**

4. Madam President, Members of the Court, Bolivia in its address to the Court yesterday effectively abandoned sovereignty as a basis for its claims to what it calls the "artificial flow".

5. Mr. Bundy, whom I thank for his kind well-wishes, stated as follows:

> "Bolivia has sovereignty over the waterworks, which includes, amongst others, the right to dismantle those works . . . 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.
>
> . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .
>
> 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."[38]

6. Bolivia's basis for this counter-claim has evolved and changed since the beginning of the proceedings before you. Indeed, Bolivia initially claimed in its Counter-Memorial that it "has full sovereignty over the artificial flow of waters of the Silala on the ground that, absent any drainage and channelization mechanisms, waters that are mechanically induced or created would not naturally flow to the territory of Chile"[39]. Bolivia argued that "[t]he principle of equitable and reasonable use under customary international law does not apply to the artificial flow of the Silala waters"[40]. And "[a] further consequence of Bolivia's sovereignty over the artificial flow of waters of the Silala is

---

[38] CR 2022/8, pp. 38-39, paras. 32-33 (Bundy).

[39] CMB, para. 120.

[40] CMB, para. 120.

that any use of such flow by Chile depends on Bolivia's consent"[41]. Madam President, this does the Harmon Doctrine one better.

7. Bolivia, however, recognized in its Rejoinder — and both Bolivia and Chile agree — that whether it flows on the surface or underground, the water is Silala water and would eventually flow to Chile[42]. In the same Rejoinder, therefore, Bolivia found itself needing to change the basis of its argument and claimed that "Bolivia's sovereignty over the artificial infrastructure in its territory affords Bolivia sovereignty over the artificial flow*H* generated by that infrastructure"[43].

8. Bolivia has effectively abandoned sovereignty as a basis for its claim and is now claiming before you that "[o]ur opponents . . . claim that Bolivia intends to enjoy 'absolute' and 'exclusive' sovereignty"[44]. This, however, is not what Chile is contending, but what Bolivia has been claiming in its written pleadings. For example, in its Counter-Memorial Bolivia claimed that "Bolivia has full rights and authority over the *artificially* created flows and volumes of Silala water coursing across that frontier"[45], and that "Bolivia has full sovereignty over the use of the artificial flow of waters which in [the] absence of an agreement between Bolivia and Chile is to be regulated by Bolivian domestic law"[46].

**II. Bolivia does not indicate the basis of its claim to an "artificial flow"**

9. Madam President, Members of the Court, Bolivia previously claimed that "the definitions for 'watercourse' and 'international watercourse' incorporated in th***e*** Convention . . . *do not reflect customary international law on the use of artificially enhanced watercourses*", thus claiming a basis in customary international law for its novel concept of excepting alleged "artificial" flow from international watercourse law[47]. Bolivia now proposes what amounts to a legal vacuum, declaring that the Silala is essentially too unique to be governed by the customary international law of

---

[41] CMB, para. 121.

[42] APCh, para. 2.3; RB, paras. 67 and 83.

[43] RB, subheading 1, p. 38.

[44] CR 2022/7, p. 55, para. 13 (Pellet), "[n]os contradicteurs . . . prétendent que la Bolivie entend jouir d'une souveraineté 'absolue' et 'exclusive'" (unofficial translation).

[45] CMB, para. 110.

[46] CMB, para. 115.

[47] CMB, para. 93 (emphasis added).

international watercourses, and that no custom has evolved to fit its unique characteristics and circumstances[48].

10. The references and sources included by Bolivia in its written pleadings that allegedly supported its novel concept of an exception for "artificial" flow from the customary international law of international watercourses, are conspicuously absent from Bolivia's oral pleadings before the Court.

11. A central component of Bolivia's claim to sovereignty over the "artificially enhanced" flow early on was the puzzling idea of a "manufactured river"[49] or "manufactured water[s]"[50]. As Bolivia seems to have acknowledged that the waters of the Silala, either as surface or groundwater, would eventually flow into Chile, minus small changes in evaporation[51], this argument has effectively disappeared, but without being openly retracted by Bolivia.

12. Bolivia, in its written pleadings, also went so far as to offer up a number of domestic United States cases concerning so-called "salvaged" water[52], which support~~***ed***~~ ownership over this water by "the party that created it"[53]. This, to support Bolivia's claim to the alleged "artificial" flows of the Silala. These authorities, as well as the idea of salvaged water, are now wholly absent from the submissions of Bolivia before the Court.

13. In fact, Bolivia appears to have entirely abandoned its position concerning sovereignty over the water flowing through the artificial works, as well as the legal basis for this position, that was advanced in its written pleadings. Of course, Bolivia still clings to a remaining vestige of sovereignty in relation to the works in their territory and their right to remove these works[54], something to which Chile has not objected. But Bolivia has provided absolutely no basis for its contention that these waters flowing through the channels, which would flow across the international boundary to Chile regardless of the works, should be exempted from the law of international

---

[48] CR 2022/7, p. 54, para. 11 (Pellet).

[49] CMB, para. 80.

[50] CMB, paras. 105-106.

[51] WSCh, pp. 1 and 15.

[52] RB, paras. 74-75.

[53] RB, para. 74.

[54] CR 2022/8, pp. 38-39, paras. 32-33 (Bundy).

watercourses — other than to say that the Silala is "unique"[55], "very particular"[56], and "very exceptional"[57]. I am translating from Professor Pellet's speech.

**III. Customary international law applies to the entire Silala watercourse system**

14. Madam President, Members of the Court, as I have shown in my earlier pleading, the Silala is an "international watercourse" as defined in Article 2 of the United Nations Watercourses Convention. Article 2 of the Convention defines the term "watercourse" as follows:

> "*(a)* 'Watercourse' means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus; . . . ".

15. The central component in this definition of an international watercourse is the idea that surface waters and groundwaters, due to their interconnectedness, comprise a *unitary whole*. But Bolivia's insistence on different treatment of what it calls an "artificial" flow would result in the "fragmentation of the natural unity of a fresh water system"[58] — the quote, by the way, is from Stephen Schwebel, a former President of this Court, in his first report on the law of international watercourses when he was special rapporteur for the International Law Commission. Destroying the natural unity of a freshwater system would fly in the face of the work of the ILC. That work was based on the concept of a watercourse as a "unitary whole", a concept now enshrined in the definition of the term "watercourse" in the Watercourses Convention. With respect, it borders on the absurd to suggest that some of the waters of the Silala become non-international by passing through human-made works, and that this removes them from the system of waters constituting an international watercourse.

16. Madam President, Bolivia's argument that a riparian State could gain ownership of a portion of the flow of an international watercourse simply by unilaterally developing infrastructure on that watercourse, as has been contended here by Bolivia, is a dangerous proposition for the governance and management of international watercourses. As discussed in my first presentation,

---

[55] CR 2022/7, p. 18, paras. 3-4, and p. 32, para. 53 (Eckstein).

[56] CR 2022/7, p. 53, para. 8 (Pellet), "bien particuliers" (unofficial translation).

[57] CR 2022/7, p. 54, para. 11 (Pellet), "très exceptionnelle" (unofficial translation).

[58] Stephen M. Schwebel, "First report on the law of the non-navigational uses of international watercourses" (UN doc. A/CN.4/320), in *YILC*, 1979, Vol. II (Part 1), p. 152, para. 38 (UN doc. A/CN.4/SER.A/1979/Add.1 (Part 1)).

the development and regulation of international watercourses by human hands is ubiquitous around the globe[59]. Despite the contention of Bolivia that the channelization works on the Silala has made that river a unique international watercourse beyond the scope of existing international law, the Silala is an international watercourse as contemplated in the Watercourses Convention. International water law contemplates the regulation and development of international watercourses. Several articles of the Watercourses Convention contemplate installations and regulation[60]. These articles are not referred to here as a reflection of customary international law, but rather to demonstrate the scope of this Convention, which applies to non-navigational uses of international watercourses[61]. Article 6 (1) *(f)* of the Watercourses Convention lists "[c]onservation, protection, development and economy of use of the water resources of the watercourse"[62] as a factor in determining the equitable and reasonable use of an international watercourse.

17. Despite the fact that Bolivia contended on Monday that, in the case of the Silala, "[t]his is a very exceptional circumstance and precedents are too rare — even if they existed — for a particular customary rule to have been formed in that regard"[63], the ILC in its work on the non-navigational uses of international watercourses was very well aware of, and considered the uniqueness of international watercourses across the globe. Indeed, "[t]he diversity characterizing individual watercourses and the consequent difficulty in drafting general principles that will apply universally to various watercourses throughout the world have been recognized by the Commission from the early stages of its consideration of the topic"[64].

18. According to Bolivia, "the qualification as an international watercourse is not sufficient to characterize the Silala: it presents very particular characteristics which have a great influence

---

[59] See *Württemberg and Prussia* v. *Baden* (the *Donauversinkung* case), German *Staatsgerichtshof*, 18 June 1927, p. 132; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 77-78, para. 140.

[60] I.e. Articles 25, 26 and 29, Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter "UNWC"), signed at New York on 21 May 1997, UN doc. A/RES/51/229 (1997); MCh, Vol. 2, Ann. 5 (key document 1 of judges' folder).

[61] UNWC, Article 1; MCh, Vol. 2, Ann. 5 (key document 1 of judges' folder).

[62] UNWC, Article 6 (1) *(f)*; MCh, Vol. 2, Ann. 5 (key document 1 of judges' folder)

[63] CR 2022/7, p. 54, para. 11 (Pellet), "[i]l s'agit là d'une circonstance très exceptionnelle et les précédents sont trop rares — même s'il en existait — pour qu'une règle coutumière particulière ait pu se former à cet égard" (unofficial translation).

[64] *YILC*, 1994, Vol. II (Part Two), p. 92, para. 1 of commentary to Article 3.

concerning applicable rules"[65]. Bolivia's efforts to complicate the matter at hand does nothing to diminish the capacity of the law of international watercourses to provide answers as to the status and use of the Silala. The law of international watercourses does provide clear indications as to the general rights and obligations of Bolivia and Chile in relation to the Silala watercourse.

19. Many intensively used watercourses are regulated in some way or another, often by straightening their channels to eliminate naturally occurring meanders and thus to facilitate their use for such purposes as navigation and hydroelectric power production[66]. This does not convert the flow they carry from being "natural" to being "artificial". Even the bypass canal involved in the *Gabčíkovo-Nagymaros Project* case[67], which was constructed by Czechoslovakia, runs for 31 km through what is now Slovak territory, and is capable of carrying some 80 to 90 per cent of the Danube's flow[68], even this was never thought to carry "artificial" flows. Nor of course could any claim have been made by Slovakia for compensation from Hungary for any "artificially enhanced" flows carried by the bypass canal following Hungary's attempted termination of the 1977 treaty involved in the case.

20. Bolivia recognizes that customary international law applies to the waters of the Silala but then applies that law in a way that distorts it beyond recognition. For Bolivia, customary international law applies to a pristine, undeveloped river, but apparently not to one that has been developed. Thus, Bolivia states in its Rejoinder: "For its part, Bolivia recognizes that, once the artificial channels and drainage mechanisms in Bolivian territory are removed, the Silala waters will be entirely governed by customary international law applicable to international watercourses."[69] This stunning proposition would reverberate throughout the world's international watercourses, almost all of which have been developed in one way or another. There is no hint in the Watercourses Convention that only

---

[65] CR 2022/7, p. 53, para. 8 (Pellet), "la qualification de cours d'eau international ne suffit pas à caractériser le Silala : il présente des caractères bien particuliers qui ont une grande influence en ce qui concerne les règles applicables" (unofficial translation).

[66] See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 17-18, para. 15, and pp. 18-20, para. 17.

[67] *Ibid.*

[68] *Ibid.*, p. 50, para. 65, and p. 54, para. 78.

[69] RB, para. 103.

international watercourses that somehow exist in a state of nature are considered to be governed by the law of the non-navigational uses of international watercourses.

21. It would be, with respect, absurd if the principle of equitable and reasonable utilization and other principles of customary international law were pre-empted by the development of international watercourses. It is often precisely in the case of such development that these principles are of critical importance. Chile does not deny Bolivia's right to develop works in its territory on the Silala. But the development of those works cannot run roughshod over Chile's co-equal rights to utilize Silala waters.

**IV. Conclusion**

22. Madam President, distinguished Members of the Court, to conclude, the standard of equitable and reasonable use and other principles of international water law apply to all of the waters of the Silala watercourse system. There is no legal basis for Bolivia to claim exemption for any alleged "artificial" portion of the flow from the norms of customary international law.

23. Madam President, for the reasons I have outlined, Chile would respectfully request the Court to declare and confirm that international law does not recognize the concept of "artificial flow" as invented by Bolivia; that the relevant rules of customary international law as reflected in the United Nations Watercourses Convention apply to the *entire* flow of the Silala watercourse system; and that there is no basis in international law for Bolivia's claim that it "has sovereignty over the artificial flow of Silala waters engineered, enhanced, or produced in its territory and Chile has no right to that artificial flow" (from Bolivia's submissions). Chile's rights are of course established by customary international law reflected in the Watercourses Convention, including the right to reasonable and equitable utilization of *all* of the waters of the Silala watercourse system.

24. Madam President, distinguished Members of the Court, thank you for your kind attention. Madam President, I would be grateful if you would now give the floor to my colleague, Professor Boyle.

The PRESIDENT: I thank Professor McCaffrey and I now give the floor to Professor Alan Boyle. You have the floor, Professor.

Mr. BOYLE:

**BOLIVIA'S THIRD COUNTER-CLAIM MUST BE REJECTED**

1. Madam President, Members of the Court. This time I will remember to take my mask off; it makes it easier to speak. It is a pleasure to appear before you, once again on behalf of the Republic of Chile. And hopefully my speech this afternoon will be short.

2. My task is to deal with Bolivia's third counter-claim, counter-claim *(c)*, which asserts that Chile must pay compensation for delivery to Chile of any "artificially-flowing waters of the Silala", and further that delivery of those waters requires the Parties to conclude an agreement[70].

3. Yesterday, Mr. Bundy attempted to clarify Bolivia's third claim, by adding that:

> "This counter-claim addresses the situation where Bolivia decides to dismantle the [channels, while] Chile indicates that it would prefer the waterworks to remain in place, [in order] to receive the delivery of the enhanced surface flows caused by those works, i.e. the current flow . . . over and above what . . . [it] would otherwise be entitled to under the [standard] of equitable and reasonable [use]."[71]

4. But, Madam President, Members of the Court, Mr. Bundy's pseudo clarification does nothing to help us. On the contrary, it shows that Bolivia's third counter-claim is entirely baseless and must be dismissed in its entirety. Bolivia's third claim is now premised not on sovereignty over the flow of the water, but only on Chile's interest in the maintenance of the channels. But Madam President, Members of the Court, Chile has no interest in the maintenance of the channels. If Bolivia decides to keep the channels anyway, Chile would be under no obligation to pay for the continued delivery of water through the Silala. My task this afternoon is to explain why.

5. Of course, as you have heard from my colleagues, it is entirely Bolivia's choice whether or not it wishes to keep or dismantle the channels. But whatever decision it takes, neither choice can provide any legal basis for an obligation of Chile either to pay a compensation or to enter into negotiation for payment.

---

[70] CMB, para. 165 *(c)*.

[71] CR 2022/8, p. 41, para. 41 (Bundy).

6. Let me, Madam President, make an additional point that arises from the way that Bolivia has presented its third counter-claim. According to Mr. Bundy, Bolivia's third counter-claim "looks [to] the future"[72].

7. But in making the claim in this way, focused on future delivery of water, he seems by implication to be accepting that it has abandoned any claim for water that has already flowed to Chile in the past, the so-called "historic debt" which Bolivia claimed some years ago, at a value of several billions of dollars, if I recall correctly. And the fact that they have now abandoned that claim to historic debt itself shows that the whole idea of payment for the delivery of water is legally baseless. And Professor Pellet, yesterday distinguished between artificial flow and natural water[73], in a way that also seemed to suggest that Bolivia is only requesting compensation for the maintenance of the channels, rather than for delivery of artificially flowing waters of the Silala. So, the latter claim for payment is beginning to look more like a political symbol devoid of any legal substance and about as meaningful as charging for fresh air flowing over the Andes.

**I. Bolivia has no exclusive sovereignty over any part of the Silala River**

8. But, Madam President, just in case we have misunderstood what Bolivia said yesterday and the day before, let me reiterate the point that Professor McCaffrey has also made today — but may I also say, just in case, that nothing I may say this afternoon is intended in any respect to disagree with or undermine anything Professor McCaffrey has said and I have no doubt that he has not intended to undermine anything I have said — but you will appreciate we have all been scrambling a little to keep up with Bolivia's gyrations and its changes of position. But we are to be read consistently with each other. Professor McCaffrey has already demolished Bolivia's claim to sovereignty over any part of the Silala waters. Such a claim is plainly, simply not tenable in international law. It is wholly inconsistent, as we have already argued, with the community of interest envisaged by the

---

[72] CR 2022/8, p. 41, para. 42 (Bundy).

[73] CR 2022/7, p. 53, para. 10 (Pellet), "[c]ette singularité fondamentale que la Bolivie fait une distinction entre écoulement naturel et écoulement artificiel des eaux du Silala—et j'insiste: '*écoulement* artificiel des eaux du Silala' et non pas '*eaux* artificielles'".

Watercourses Convention and the International Law Commission, and as affirmed by the Court in the *River Oder*[74], the *Gabčíkovo-Nagymaros*[75] case, and the *Pulp Mills*[76] case[77].

9. As Professor McCaffrey argued, the principle that a State does not have exclusive sovereignty over any portion of an international watercourse remains today the very basis of the law of international watercourses as set out in the United Nations Watercourses Convention and reaffirmed in the case law of the Court. If Bolivia no longer claims or does not in law have sovereignty over the Silala waters flowing into Chile, and in the absence of any agreement to the contrary, then it ~~***plainly***~~ ***clearly*** has no legal right to demand either prior agreement or payment for delivery of water*s* which ***will*** flow~~s~~ into Chile in the future. The whole legal basis for that claim has simply disappeared in the absence of sovereignty.

10. Chile rejects entirely the claim that an agreement is a necessary precondition for future delivery of the Silala waters or that it must pay for any of that water, whether it flows to Chile "artificially" or otherwise.

11. The assertion by Bolivia that Chile's entitlement to the waters of the Silala is dependent on and subject to Bolivia's prior agreement is, of course, plainly inconsistent with the *Lac Lanoux* arbitration[78], where the learned arbitrators held that an upstream State had no veto over the flow of water to downstream States[79]. The other precedents also show that the sovereignty of a State over rivers within its borders is qualified by a recognition of the equal rights of other riparians to make equitable use of that water without payment or agreement.

12. Bolivia, of course, claims that international law does not apply to the so-called "artificial flow" of the water delivered via the 1928 FCAB channels, or at least that is what it argued until this week. I am not going to further repeat Professor McCaffrey's comprehensive rebuttal of the sovereignty claim.

---

[74] *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*.

[75] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*.

[76] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*.

[77] RCh, paras. 2.30-2.31.

[78] *Lake Lanoux Arbitration (Spain* v. *France), Award of 16 November 1957, Reports of International Arbitral Awards (RIAA)*, 1957, Vol. XII.

[79] RCh, paras. 2.24-2.25.

13. But if, as Bolivia suggests, it goes ahead and dismantles the channels through which the Silala currently flows, the 2-3 l/s of "additional" water[80], which it says the channels generate, will no longer reach Chile as surface water, and counter-claim *(c)* will essentially become moot. Indeed, Bolivia now appears to accept this. Mr. Bundy noted yesterday, besides the "significant decrease" in the surface flow that the dismantling of the channels ***~~would~~*** ***will*** cause, the groundwater flow ***~~would~~*** ***will*** increase, and that "Chile will be able to recover the corresponding groundwater . . . as a major part of its equitable and reasonable share"[81]. So, they accept the point we made all along, that the water will end up in Chile anyway.

14. Thus, the best objection to Bolivia's absurd and wholly unmerited claim for payment is that all of the water in the Silala flows naturally downhill into Chile either superficially or as groundwater. Bolivia cannot claim to be a victim of topography, and no remotely plausible basis has been put forward for the case that Chile must pay for the water that it receives naturally, whether above ground or below.

**II. No upstream State can charge a downstream State according to international law**

15. But there is another stronger objection to Bolivia's claim for payment, and it is simply that State practice and the law of international watercourses do not support it. An upstream State as a matter of law cannot charge a downstream State for water emanating from its territory, or for works in its own territory that were never requested by, or agreed with, the downstream State.

16. Bolivia cites no relevant authority for its wholly unprecedented claim to payment for the delivery of that additional water to Chile. Remarkably, Bolivia, nowhere in its pleadings, neither in the written pleadings or its oral pleadings, nowhere does it make any reference to the compendium of documents on international watercourses edited by a then rather young Dr. Bruno Simma[82]. Let me put it this way: had I been making the argument that Bolivia was making yesterday, I would have taken the precaution of going and looking through that compendium of documents. It is an invaluable research tool, and I did that when I was young and when I was writing about international

[80] Wheater and Peach (2019), p. 6; RCh, Vol. 1, p. 102.

[81] CR 2022/8, p. 40, para. 38 (Bundy).

[82] Rüster, B. and Simma, B., *International Protection of The Environment: Treaties and Related Documents* (1975-1983), Dobbs Ferry, New York.

watercourses and the pollution thereof. But Bolivia's complete failure to make any reference to this epic work — the best explanation for that surely, presumably, is that they could not find anything. I imagine they did go and search. They are professional lawyers. They must have done. But they obviously did not find anything of any relevance to the case that they are putting to you today — no treaties, no precedents, nothing, nothing to support their case. And it has to be said that that silence speaks volumes. None of the case law supports them either.

17. In the *River Oder*, *Lac Lanoux*, *Gabčíkovo-Nagymaros Project* and *Pulp Mills* cases, there was a diversion of water. Every one of those cases involved water in some way diverted from the main stream. But none of those cases treated that diverted water in any way any differently from the natural flow. It was all regarded as simply a watercourse, with water flowing naturally through it. So no authority at all for the proposition that there is a different régime for supposedly artificial water. These cases also give the lie to Professor Pellet's argument that the Silala possesses a *singularité fondamentale*[83]. This is simply not borne out when the facts of the cases are properly understood. The law of international watercourses is just that: law for all such waters, with no exception for Bolivian waters, no exception for the Silala.

18. If Bolivia's view of the law were correct, the Dutch would be paying large sums to the Swiss and to the French for water delivered via the heavily canalized Rhine. The same could be said about the Rhone. If you want the evidence, just drive down to the *riviera* and see what they are like. But the French and the Dutch are not paying the Swiss for an artificially enhanced flow of water.

19. The most that can be said — and this is an interesting comparison — is that the Dutch and the Germans do pay France under an agreement for the removal of chlorides from Rhine water[84]. But here, the upstream State, France, is providing a service by agreement with the downstream States and the costs are shared equitably by all riparians. But there is no hint in that agreement, the Rhine water agreement, of any payment by downstream States for any of the water that is delivered to them.

[83] CR 2022/7, p. 53, para. 10 (Pellet).

[84] Convention for the Protection of the Rhine from Pollution by Chlorides (with annexes and exchanges of letters constituting an amendment, dated at Neuilly on 29 Apr. 1983, at Bonn on 4 May 1983, at The Hague on 4 May 1983, at Luxembourg on 13 May 1983 and at Berne on 13 May 1983), concluded at Bonn on 3 Dec. 1976, United Nations, *Treaty Series (UNTS)*, 1985, Vol. 1404, p. 59, and Additional Protocol to the Above-Mentioned Convention (with annexes, declaration and record of corrections), concluded at Brussels on 25 Sept. 1991, *UNTS*, 1994, Vol. 1840, p. 372. France and Germany pay 30 per cent each; the Netherlands, 34 per cent; Switzerland, 6 per cent (1991 Additional Protocol, Art. 4). See also Permanent Court of Arbitration, *The Rhine Chlorides Arbitration concerning the Auditing of Accounts (The Netherlands/France), PCA Case No. 2000-02, Award of 12 March 2004.*

Now, this precedent is the polar opposite of Bolivia's claim in this case. It stands, it seems to me, as a total rebuttal of what Bolivia is claiming.

20. So, the case law the State practice and doctrine referred to by Bolivia in its written pleadings simply do not begin to support the existence of a distinct legal régime for "artificially enhanced" flow; they are irrelevant to Bolivia's case, and *most obviously* the precedents drawn from the Law of the Sea are *wholly* inappropriate. This is perhaps an area where I am slightly more at home than in international rivers, but this really is an empty drawer. Quite true. Coastal States do sometimes artificially enhance rocks, or low-tide elevations, by covering them in reclaimed sea-bed material or cement, but both the Law of the Sea Convention and the case law under the convention of international arbitral tribunals — and the ITLOS, and the ICJ — show that an artificially enhanced rock remains a rock. It does not become an island. And an artificially enhanced low-tide elevation remains a low-tide elevation. It does not become an island either. So, this bogus law-of-the-sea analogy does not help Bolivia at all. It is a ridiculous claim to make in the first place. Conclusion? An artificially enhanced river remains a river in international law.

21. Now, Bolivia accuses Chile of "taking advantage" of the supposed additional litres of water that cross the border, as if there is something wrong in that, but why would Chile not use this water? It is a scarce commodity. It comes naturally downhill anyway. And even if it were true that Chile has received additional water — this is a *de facto* situation. It does not give Bolivia the right to charge Chile for it. No principle of law, none — not in international law or domestic law — supports such a claim. Not even in the law of restitution, which is usually the home of lost causes for lawyers. Can anyone — or at least no professor I have consulted has been able to come up with any principle of national law that supports Bolivia's claim here. If there were any principle — the equitable and reasonable principle does not demand that downstream States pay for water they would receive anyway — if it did, there would surely be precedents. But as I have shown you this afternoon, I hope, there are simply no such precedents, and Bolivia does not cite any.

22. Moreover, Bolivia, if it wished, could eliminate the channels and remove the benefit that Chile currently enjoys from them. As our Agent has emphasized and as my colleagues have

emphasized, Chile does not object to the removal of the channels[85]. I think it would make no difference, to be perfectly honest. So, that brings me to my concluding observations about the broader implications of Bolivia's claim to payment, if it were recognized by the broader implications of international law.

### III. The broader implications if payment for waters of the Silala were recognized

23. Madam President, Members of the Court, rather obviously, if you were to accept any part of Bolivia's unprecedented claim with respect to payment for the waters of the Silala, the implications for downstream States across the globe would surely be worrying and substantial. Would Egypt have to pay for any portion of the waters it receives via the Nile? Would India and Bangladesh have to pay for water delivered via channels which might be said to enhance the natural flow of water from the Hindu Kush? And, please, remember: we are not talking here about enhancements requested or agreed with the downstream State — that would be different. Bolivia wants to be paid *without* an agreement and, to enforce its claim, it wants to cut off or reduce the flow of water if there is no agreement.

24. Madam President, Members of the Court, this is simply not international law, nor should it be. In my 20 years as an advocate before international courts, Bolivia's argument strikes me as the most destabilizing and dangerous that I have yet heard. No watercourse treaty adopts any such arrangements for regulating the flow of water between riparians[86]. For all of the aforesaid reasons, I would urge you to reject Bolivia's unwarranted and outrageous claims on the waters of the Silala. Legally and factually, they simply have no basis. Bolivia has claimed sovereignty over an empty vessel. But, in common with other such vessels, it has made much noise.

25. In conclusion and in summary, let me quote from a judgment of the Krishna Water Disputes Tribunal, which said— and we agree very much with this: "No State has a proprietary interest in a particular volume of an inter-State river on the basis of its contribution."[87] The fact that

---

[85] APCh, para. 1.18.

[86] RCh, para. 2.48.

[87] Krishna Water Disputes Tribunal, Decision of 24 December 1973, para. 308; RCh, para. 2.29.

the water that rises in Bolivia is neither here nor there. It flows into Chile. Rivers all rise somewhere. And we invite the Court to hold that even, if any part of the flow of the Silala were enhanced as alleged, it is still part of the Silala watercourse system — whether it flows through the stream or in channels, or underground. Where it originates and how it reaches Chile is neither here nor there; it is of no legal relevance whatever. As we point out in the Reply, the fact that Bolivia's theory is without precedent and unsupported by any source of national or international law, leads to the unavoidable conclusion that the theory on which all of its counter-claims are constructed — but in particular counter-claim *(c)* is just that, a theory, and it has no legal value[88]. Just for a moment, pause before we finish this afternoon, and consider what Bolivia is claiming: they want Chile to pay Bolivia in order to maintain the channels. Yet, yesterday, they pointed to the need to restore the wetlands. They cannot have it both ways. If we pay them to maintain the flow of water through the channels, how can they then restore the allegedly desiccated wetlands? Where will the water to do so come from? It can only come from the Silala. That would mean robbing Peter to pay Paul for an alleged environmental problem that Bolivia itself has created by its negligence.

26. So, Madam President, Members of the Court, we say that Chile remains free to use the waters of the Silala, which it receives naturally, as it chooses, without payment or further agreement, provided of course that its use is equitable and reasonable, and we invite the Court to rule accordingly. Because the Silala is, as Professor McCaffrey reiterated again this afternoon, in its entirety an international watercourse, shared by both States, and the usual obligations of customary international law to co-operate and to take all necessary measures to prevent transboundary harm apply in full[89].

27. Madam President, Members of the Court, that concludes Chile's submissions for today. I thank you for listening. I am, of course, happy to answer any questions if you have any. Thank you.

---

[88] RCh, para. 2.51.

[89] UNWC, Articles 7, 20-22, MCh, Vol. 2, Ann. 5, p. 41 (key document 1 of judges' folder); *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*; *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).*

The PRESIDENT: I thank Prof. Boyle. Your statement brings to an end today's sitting, as well as the first round of oral argument. The Court will reconvene on Thursday 7 April at 3 p.m. for a sitting dedicated to the questioning of the experts called by Chile.

The sitting is adjourned.

*The Court rose at 5.05 p.m.*

___________